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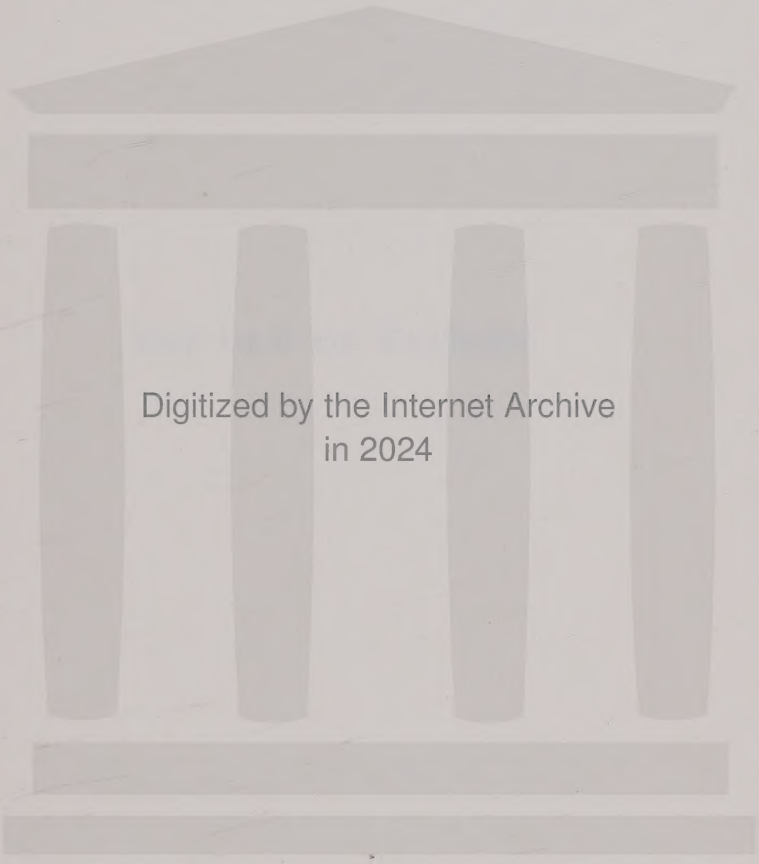

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THE LAW OF NATIONS

A SELECTION OF CASES AND OTHER READINGS ON THE LAW OF NATIONS

CHIEFLY AS IT IS INTERPRETED AND APPLIED BY BRITISH AND AMERICAN COURTS

BY
EDWIN DEWITT DICKINSON
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FIRST EDITION
SECOND IMPRESSION

Mills College Library
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McGRAW-HILL BOOK COMPANY, INC.
NEW YORK: 370 SEVENTH AVENUE
LONDON: 6 & 8 BOUVERIE ST., E. C. 4
1929

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McGRAW-HILL BOOK COMPANY, INC.

PRINTED IN THE UNITED STATES OF AMERICA

THE MAPLE PRESS COMPANY, YORK, PA.

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PREFACE

This selection of cases and readings on the Law of Nations is the result of an introductory course which the editor has offered for ten years past to students in the University of Michigan Law School. Perhaps it would be more accurate to say that it represents a stage in the evolution of the course.

In three respects, at least, the selection departs a little from the beaten path of earlier casebooks. In the first place, its scope is more limited. Experience has convinced the editor that the magnitude and illimitable ramifications of the subject make it inexpedient, even in an introductory course, to attempt a survey of the entire field. He is satisfied that students derive a more thorough understanding of the subject and a keener zest for further acquaintance from a relatively more intensive study of a few fundamental topics. Consequently the scope of the selection has been limited by the deliberate exclusion of much that has been included hitherto in introductory courses in international law. While the process of inclusion and exclusion has not been an easy one, it has seemed reasonably clear to the editor that most of the relations of war, much of the relations of neutrality, and such of the relations of peace as are still governed by essentially political standards of conduct should be set apart to be studied elsewhere than in the introductory course.

In the second place, the emphasis in selection and arrangement has been pedagogic rather than systematic. While the editor would be among the last to suggest that sound pedagogics and systematic presentation are irreconcilable, it is only fair to warn that he has not hesitated to exclude a leading case on the ground that it does not stimulate students or to include a relatively unknown case which challenges attention to an important problem. Where it has been found that the student studies one case or topic more effectively after having studied another, the order of cases or topics has been determined accordingly.

In the third place, the content of the collection has been determined with no very consistent regard for accepted subject classifications. While the book is called "A Selection of Cases and Other Readings on the Law of Nations," part only of its content deals with public international law in any accurate sense of the term. The volume includes much public international law, a good deal of private international law, some constitutional law, and a substantial selection from the municipal law which is applied by courts in various cases affecting international relations As the subtitle is intended to suggest, the book aims to present the Law of Nations "Chiefly as It is Interpreted and Applied by British and American Courts."

In editing and annotating the selections it has been the editor's practice, in general, to reproduce the best available texts *verbatim et literatim* in respect to paragraphing, spelling, capitalization, punctuation, etc. It is only in respect to the reproduction of italicized printing that an important exception has been made. Words and phrases in foreign language have been consistently italicized, without regard to the form of the original texts, while elsewhere the original italics have been preserved only as their use for emphasis has made reproduction essential in order to preserve the meaning. Obvious typographical errors have been corrected in a few instances without note of the correction. The original form has been varied slightly in reproducing some of the selections from statutes and from treaties. In printing the texts of international awards, especially those of the Permanent Court of International Arbitration, and the opinions and judgments of the Permanent Court of International Justice, a few changes have been made in the form of the conventional introductory paragraphs, in order to conserve space, and the subscriptions at the end have been consistently omitted. It has been the editor's practice, also, to insert in the text in square brackets all editorial modifications, substitutions, or explanations and such of the footnotes accompanying the originals as it has seemed important to reproduce. To avoid confusion parentheses have been substituted for the square brackets used occasionally in the original texts, excepting those used to enclose the date in citing the modern British law reports. The above practice has made it possible to use the footnotes of the volume for annotation exclusively. Omissions have been indicated by the use of periods (. . .) or by editorial explanations enclosed in square brackets. Editorial explanation has also been inserted to indicate the nature or content of important omissions. Treaties have been given the date of signature throughout. Foreign texts and cases have been reproduced in rather literal translations. The editor regrets that it has not seemed feasible to reproduce the foreign originals along with the translations.

Suggestions, criticisms, and other assistance have come from many quarters during the preparation of the book. While it is impossible, unfortunately, to acknowledge each obligation severally, the editor would be remiss if he did not express the gratitude he feels to authors and publishers for permission to reprint selections used in this volume, to the editors of earlier casebooks for all assistance consciously or unconsciously received, to colleagues of the University of Michigan and of other institutions for their invaluable criticisms and suggestions, and perhaps most of all to former students who have toiled patiently through lists of readings and mimeographed materials, contributing largely both to the arrangement and to the substance of the book as it now appears.

ANN ARBOR, MICHIGAN
June, 1929.

E. D. D.

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LIST OF ABBREVIATIONS[1]

Académie de Dr. Int.	Académie de Droit International, Recueil des Cours
Am. Bar Assoc. Rep.	American Bar Association, Reports
Am. Jour. Int. L.	American Journal of International Law
Am. Jour. Int. L. Suppl.	American Journal of International Law, Supplement, Official Documents
Am. L. Reg.	American Law Register
Am. L. Rev.	American Law Review
Am. Soc. Int. L. Proc.	American Society of International Law, Proceedings
Bar.	Bar, International Law: Private and Criminal (Gillespie's transl.)
Bar, 2d ed.	Bar, The Theory and Practice of Private International Law, 2d ed. (Gillespie's transl.)
Bibliotheca Visseriana.	Bibliotheca Visseriana Dissertationum Ius Internationale Illustrantium
Blackstone, Commentaries.	Blackstone, Commentaries on the Laws of England
Bluntschli.	Bluntschli, Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt
Borchard, Diplomatic Protection.	Borchard, The Diplomatic Protection of Citizens Abroad, or The Law of International Claims
Br. & For. S. P.	British & Foreign State Papers
Bryce, Studies.	Bryce, Studies in History and Jurisprudence
B. Y. B. Int. L.	The British Year Book of International Law
Calif. L. Rev.	California Law Review
Calvo.	Calvo, Le Droit International Théorique et Pratique
Can. Bar Assoc. Proc.	Canadian Bar Association, Proceedings
Can. Bar Rev.	Canadian Bar Review
Can. Rev. Stat.	Canada, Revised Statutes
Chrétien.	Chrétien, Principes de Droit International Public
Cobbett, Cases.	Cobbett, Cases and Opinions on International Law, and Various Points of English Law Connected Therewith
Col. L. Rev.	Columbia Law Review
Colombos.	Colombos, A Treatise on the Law of Prize
Confer. Teachers Int. L. Proc.	Conference of Teachers of International Law and Related Subjects, Proceedings
Conn. Laws.	Connecticut Public Laws

[1] This list does not include titles which are described sufficiently where cited in the footnotes. It is not a bibliography. It does not include abbreviations used in the citation of American, British, or European law reports.

Cornell L. Quart.	Cornell Law Quarterly
Crandall, Treaties.	Crandall, Treaties, Their Making and Enforcement
Despagnet.	Despagnet, Cours de Droit International Public
Dicey.	Dicey, A Digest of the Law of England with Reference to the Conflict of Laws
Dodd.	Dodd, Modern Constitutions
Evans, Cases.	Evans, Leading Cases on International Law
Fauchille.	Fauchille, Traité de Droit International Public
Fenwick.	Fenwick, International Law
Fiore.	Fiore, Trattato di Diritto Internazionale Pubblico
Fiore, Int. L. Cod.	Fiore, International Law Codified and Its Legal Sanction (Borchard's transl.)
Forsyth.	Forsyth, Cases and Opinions on Constitutional Law, and Various Points of English Jurisprudence
Gareis.	Gareis, Institutionen des Völkerrechts
Garner, Prize Law.	Garner, Prize Law during the World War
G. B. Misc. No. 2 (1927)	Great Britain, Foreign Office, "Nationality and Naturalization Laws of Certain Foreign Countries," Misc. No. 2 (1927) Cmd. 2852
G. B. U. S. Cl. Com'n.	Great Britain and United States, Claims Commission, American and British Claims Arbitration under the Special Agreement Concluded August 18, 1910 (Nielsen's Report)
Grotius.	Grotius, De Jure Belli ac Pacis
Grot. Soc. Publ.	The Grotius Society Publications
Grot. Soc. Trans.	The Grotius Society, Transactions
Hall.	Hall, A Treatise on International Law
Halleck.	Halleck, International Law
Hansard.	Hansard, Parliamentary Debates
Harv. L. Rev.	Harvard Law Review
Heffter.	Heffter, Das europäische Völkerrecht der Gegenwart
Heilborn.	Heilborn, Das System des Völkerrechts entwickelt aus den völkerrechtlichen Begriffen
Hertslet.	Hertslet, The Map of Europe by Treaty
Holland, Studies.	Holland, Studies in International Law
Holtzendorff.	Holtzendorff, Handbuck des Völkerrechts
How. St. Tr.	Howell, A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783, with Notes and Other Illustrations
Hyde.	Hyde, International Law Chiefly as Interpreted and Applied by the United States
Ia. L. Bulletin	Iowa Law Bulletin

Inst. de Dr. Int.	L'Institut de Droit International, Annuaire de
Int. L. Assoc. Rep.	International Law Association, Reports
Jessup, Territorial Waters	Jessup, The Law of Territorial Waters and Maritime Jurisdiction
Jour. du Dr. Int. Privé.	Journal du Droit International Privé et de la Jurisprudence Comparée
Jour. R. Inst. Int. Aff.	Journal of the Royal Institute of International Affairs
Jour. Soc. Comp. Leg.	Journal of the Society of Comparative Legislation and International Law
Jurid. Rev.	Juridical Review
Jurid. Soc. Papers.	Juridical Society, Papers Read before
Kent, Commentaries.	Kent, Commentaries upon American Law
Klüber.	Klüber, Droit des Gens Moderne de l'Europe
L. Mag. & Rev.	Law Magazine and Review
L. of N. Doc.	League of Nations Documents
L. of N. T. S.	League of Nations Treaty Series
L. Quart. Rev.	Law Quarterly Review
L. R. A.	Lawyers Reports Annotated
Lewis, Foreign Jurisdiction.	Lewis, On Foreign Jurisdiction and the Extradition of Criminals
Lorimer.	Lorimer, The Institutes of the Law of Nations
Magoon, Reports.	Magoon, Reports on the Law of Civil Government in Territory Subject to Military Occupation by the Military Forces of the United States
Maine.	Maine, International Law
Martens.	Martens, G. F. von, Précis du Droit des Gens Moderne de l'Europe
Martens, Causes Célèbres.	Martens, Causes Célèbres du Droit des Gens
Martens, F.	Martens, F. de, Traité de Droit International (Léo's transl.)
Martens, Rec. Rec. Suppl. Nouv. Rec. Nouv. Rec. Gén.	Martens, Recueil de Traités d'Alliance, de Paix, de Trêve, de Neutralité, de Commerce, de Limites, d'Échange, etc.
Mass. Acts.	Massachusetts Acts and Resolves
McBain and Rogers.	McBain and Rogers, the New Constitutions of Europe
Mex. U. S. Gen. Cl. Cm'n.	Mexico and United States, General Claims Commission, Opinions of Commissioners under the Convention Concluded Sept. 8, 1923 (Feb. 4, 1926, to July 23, 1927)
Mich. L. Rev.	Michigan Law Review
Minn. L. Rev.	Minnesota Law Review
Moore, Dig. Int. L.	Moore, A Digest of International Law
Moore, Extradition.	Moore, A Treatise on Extradition and Interstate Rendition

Moore, Int. Arb.	Moore, History and Digest of the International Arbitrations to Which the United States has been a Party
N. J. Laws.	New Jersey Laws
Op. Atty. Gen.	Opinions of the Attorneys General of the United States
Oppenheim.	Oppenheim, International Law, A Treatise
Ortolan.	Ortolan, Règles Internationales et Diplomatie de la Mer
Pan. Am. Union, L. & T. S.	Pan American Union, Law and Treaty Series
P. C. I. J. Publ.	Permanent Court of International Justice, Publications
Phillimore.	Phillimore, Commentaries Upon International Law
Picciotto, Relation of Int. L.	Picciotto, The Relation of International Law to the Law of England and of the United States of America
Piggott, Extradition.	Piggott, Extradition: A Treatise on the Law Relating to Fugitive Offenders
Piggott, Foreign Judgments.	Piggott, The Law and Practice of the Courts of the United Kingdom Relating to Foreign Judgments and Parties out of the Jurisdiction
Piggott, Nationality.	Piggott, Nationality, Including Naturalization and English Law on the High Seas and Beyond the Realm
Pillet.	Pillet, Traité Pratique de Droit International Privé
Pillet, Principes.	Pillet, Principes de Droit International Privé
Pollock, Torts.	Pollock, The Law of Torts
Pol. Sci. Quart.	Political Science Quarterly
Pradier-Fodéré.	Pradier-Fodéré, Traité de Droit International Public Européen & Américain
Ralston, Int. Tribunals.	Ralston, The Law and Procedure of International Tribunals
Rev. de Dr. Int.	Revue de Droit International et de Legislation Comparée
Rev. de Dr. Int. Privé.	Revue de Droit International Privé
Rev. du Dr. Pub.	Revue du Droit Public et de la Science Politique en France et a l'Étranger
Rev. Gén. de Dr. Int. Pub.	Revue Générale de Droit International Public
Rev. Jur. Int. Loc. Aér.	Revue Juridique Internationale de la Locomotion Aérienne
Rivier.	Rivier, Principes du Droit des Gens
Rodriguez.	Rodriguez, American Constitutions
Russ. & Jap. P. C.	Russian and Japanese Prize Cases, Hurst and Bray
Scott, Cases.	Scott, Cases on International Law
Scott, Resolutions.	Scott, Resolutions of the Institute of International Law Dealing with the Law of Nations

St. Tr., N. S.	State Trials, Reports of, New Series
Stephen, Digest.	Stephen, A Digest of the Criminal Law
Stephen, History.	Stephen, A History of the Criminal Law of England
Stier-Somlo.	Stier-Somlo, Handbuch des Völkerrechts
Stowell and Munro.	Stowell and Munro, International Cases
Travers.	Travers, Le Droit Pénal International
Triepel.	Triepel, Völkerrecht und Landesrecht
Twiss.	Twiss, The Law of Nations Considered as Independent Political Communities
Ullmann.	Ullmann, Völkerrecht.
U. of Pa. L. Rev.	University of Pennsylvania Law Review
U. S. Civil Aeronautics (1928)	United States, House of Representatives Committee on Interstate and Foreign Commerce, Civil Aeronautics, Legislative History of the Air Commerce Act of 1926, etc. (Corrected to August 1, 1928)
U. S. Code Ann.	United States Code Annotated
U. S. For. Rel.	United States, Papers Relating to the Foreign Relations of the United States
U. S. Naval War College.	United States, Naval War College, International Law Situations
U. S. Rev. Stat.	United States, Revised Statutes
U. S. Stat. L.	United States, Statutes at Large
U. S. Treaties.	United States, Treaties, Conventions, International Acts, Protocols, and Agreements between the United States of America and Other Powers
U. S. Treaty Series.	United States, Treaty Series
Va. L. Rev.	Virginia Law Review
Van Dyne, Citizenship.	Van Dyne, Citizenship of the United States
Van Dyne, Naturalization.	Van Dyne, A Treatise on the Law of Naturalization of the United States
Vattel.	Vattel, Le Droit des Gens, ou Principes de la Loi Naturelle Appliqués à la Conduite et aux Affaires des Nations et des Souverains
Venez. Arb. (1903).	Venezuela Arbitrations of 1903, United States Senate Document, 58th Congress, 2d Session, No. 316
Walker.	Walker, The Science of International Law
Walker, History.	Walker, A History of the Law of Nations
Westlake.	Westlake, International Law
Westlake, Collected Papers.	Westlake, The Collected Papers of John Westlake on Public International Law
Westlake, Principles.	Westlake, Chapters on the Principles of International Law
Westlake, Private Int. L.	Westlake, A Treatise on Private International Law

Wharton St. Tr.	Wharton, State Trials of the United States during the Administrations of Washington and Adams
Wheaton.	Wheaton, Elements of International Law
Wildman.	Wildman, Institutes of International Law
Woodhouse.	Woodhouse, Textbook of Aerial Laws
W. Va. L. Quart.	West Virginia Law Quarterly
Yale L. Jour.	Yale Law Journal
Z. f. Int. R.	Zeitschrift für internationales Recht
Z. f. V.	Zeitschrift für Völkerrecht

THE LAW OF NATIONS

CHAPTER I

NATURE AND AUTHORITY OF THE LAW OF NATIONS

SECTION 1. DEFINITIONS

BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE

Essay XI, The Law of Nature, pages 556, 564–565. 1901.

Now Laws, the rules and binding customs which men observe and by which society is held together, fall into two classes. Some are essentially the same, in all, or at any rate in most communities, however they may superficially vary in their arrangement or in the technical terms they employ. They aim at the same objects, and they pursue those objects by methods generally similar. Other laws differ in each community. Perhaps they pursue objects which are peculiar to that community; perhaps they spring out of some historical accident; perhaps they are experimental; perhaps they are due to the caprice of a ruler. Those which prevail everywhere, or at any rate, generally, appear to issue out of the mental and moral constitution common to all men. They are the result of the principles uniting men as social beings, which Nature, personified as a guiding power, is deemed to have evolved and prescribed. Hence they are called Natural. Being the work of Nature, they are not only wider in their area, but also of earlier origin than any other rules or customs. They are essentially anterior in thought as well as in date to the laws each community makes for itself, for they belong to the human race as a whole. Hence they are also deemed to be higher in moral authority than the laws which are peculiar to particular communities, for these may be enacted to-day and repealed to-morrow, and have force only within certain local limits.

GROTIUS, DE JURE BELLI AC PACIS

Book I, chapter 1, sections ix–x, xii–xiv. 1625.

IX. (1) Then there is a third signification of Right—that of Law, in the widest sense of the word, which is a rule of moral acts obliging to what is right. "Obliging" is necessary, for advice and mere precepts,

honoured, it may be, but not obliging, do not come within the idea of Law or Right in this sense. Permission is not properly an act of law but rather an inaction, except so far as it obliges another to raise no impediment to him to whom permission is given. But, as we have said, the obliging is to the right, not merely to the just, because the right in this sense belongs not only to the matter of justice alone, as we have already explained, but also to that of the other virtues. . . . (2) The most acceptable division of Right in this general sense is that of Aristotle. On the one hand, there is Natural Law, and, on the other, Voluntary Law, or, as he calls it, "Legal Law," or Positive Law, the word "law" being taken in its stricter sense. The Hebrews have the same division. . . .

X. (1) Natural Law is the dictate of right reason. It indicates whether an act is morally right or wrong, according as it complies or disagrees with rational nature itself. Such an act is consequently either prescribed or forbidden, as the case may be, by God the Author of Nature. . . .

XII. (1) That anything is or is not of Natural Law is usually proved by arguments either *a priori* or *a posteriori*, the latter mode of proof being the more popular and the former the more subtle. It is proof *a priori* when there is shown the necessary agreement or disagreement with a rational and social nature of the thing in question. It is proof *a posteriori* if, without absolute certainty but yet with greatest probability, that is regarded as of the Natural Law which is so believed to be by all, or, at least, the more civilised peoples. And inasmuch as a universal effect requires a universal cause, no other cause can well be assigned for this general opinion than that general sense which is called common. . . .

XIII. The other kind of law, we told you, is Voluntary (Positive) Law, which has its origin in the will. And this is either human or divine.

XIV. (1) Let us begin with the human, because that is the more widely known. This is either Civil Law (national or municipal law) or law in a more restricted or in a wider sense. Civil Law is so called because it proceeds from the civil power; and it is that power which governs the State, which, in its turn, is a perfect union of free men associated for protection by law and for their common benefit. Law in a more restricted sense, not proceeding from the civil power itself, though subject to it, is various, including paternal precepts, a master's commands, and the like. But law in the wider sense is the Law of Nations, being that which derives its obliging power from the will of all nations, or, at least, of many. We have said "of many," because scarcely any law is to be found common to all peoples outside Natural Law, which itself is usually also called the Law of Nations. Rather, what is often the Law of Nations in one part of the world is not so in another, as we shall explain later on in connection with capture and postliminium. (2) And the Law of Nations is proved in the same manner as the unwritten Civil Law,

namely, by long usage and the testimony of its professors; for this law, as Dio Chrysostom says, is "the invention of time and experience," and here the great historians are of the greatest service to us.[1] [KNIGHT'S transl.]

POLLOCK, THE SOURCES OF INTERNATIONAL LAW

Columbia Law Review, Volume II, pages 511, 517–519. 1902.

The origin of the modern law of nations, as a distinct system of rules, is now to be shortly traced. . . . The task of Grotius and his precursors and followers was to define and specialize a branch of the law of nature to which all men professed to bow, not to invent that which was ready to their hands. . . . In fact all political and moral discussion had long been dominated by an elaborate theory of the Law of Nature which may be traced to three distinct sources in the literature regarded as authoritative by the founders of mediæval learning. It was constructed, and quite openly constructed, in part on the Aristotelian texts which speak of natural justice, in part on the expositions of later Greek philosophical views, mostly Stoic, found in Cicero and other writers down to the Fathers of the Church, and in part on the technical development of those same views by Roman jurists in search of a theoretical basis for a law which, from being national or tribal, had become cosmopolitan.[2]

[1] On Grotius' life and works, see BASDEVANT, in Les Fondateurs, 125–267; KNIGHT, Life and Works of Hugo Grotius; RATTIGAN, in Great Jurists of the World, 169–184; VREELAND, Hugo Grotius; WALKER, History, 278–329; WHITE, Seven Great Statesmen, 55–110.

In a petition presented to the House of Lords by Golding and others in 1693, after their condemnation for acts of piracy, it was said: "That the law of nations, to the judgment of which our case only belongs, is the great and imperial law of right and equity that judges of the rights of kings and nations, with respect to each other, and of the rights of war, and of the rights of peace; and all nations with respect to this law are considered as one great corporation, and each kingdom or nation but as a single member or part of this corporation. And therefore this law, or any rule of right, or notion of it, cannot be altered, concluded or estopped by any votes, ordinances or statutes of any particular nation or kingdom." 12 How. St. Tr. 1269, 1278.

"This law is for the most part unwritten and lacks sanctions; it rests on a general consensus of opinion; on the acceptance by civilized States, members of the great community of nations, of rules, customs and existing conditions which they are bound to respect in their mutual relations, although neither committed to writing nor confirmed by conventions. This body of rules is called international law." LODER, J., dissenting, in the Lotus Case, P. C. I.J. Publ., Series A, Judgment No. 9, p. 34.

On the relation of the law of nations or international law to law in general, see WESTLAKE, Collected Papers, 1.

[2] "Speaking broadly, the Law of Nature represented to the Romans that which is conformable to Reason, to the best side of Human Nature, to an elevated morality, to practical good sense, to general convenience. It is Simple and Rational, as opposed

All these fountains of authority were, for scholars of the twelfth and thirteenth centuries, little short of sacred. The Corpus Juris appeared to them, not as the historical record of republican and imperial jurisprudence in a heathen empire, but as the deliverance of the orthodox emperor Justinian. The morality of Cicero had been stamped with all but unqualified approval in the repeated citations and comments of Christian and beatified authors. Of Aristotle's position it is needless to speak, for it is matter of common knowledge among all scholars. Warranted by such commanding names, the Law of Nature presented itself as a rule of human conduct independent of positive enactment and even of special divine revelation, and binding always and everywhere in virtue of its intrinsic reasonableness.

DICKINSON, THE EQUALITY OF STATES IN INTERNATIONAL LAW

Harvard Studies in Jurisprudence, Volume III, pages 68–69. 1920.

The modern law of nations was developed, in its formative period, chiefly by great teachers and publicists. The body of accumulated custom was meager, the evidence of its existence frequently inaccessible. The state of international relations was worse than unsatisfactory to all right-thinking men. So it came about, partly from the want of common usage, partly from the prevalence of certain theories, partly from the desire of the writers to ameliorate existing conditions, and partly, perhaps, from the type of mind which was most frequently devoted to the law of nations, that the primitive stages of the science were influenced largely by those theoretical conceptions which were included in the common heritage of learning from antiquity and the Middle Ages. Development of the theory of the law of nations particularly, and of no inconsiderable part of its substance, was determined by the force of these ideas.

The successors of Grotius were by no means agreed, however, as to the precise application and significance of these theories. Three tendencies appeared among the publicists, represented by the naturalists, the positivists, and the eclectics respectively. The writers are sometimes divided into three schools corresponding to these tendencies. There is no objection to the division, provided it be remembered that it is an arbitrary one, and that it does not always offer an adequate explanation

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to that which is Artificial and Arbitrary. It is Universal, as opposed to that which is Local or National. It is superior to all other law because it belongs to mankind as mankind, and is the expression of the purpose of the Deity or of the highest reason of man. It is therefore Natural, not so much in the sense of belonging to men in their primitive and uncultured condition, but rather as corresponding to and regulating their fullest and most perfect social development in communities, where they have ripened through the teachings of Reason." BRYCE, Studies, 556, 589.

for the system of an individual writer. It must be applied, as might be expected, not only to publicists holding views that are widely divergent and hence easily classified, but also to representatives of many shades of opinion between the extremes. As might be expected, also, modern authorities are not always agreed as to the school to which certain of the classical publicists should be accredited.

The divergent tendencies that found expression in these so-called schools had their inception in different conceptions of international society and the law of nations. The philosophical or pure law of nature school held that the law of nations was nothing more than the law of nature applied to separate states in a state of nature; they accordingly denied to the customary, conventional, or positive element any of the attributes of true law apart from the natural law. The positivist or historical school contended that the principles underlying customs and treaties constituted a positive law of nations, distinct from the natural law and of superior practical importance. The eclectics or Grotians, as they are sometimes called, took an intermediate position, retaining Grotius' distinction between the natural and the voluntary law of nations, while treating the two as about equal in importance.[3]

PUFENDORF, DE JURE NATURÆ ET GENTIUM

Book II, chapter 3, section xxiii. 1672.

Finally, there is one more question which we must consider, whether there is a special law of nations, positive, and contradistinct to the law of nature. On this point there is no satisfactory agreement among learned men. Many consider the law of nature and the law of nations as one and the same, differing simply in their external denomination. Thus Hobbes (*De Cive, cap.* xiv, 4.) divides natural law into the natural law of men and the natural law of states which is commonly called the law of nations. "The precepts of both are the same," he observes: "but since states, once formed, assume the personal qualities of men, law, which we term natural when speaking of the obligation of man individually, we call the law of nations when applied to whole states, nations or peoples." We unqualifiedly approve of this opinion. We do not believe that there is any other law of nations, voluntary or positive, which properly speaking has the force of law ruling nations as by a superior power.[4] [Editor's transl.]

[3] On the different tendencies or schools, see DESPAGNET, 4th ed., §§31–33; FENWICK, in 8 Am. Jour. Int. L. 38; KATCHENOVSKY, in 2 Jurid. Soc. Papers 99, 107; OPPENHEIM, 4th ed., I, §§53–58; PHILLIPSON, in Great Jurists of the World, 390, 394; PICCIOTTO, Relation of Int. L., 14.

[4] On Pufendorf's life and works, see AVRIL, in Les Fondateurs, 331–383; PHILLIPSON, in Great Jurists of the World, 305–344.

BURLAMAQUI, PRINCIPES DU DROIT NATUREL

Part II, chapter 6, sections i–vi. 1747.

I. Among different human institutions, the most eminent without doubt is the institution of civil society or the body politic, which is rightly reputed the most perfect of societies, and to which we have given the name "state" on account of its preëminence.

Simple human society is of itself and with regard to those who compose it a society of equality and independence. It is subject only to God; no one has a natural and primitive right to command; but each person may dispose of himself and of what he possesses as he thinks proper, under the sole restriction that he keep within the bounds of the natural law and do no wrong to others.

The civil state makes a great change in this primitive condition. The establishment of sovereignty destroys that independence in which men were originally in relation to one another; subordination takes its place. The sovereign becoming the depository, as it were, of the will and power of each individual, which are united in his person, all other members of society become subjects and find themselves under obligation to obey and to conduct themselves according to the laws which the sovereign imposes upon them.

II. But however great may be the change which government and sovereignty make in the natural condition of affairs, it is not to be assumed in consequence that the civil state really subverts natural society nor that it destroys either the essential relations existing among men or between men and God. This would be neither physically nor morally possible; on the contrary, the civil state assumes that the nature of man is to be as the Creator has made it; it assumes the primitive condition of union and society with all the relationships which that condition includes; it assumes in brief the natural dependence of man in relation to God and his laws. So far from upsetting this original order, government was established rather to give it a new degree of force and consistency. The purpose was to better enable men to discharge the duties which the natural laws prescribe and to attain their destination more surely.

III. In order to formulate an accurate idea of civil society, it is necessary to say that it is natural society itself modified in such fashion that there is a sovereign who commands and upon whose will everything which may concern the welfare of society ultimately depends, to the end that under his protection and by virtue of his care men may obtain more certainly the happiness to which they naturally aspire.

IV. Every society is formed by the concurrence or union of the wills of several persons with a view to acquiring some advantage. Hence it is that societies are considered as bodies and that we give them the name of moral persons, because these bodies are animated in effect by a single

will which regulates all their movements. This agrees particularly with the body politic or state. The sovereign is the chief or head, and the subjects the members; all their actions that have any relation to the society are directed by the will of the chief. Wherefore as soon as states are formed they acquire in some manner personal qualities, and we may consequently attribute to them in proportion whatever agrees in particular with men, such as certain actions which are suited to them, certain rights which pertain to them, certain duties which they are bound to fulfil, etc.

V. This being granted, the establishment of states introduces a kind of society among them, similar to that which exists naturally among men, and the same reasons which induce men to maintain union among themselves ought also to persuade nations or their sovereigns to live on good terms with one another.

It is necessary, therefore, that there should be some law among nations to serve as a rule for mutual intercourse. Now this law can be nothing else but the natural law itself, which is then called the right or law of nations (*droit des gens ou loi des nations*). Natural law, says Hobbes very properly, is divided into the natural law of man and the natural law of states, and the latter is what we call the law of nations. Thus the natural law and the law of nations are in reality one and the same thing, and differ only by an external denomination. It should be said, therefore, that the law of nations, properly so called and considered as a law emanating from a superior, is nothing else than the natural law itself applied, not to men regarded simply as such, but to peoples or nations, to states or their chiefs, in the relations they have together and in the interests they have to manage among themselves.

VI. There can be no question about the reality and certainty of such a Law of Nations, obligatory in itself, to which the peoples or the sovereigns who govern them ought to be subject. For if God by means of right reason imposes certain duties on individuals in their relations to one another, it is quite evident that he wills also that nations, which are only societies of men, should observe the same duties among themselves. [Editor's transl.]

Zouche, Iuris et Iudicii Fecialis, sive, Iuris inter Gentes, et Quæstionum de eodem Explicatio

Part I, section 1. 1650.

Law between Nations is the law which is recognized in the community of different princes or peoples who hold sovereign power—that is to say, the law which has been accepted among most nations by customs in harmony with reason, and that upon which single nations agree with one

another, and which is observed by nations at peace and by those at war.[5] [BRIERLY's transl.]

WILDMAN, INSTITUTES OF INTERNATIONAL LAW

Volume I, pages 16–20. 1849–1850.

In discussing the law of nations we must defer to the usage of nations and not rely upon our own reasoning. Different rules may be equally supported by reason, but that reason ought to prevail which is sanctioned by the usage of nations. Reason and usage determine these questions: reasons may be produced on either side, but those reasons ought to prevail which usage has sanctioned, for the law of nations is founded upon the usage of nations. The nature and sources of the law of nations, its rules and distinctions have formed the subject of volumes. He will not be wrong, who follows the old lawyers and holds it to be, that which reason has induced, if not all nations, at least the most civilized, to observe in their intercourse with each other. It rests therefore on the double foundation of reason and usage, and depends upon precedents and the analogies which are to be deduced from the comparison thereof. Hence it is distinguishable from the law of nature, which depends not upon precedent, but upon instinct. All controversies respecting the law of nations terminate in this one result: that, what reason dictates to nations, and which by precedent is grown into usage, is the only law of those who are subject to no other. . . .

Mere speculative general principles are not sufficient to establish any rule, it must be shown to be conformable to the usage and practice of nations. A great part of the law of nations stands on no other foundation. It is introduced indeed by general principles, but it travels with those general principles only to a certain extent; and if it stops there, you are not at liberty to go further, and to say, that mere general principles would bear you out in a further progress. . . .

Where the practice of nations is various, there is no rule operating with the proper force and authority of a general law. Mere unity of principle forms no uniform rule to regulate the general practice. Were the public opinion of European states agreed on any principle, as fit to form a rule of the law of nations, it by no means follows, that any one nation would be under any obligation to observe it. That obligation could arise only from a reciprocity of practice in other nations; for, from the

[5] On Zouche's life and works, see PHILLIPSON, in Great Jurists of the World, 220–247; SCELLE, in Les Fondateurs, 269–330.

"The law of nations . . . is the *ensemble* of international conventions, usages, and received opinions, aided, in case of need, by the doctrines of abstract justice and of universal reason." ATTORNEY-GENERAL CUSHING, "Foreign Enlistments in the United States," 7 Op. Atty. Gen. 367, 380.

very circumstance of the prevalence of a different rule among other nations, it would become not only lawful, but necessary for that one nation to pursue a different conduct. It cannot be supposed to be the duty of any country to make itself a martyr to speculative propriety, were that established on clearer demonstration than such questions will generally admit. Where mere abstract propriety, therefore, is on one side, and real practical justice on the other; the rule of substantial justice must be held to be the true rule of the law of nations between independent states; that is to say, the rule to which civilized nations attending to just principles ought to adhere, and rest secure in the reliance of receiving reciprocal justice in their turn. If this reliance should be disappointed, redress must be sought in retaliation, which in the disputes of independent states is not to be considered as vindictive retaliation, but as the just and equal measure of civil retribution. This will be their ultimate security, and it is a security sufficient to warrant the reliance. For the transactions of states cannot be balanced by minute arithmetic; something must on all occasions be hazarded on just and liberal presumptions.[6]

Vattel, Le Droit des Gens, ou Principes de la Loi Naturelle, Appliqués à la Conduite et aux Affaires des Nations et des Souverains

Introduction, sections 1–7, 21, 24–25, 27. 1758.

§1. Nations or States are political bodies, societies of men who have united together and combined their forces, in order to procure their mutual welfare and security.

§2. Such a society has its own affairs and interests; it deliberates and takes resolutions in common, and it thus becomes a moral person having an understanding and a will peculiar to itself, and susceptible at once of obligations and of rights.

§3. The object of this work is to establish on a firm basis the obligations and the rights of Nations. The Law of Nations is the science of the rights which exist between Nations or States, and of the obligations corresponding to these rights. . . .

[6] "The law of nations is that collection of usages which civilized states have agreed to observe in their dealings with one another." Coleridge, C. J., in Queen v. Keyn, 2 Ex. D. 63, 154. "What, then, is International Law? I know no better definition of it than that it is the sum of the Rules or Usages which civilized states have agreed shall be binding upon them in their dealings with one another." Lord Russell of Killowen, in 19 Am. Bar Assoc. Rep. 253, 256. "The Law of Nations, or International Law, is a body of rules recognized as binding on civilized independent states in their dealings with one another and with one another's subjects." Sir Frederick Pollock, in 2 Col. L. Rev. 511.

§4. Since Nations are composed of men who are by nature free and independent, and who before the establishment of civil society lived together in the state of nature, such Nations or sovereign States must be regarded as so many free persons living together in the state of nature. . . .

§5. As men are subject to the laws of nature, and as their union in civil society can not exempt them from the obligation of observing those laws, since in that union they remain none the less men, the whole Nation, whose common will is but the outcome of the united wills of the citizens, remains subject to the laws of nature and is bound to respect them in all its undertakings. And since right is derived from obligation, as we have just remarked, a Nation has the same rights that nature gives to men for the fulfillment of their duties.

§6. We must therefore apply to nations the rules of the natural law to discover what are their obligations and their rights; hence the Law of Nations is in its origin merely the Law of Nature applied to Nations. Now the just and reasonable application of a rule requires that the application be made in a manner suited to the nature of the subject; but we must not conclude that the Law of Nations is everywhere and at all points the same as the natural law, except for a difference of subjects, so that no other change need be made than to substitute Nations for individuals. A civil society, or a State, is a very different subject from an individual person, and therefore, by virtue of the natural law, very different obligations and rights belong to it in most cases. The same general rule, when applied to two different subjects, can not result in similar principles, nor can a particular rule, however just for one subject, be applicable to a second of a totally different nature. Hence there are many cases in which the natural law does not regulate the relations of States as it would those of individuals. We must know how to apply it conformably to its subjects; and the art of so applying it, with a precision founded upon right reason, constitutes of the Law of Nations a distinct science.

§7. We use the term necessary Law of Nations for that law which results from applying the natural law to Nations. It is necessary, because Nations are absolutely bound to observe it. It contains those precepts which the natural law dictates to States, and it is no less binding upon them than it is upon individuals. For States are composed of men, their policies are determined by men, and these men are subject to the natural law under whatever capacity they act. This same law is called by Grotius and his followers the internal Law of Nations, inasmuch as it is binding upon the conscience of Nations. Several writers call it the natural Law of Nations.

§21. Since Nations are free, independent, and equal, and since each has the right to decide in its conscience what it must do to fulfill its duties, the effect of this is to produce, before the world at least, a perfect equality

of rights among Nations in the conduct of their affairs and in the pursuit of their policies. The intrinsic justice of their conduct is another matter which it is not for others to pass upon finally; so that what one may do another may do, and they must be regarded in the society of mankind as having equal rights.

When differences arise each Nation in fact claims to have justice on its side, and neither of the interested parties nor other Nations may decide the question. The one who is actually in the wrong sins against its conscience; but as it may possibly be in the right, it can not be accused of violating the laws of the society of Nations.

It must happen, then, on many occasions that Nations put up with certain things although in themselves unjust and worthy of condemnation, because they can not oppose them by force without transgressing the liberty of individual Nations and thus destroying the foundations of their natural society. And since they are bound to advance that society, we rightly presume that they have agreed to the principle just established. The rules resulting from it form what Wolf calls the voluntary Law of Nations; and there is no reason why we should not use the same expression, although we have thought it our duty to differ from that learned man as to how the foundation of that law should be established.

§24. The various agreements which Nations may enter into give rise to a new division of the Law of Nations which is called conventional, or the law of treaties. As it is clear that a treaty binds only the contracting parties the conventional Law of Nations is not universal, but restricted in character. All that can be said upon this subject in a treatise on the Law of Nations must be limited to a statement of the general rules which Nations must observe with respect to their treaties. . . .

§25. Certain rules and customs, consecrated by long usage and observed by Nations as a sort of law, constitute the customary Law of Nations, or international custom. This law is founded upon a tacit consent, or rather upon a tacit agreement of the Nations which observe it. Hence it evidently binds only those Nations which have adopted it and is no more universal than the conventional law. Hence we must also say of this customary law that its details do not come within a systematic treatise on the Law of Nations, and we must limit ourselves to stating the general theory of it, that is to say, the rules to be observed in it, both as regards its effects and its substance. . . .

§27. These three divisions of the Law of Nations, the voluntary, the conventional, and the customary law, form together the positive Law of Nations, for they all proceed from the agreement of Nations; the voluntary law from their presumed consent; the conventional law from their express consent; and the customary law from their tacit consent. And since there are no other modes of deducing a law from the agreement of Nations, there are but these three divisions of the positive Law of Nations.

We shall be careful to distinguish them from the natural or necessary Law of Nations, without, however, treating them separately.[7] . . . [FENWICK's transl.]

SECTION 2. SOURCES

BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND

Introduction, page 43, section 2. 1765.

If man were to live in a state of nature, unconnected with other individuals, there would be no occasion for any other laws, than the law of nature, and the law of God. Neither could any other law possibly exist; for a law always supposes some superior who is to make it; and in a state of nature we are all equal, without any other superior but him who is the author of our being. But man was formed for society; and, as is demonstrated by the writers on this subject, is neither capable of living alone, nor indeed has the courage to do it. However, as it is impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many; and form separate states, commonwealths, and nations; entirely independent of each other, and yet liable to a mutual intercourse. Hence arises a third kind of law to regulate this mutual intercourse, called "the law of nations;" which, as none of these states will acknowledge a superiority in the other, cannot be dictated by either; but depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between these several communities: in the construction also of which compacts we have

[7] On Vattel's life and works, see MALLARMÉ, in Les Fondateurs, 481–601; PHILLIPSON, in Great Jurists of the World, 477–504.

"The law of nations, without defining or developing its divisions more minutely, may be stated to be the law of nature, rendered applicable to political societies, and modified, in progress of time, by the tacit or express consent, by the long-established usages and written compacts of nations: usages and compacts become so general that every civilized people ought to recognize and adopt their principles." VAN NESS, J., in Johnson v. Twenty-one Bales, 2 Paine 601, 604. See also CHACE, J., in Ware v. Hylton, 3 Dall. 199, 227; STORY, J., in United States v. La Jeune Eugenie, 2 Mason 409, 448, *infra*, 13, 16. "International law, as understood among civilized nations, may be defined as consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent." WHEATON, Dana's 8th ed., §14.

See CHIEF JUSTICE JAY's Charge to the Grand Jury, Wharton St. Tr., 49, 53; Heirn v. Bridault and Wife, 37 Miss. 209, 229–230, *infra*, 80, 81; Gray, Adm'r., v. United States, 21 Ct. Cl. 340, 399; The Ambrose Light, 25 Fed. 408, 422; the Janes Case, Mex. U. S. Gen. Cl. Com'n., 108, 131; the Lotus Case, P. C. I. J. Publ., Series A, Judgment No. 9, p. 18.

On the concept of international law, in general, see POUND, "Philosophical Theory and International Law," Bibliotheca Visseriana, I, 71.

no other rule to resort to, but the law of nature; being the only one to which both communities are equally subject: and therefore the civil law very justly observes, that *quod naturalis ratio inter omnes homines constituit, vocatur jus gentium.*[8]

United States v. The Schooner La Jeune Eugenie, Raibaud and Labatut, Claimants

United States. Circuit Court, First Circuit. 1822.

2 *Mason's Reports* 409.

[The statement of the case, the arguments of counsel, and part of the opinion are omitted. The facts are stated sufficiently in the opinion.]

Story J. This is a libel brought against the schooner La Jeune Eugenie, which was seized by Lieut. Stockton, on the coast of Africa, for being employed in the slave trade. The allegation asserts the offence in two forms; first, as against the slave trade acts of the United States; and secondly, as against the general law of nations. A claim has been given in by the French consul, in behalf of the claimants, who are subjects of

[8] "The law of nations is a law founded on the great and immutable principles of equity and natural justice." Marshall, C. J., dissenting, in The Venus, 8 Cr. 253, 297. "What is the law of nations? Not a rule adopted by one nation only, but the law of nature, of reason, and of justice, applied to the intercourse of nations, and admitted by all such as are civilized." Harper, arguing, in Thirty Hogsheads of Sugar v. Boyle, 9 Cr. 191, 193. See Nathan v. Virginia, 1 Dall. 77 n., 78 n.

"The law of nature may have been helpful, some three centuries ago, to build up a new law of nations, and the conception of inalienable rights of men and nations may have exercised a salutary influence, some one hundred and fifty years ago, on the development of modern democracy on both sides of the ocean; but they have failed as a durable foundation of either municipal or international law and can not be used in the present day as substitutes for positive municipal law, on the one hand, and for positive international law, as recognized by nations and governments through their acts and statements, on the other hand. Inalienable rights have been the cornerstones of policies like those of the Holy Alliance and of Lord Palmerston; instead of bringing to the world the benefit of mutual understanding, they are to weak or less fortunate nations an unrestrained menace." Mexico and United States, General Claims Commission, opinion in North American Dredging Co. Case, Mex. U. S. Gen. Cl. Com'n., 21, 26. See Hudson, in Confer. Teachers Int. L. Proc. (1925) 83, 86. "And though it may be true that we moderns regard with suspicion appeals to 'nature' or 'natural law' as made to a court which exists only as the looking-glass of the contemporary mind, still arguments of this kind are of permanent value for a development of international law in that they involve a reference to a standard set, not by the will or intention of the parties themselves, but by an external authority." Williams, in 22 Am. Jour. Int. L. 89, 94.

On the derivation of the law of nations from natural law, in general, see Bryce, Studies, 556, 602; Kent, Commentaries, I, 2; Mackintosh, Discourse on the Study of the Law of Nature and Nations; Maine, Ancient Law, Pollock's ed., 99, 120; Pollock, "Sources of International Law," 2 Col. L. Rev. 511, 517.

France, resident in Basseterre, in the island of Guadaloupe, as owners of the schooner; and there is also a Protest filed by the French consul against the jurisdiction of the court, upon the ground, that this is a French vessel, owned by French subjects, and, as such, exclusively liable to the jurisdiction of the French tribunals, if she shall turn out, upon the evidence, to have been engaged in this dishonourable traffic. . . .

[In an omitted part of the opinion the court examined the evidence and concluded that the ownership of the French claimants had not been sufficiently established.]

Standing, then, as this cause does, I am not satisfied, that the property is owned as claimed; and before it would be restored, even if all other difficulties were overcome, I should feel myself bound to require farther proof of proprietary interest. If there were nothing more in the cause, I should pass such an order without hesitation.

But supposing the vessel to be established to be French, sailing under French papers, and employed in the African slave trade, the more important question is, whether this court is at liberty to entertain jurisdiction of the cause, or is bound to restore the property without any farther inquiry, remitting the party to the domestic forum. It is contended on behalf of the plaintiffs, that this court has a right to entertain jurisdiction, and is bound to reject the claim of the defendants; First, because the African Slave Trade is repugnant to the law of nations; Secondly, because it is prohibited by the municipal laws of France. On the other side it is contended, that the trade is not repugnant to the law of nations; and if prohibited by the laws of France, it is a municipal regulation, which the tribunals of France are alone competent to inquire into and punish. . . .

[In an omitted part of the opinion the court discussed the nature of admiralty jurisdiction and the rights of visitation, search, and seizure.]

Having adverted to these preliminary considerations, I may now be permitted to proceed to the great points in controversy.

And the first question naturally arising out of the asserted facts is, whether the African slave trade be prohibited by the law of nations; for, if it be so, it will not, I presume, be denied, that confiscation of the property ought to follow; for that is the proper penalty denounced by that law for any violation of its precepts; and the same reasons, which enforce that penalty ordinarily, apply with equal force to employment in this trade.

I shall take up no time in the examination of the history of slavery, or of the question, how far it is consistent with the natural rights of mankind. That it may have a lawful existence, at least by way of punishment for crimes, will not be doubted by any persons, who admit the general right of society to enforce the observance of its laws by adequate penalties. That it has existed in all ages of the world, and has been

tolerated by some, encouraged by others, and sanctioned by most, of the enlightened and civilized nations of the earth in former ages, admits of no reasonable question. That it has interwoven itself into the municipal institutions of some countries, and forms the foundation of large masses of property in a portion of our own country, is known to all of us. Sitting, therefore, in an American court of judicature, I am not permitted to deny, that under some circumstances it may have a lawful existence; and that the practice may be justified by the condition, or wants, of society, or may form a part of the domestic policy of a nation. It would be unbecoming in me here to assert, that the state of slavery cannot have a legitimate existence, or that it stands condemned by the unequivocal testimony of the law of nations.

But this concession carries us but a very short distance towards the decision of this cause. It is not, as the learned counsel for the government have justly stated, on account of the simple fact, that the traffic necessarily involves the enslavement of human beings, that it stands reprehended by the present sense of nations; but that it necessarily carries with it a breach of all the moral duties, of all the maxims of justice, mercy and humanity, and of the admitted rights, which independent christian nations now hold sacred in their intercourse with each other. What is the fact as to the ordinary, nay, necessary course, of this trade? It begins in corruption, and plunder, and kidnapping. It creates and stimulates unholy wars for the purpose of making captives. It desolates whole villages and provinces for the purpose of seizing the young, the feeble, the defenceless, and the innocent. It breaks down all the ties of parent, and children, and family, and country. It shuts up all sympathy for human suffering and sorrows. It manacles the inoffensive females and the starving infants. It forces the brave to untimely death in defence of their humble homes and firesides, or drives them to despair and self-immolation. It stirs up the worst passions of the human soul, darkening the spirit of revenge, sharpening the greediness of avarice, brutalizing the selfish, envenoming the cruel, famishing the weak, and crushing to death the broken hearted. This is but the beginning of the evils. Before the unhappy captives arrive at the destined market, where the traffic ends, one quarter part at least in the ordinary course of events perish in cold blood under the inhuman, or thoughtless treatment of their oppressors.

Strong as these expressions may seem, and dark as is the colouring of this statement, it is short of the real calamities inflicted by this traffic. All the wars, that have desolated Africa for the last three centuries, have had their origin in the slave trade. The blood of thousands of her miserable children has stained her shores, or quenched the dying embers of her desolated towns, to glut the appetite of slave dealers. The ocean has received in its deep and silent bosom thousands more, who have

perished from disease and want during their passage from their native homes to the foreign colonies. I speak not from vague rumours, or idle tales, but from authentic documents, and the known historical details of the traffic,—a traffic, that carries away at least 50,000 persons annually from their homes and their families, and breaks the hearts, and buries the hopes, and extinguishes the happiness of more than double that number. "There is," as one of the greatest of modern statesmen has declared, "something of horror in it, that surpasses all the bounds of imagination."

It is of this traffic, thus carried on, and necessarily carried on, beginning in lawless wars, and rapine, and kidnapping, and ending in disease, and death, and slavery,—it is of this traffic in the aggregate of its accumulated wrongs, that I would ask, if it be consistent with the law of nations? It is not by breaking up the elements of the case into fragments, and detaching them one from another, that we are to be asked of each separately, if the law of nations prohibits it. We are not to be told, that war is lawful, and slavery lawful, and plunder lawful, and the taking away of life is lawful, and the selling of human beings is lawful. Assuming that they are so under circumstances, it establishes nothing. It does not advance one jot to the support of the proposition, that a traffic, that involves them all, that is unnecessary, unjust, and inhuman, is countenanced by the eternal law of nature, on which rests the law of nations.

Now the law of nations may be deduced, first, from the general principles of right and justice, applied to the concerns of individuals, and thence to the relations and duties of nations; or, secondly, in things indifferent or questionable, from the customary observances and recognitions of civilized nations; or, lastly, from the conventional or positive law, that regulates the intercourse between states. What, therefore, the law of nations is, does not rest upon mere theory, but may be considered as modified by practice, or ascertained by the treaties of nations at different periods. It does not follow, therefore, that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations. Nor is it to be admitted, that no principle belongs to the law of nations, which is not universally recognised, as such, by all civilized communities, or even by those constituting, what may be called, the christian states of Europe. Some doctrines, which we, as well as Great Britain, admit to belong to the law of nations, are of but recent origin and application, and have not, as yet, received any public or general sanction in other nations; and yet they are founded in such a just view of the duties and rights of nations, belligerent and neutral, that we have not hesitated to enforce them by the penalty of confiscation. There are other doctrines, again, which have met the decided hostility of some of the European states, enlightened as

well as powerful, such as the right of search, and the rule, that free ships do not make free goods, which, nevertheless, both Great Britain and the United States maintain, and in my judgment with unanswerable arguments, as settled rules in the Law of Prize, and scruple not to apply them to the ships of all other nations. And yet, if the general custom of nations in modern times, or even in the present age, recognized an opposite doctrine, it could not, perhaps, be affirmed, that that practice did not constitute a part, or, at least, a modification, of the law of nations.

But I think it may be unequivocally affirmed, that every doctrine, that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligation, may theoretically be said to exist in the law of nations; and unless it be relaxed or waived by the consent of nations, which may be evidenced by their general practice and customs, it may be enforced by a court of justice, whenever it arises in judgment. And I may go farther and say, that no practice whatsoever can obliterate the fundamental distinction between right and wrong, and that every nation is at liberty to apply to another the correct principle, whenever both nations by their public acts recede from such practice, and admit the injustice or cruelty of it.

Now in respect to the African slave trade, such as it has been described to be, and in fact is, in its origin, progress, and consummation, it cannot admit of serious question, that it is founded in a violation of some of the first principles, which ought to govern nations. It is repugnant to the great principles of christian duty, the dictates of natural religion, the obligations of good faith and morality, and the eternal maxims of social justice. When any trade can be truly said to have these ingredients, it is impossible, that it can be consistent with any system of law, that purports to rest on the authority of reason or revelation. And it is sufficient to stamp any trade as interdicted by public law, when it can be justly affirmed, that it is repugnant to the general principles of justice and humanity.

Now there is scarcely a single maritime nation of Europe, that has not in the most significant terms, in the most deliberate and solemn conferences, acts, or treaties, acknowledged the injustice and inhumanity of this trade; and pledged itself to promote its abolition. I need scarcely advert to the conferences at Vienna, at Aix-la-Chapelle, and at London, on this interesting subject, as they have been cited at the argument of this cause, and authenticated by our own government, to shew what may be emphatically called the sense of Europe upon this point. France, in particular, at the conferences at Vienna, in 1815, engaged to use "all the means at her disposal, and to act in the employment of these means with all the zeal and perseverance due to so great and noble a cause." (the abolition of the slave trade.) And accordingly, in the treaty of peace between her and Great Britain, France, expressing her concurrence

without reserve in the sentiments of his Britannic majesty with respect to this traffic, admits it to be "repugnant to the principles of natural justice, and of the enlightened age, in which we live;" and, at a short period afterwards, the government of France informed the British government, that it had "issued directions in order, that on the part of France the traffic in slaves may cease from the present time everywhere and forever." The conduct and opinions of Great Britain, honourably and zealously, and, I may add, honestly, as she has been engaged in promoting the universal abolition of the trade, are too notorious to require a pointed enumeration. She has through her Parliament expressed her abhorrence of the trade in the most marked terms, as repugnant to justice and humanity; she has punished it as a felony, when carried on by her subjects; and she has recognised through her judicial tribunals the doctrine, that it is repugnant to the law of nations. Our own country, too, has firmly and earnestly pressed forward in the same career. The trade has been reprobated and punished, as far as our authority extended, from a very early period of the government; and by a very recent statute, to mark at once its infamy and repugnance to the law of nations, it has been raised in the catalogue of public crimes to the bad eminence of piracy. I think, therefore, that I am justified in saying, that at the present moment the traffic is vindicated by no nation, and is admitted by almost all commercial nations as incurably unjust and inhuman. It appears to me, therefore, that in an American court of judicature, I am bound to consider the trade an offence against the universal law of society and in all cases, where it is not protected by a foreign government, to deal with it as an offence carrying with it the penalty of confiscation.

And I cannot but think, notwithstanding the assertion at the bar to the contrary, that this doctrine is neither novel nor alarming. That it stands on principles of sound sense and general policy, and, above all, of moral justice. And I confess, that I should be somewhat startled, if any nation, sincerely anxious for the abolition, and earnest in its duty, should interpose its influence to arrest its universal adoption.

There is an objection urged against the doctrine, which is here asserted, that ought not to be passed over in silence; and that is, if the African slave trade is repugnant to the law of nations, no nation can rightfully permit its subjects to carry it on, or exempt them from obedience to that law; for it is said, that no nation can privilege itself to commit a crime against the law of nations by a mere municipal regulation of its own. In a sense the proposition is true, but not universally so. No nation has a right to infringe the law of nations, so as thereby to produce an injury to any other nation. But if it does, this is understood to be an injury, not against all nations, which all are bound or permitted to redress; but which concerns alone the nation injured. The independence of nations guarantees to each the right of guarding its own honour,

and the morals and interests of its own subjects. No one has a right to sit in judgment generally upon the actions of another; at least to the extent of compelling its adherence to all the principles of justice and humanity in its domestic concerns. If a nation were to violate as to its own subjects in its domestic regulation the clearest principles of public law, I do not know, that that law has ever held them amenable to the tribunals of other nations for such conduct. It would be inconsistent with the equality and sovereignty of nations, which admit no common superior. No nation has ever yet pretended to be the *custos morum* of the whole world; and though abstractedly a particular regulation may violate the law of nations, it may sometimes, in the case of nations, be a wrong without a remedy. . . .

[In an omitted part of the opinion the court considered the authorities and the effect of French regulations prohibiting the slave trade.]

Thus far I have proceeded in the cause without reference to any other claims, but those asserted in the original libel and answer. But at a late period in this cause, by direction of the president, a suggestion has been filed by the District Attorney, expressing a willingness to yield up the vessel to the French government, or its consular agent, for the purpose of remitting the cause for ultimate adjudication to the domestic forum of the sovereign of the owners. To a suggestion of this nature this court is bound to listen with the most respectful attention. It is understood to be, not a direction to the court, for that is beyond the reach of executive authority, but an intimation of the wishes of the government, so far as its own rights are concerned, to spare the court any farther investigation. If it had seemed fit to all the parties, whose interests are before the court, to agree to the course held out by this suggestion, it would have relieved my mind from a weight of responsibility, which has most heavily pressed upon it. But the French claimants resist this course, and require, that the property should be delivered over to their personal possession, and not to the possession of their sovereign. Under such circumstance this court must follow the duty prescribed to it by law, independently of any wishes of our own government or of France. I have been compelled, therefore, reluctantly to travel over the whole merits of the cause, and to decide it with reference to the French owners upon the great principles, on which it has been argued.

After listening to the very able, eloquent, and learned arguments delivered at the bar on this occasion—after weighing the authorities, which bear on the case, with mature deliberation,—after reflecting anxiously and carefully upon the general principles, which may be drawn from the law of nations to illustrate or confirm them, I have come to the conclusion, that the slave trade is a trade prohibited by universal law, and by the law of France, and that, therefore, the claim of the asserted French owners must be rejected. That claim being rejected, I feel

myself at perfect liberty, with the express consent of our own government, to decree, that the property be delivered over to the consular agent of the King of France, to be dealt with according to his own sense of duty and right

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The Antelope, The Vice-Consuls of Spain and Portugal, Libellants

United States. Supreme Court. 1825.

10 *Wheaton's Reports* 66.

Appeal from the Circuit Court of Georgia.

These cases were allegations filed by the Vice-Consuls of Spain and Portugal, claiming certain Africans as the property of subjects of their nation. The material facts were as follows: A privateer, called the Colombia, sailing under a Venezuelean commission, entered the port of Baltimore in the year 1819; clandestinely shipped a crew of thirty or forty men; proceeded to sea, and hoisted the Artegan flag, assuming the name of the Arraganta, and prosecuted a voyage along the coast of Africa; her officers and the greater part of her crew being citizens of the United States. Off the coast of Africa she captured an American vessel, from Bristol, in Rhode Island, from which she took twenty-five Africans; she captured several Portuguese vessels, from which she also took Africans; and she captured a Spanish vessel, called the Antelope, in which she also took a considerable number of Africans. The two vessels then sailed in company to the coast of Brazil, where the Arraganta was wrecked, and her master, Metcalf, and a great part of his crew, made prisoners; the rest of the crew, with the armament of the Arraganta, were transferred to the Antelope, which, thus armed, assumed the name of the General Ramirez, under the command of John Smith, a citizen of the United States; and on board this vessel were all the Africans, which had been captured by the privateer in the course of her voyage. This vessel, thus freighted, was found hovering near the coast of the United States, by the revenue cutter, Dallas, under the command of Captain Jackson, and finally brought into the port of Savannah for adjudication. The Africans, at the time of her capture, amounted to upwards of two hundred and eighty. On their arrival, the vessel, and the Africans, were libelled, and claimed by the Portuguese and Spanish Vice-Consuls reciprocally. They were also claimed by John Smith, as captured *jure belli*. They were claimed by the United States, as having been transported from foreign parts by American citizens, in contravention to the laws of the United States, and as entitled to their freedom by those laws, and by the law of nations. Captain Jackson, the master of the revenue cutter, filed an alternative claim for the bounty given by law, if the Africans should be

adjudged to the United States; or to salvage, if the whole subject should be adjudged to the Portuguese and Spanish Consuls.

The Court dismissed the libel and claim of John Smith. They dismissed the claim of the United States, except as to that portion of the Africans which had been taken from the American vessel. The residue was divided between the Spanish and Portuguese claimants.

No evidence was offered to show which of the Africans were taken from the American vessel, and which from the Spanish and Portuguese; and the Court below decreed, that, as above one third of them died, the loss should be averaged among these three different classes; and that sixteen should be designated, by lot, from the whole number, and delivered over to the Marshal, according to the law of the United States, as being the fair proportion of the twenty-five, proved to have been taken from an American vessel.

[The arguments of counsel and part of the opinion are omitted.]

Mr. Chief Justice Marshall delivered the opinion of the Court, and, after stating the case, proceeded as follows:

In prosecuting this appeal, the United States assert no property in themselves. They appear in the character of guardians, or next friends, of these Africans, who are brought, without any act of their own, into the bosom of our country, insist on their right to freedom, and submit their claim to the laws of the land, and to the tribunals of the nation.

The Consuls of Spain and Portugal, respectively, demand these Africans as slaves, who have, in the regular course of legitimate commerce, been acquired as property by the subjects of their respective sovereigns, and claim their restitution under the laws of the United States.

In examining claims of this momentous importance; claims in which the sacred rights of liberty and of property come in conflict with each other; which have drawn from the bar a degree of talent and of eloquence, worthy of the questions that have been discussed; this Court must not yield to feelings which might seduce it from the path of duty, and must obey the mandate of the law.

That the course of opinion on the slave trade should be unsettled, ought to excite no surprise. The Christian and civilized nations of the world, with whom we have most intercourse, have all been engaged in it. However abhorrent this traffic may be to a mind whose original feelings are not blunted by familiarity with the practice, it has been sanctioned in modern times by the laws of all nations who possess distant colonies, each of whom has engaged in it as a common commercial business which no other could rightfully interrupt. It has claimed all the sanction which could be derived from long usage, and general acquiescence. That trade could not be considered as contrary to the law of nations which was authorized and protected by the laws of all commercial nations; the right to carry on which was claimed by each, and allowed by each.

The course of unexamined opinion, which was founded on this inveterate usage, received its first check in America; and, as soon as these States acquired the right of self-government, the traffic was forbidden by most of them. In the beginning of this century, several humane and enlightened individuals of Great Britain devoted themselves to the cause of the Africans; and, by frequent appeals to the nation, in which the enormity of this commerce was unveiled, and exposed to the public eye, the general sentiment was at length roused against it, and the feelings of justice and humanity, regaining their long lost ascendency, prevailed so far in the British parliament as to obtain an act for its abolition. The utmost efforts of the British government, as well as of that of the United States, have since been assiduously employed in its suppression. It has been denounced by both in terms of great severity, and those concerned in it are subjected to the heaviest penalties which law can inflict. In addition to these measures operating on their own people, they have used all their influence to bring other nations into the same system, and to interdict this trade by the consent of all.

Public sentiment has, in both countries, kept pace with the measures of government; and the opinion is extensively, if not universally entertained, that this unnatural traffic ought to be suppressed. While its illegality is asserted by some governments, but not admitted by all; while the detestation in which it is held is growing daily, and even those nations who tolerate it in fact, almost disavow their own conduct, and rather connive at, than legalize, the acts of their subjects; it is not wonderful that public feeling should march somewhat in advance of strict law, and that opposite opinions should be entertained on the precise cases in which our own laws may control and limit the practice of others. Indeed, we ought not to be surprised, if, on this novel series of cases, even Courts of justice should, in some instances, have carried the principle of suppression farther than a more deliberate consideration of the subject would justify. . . .

[In an omitted part of the opinion the court reviewed The Amedie, 1 Acton 240; The Fortuna, 1 Dods. 81; The Diana, 1 Dods. 95; and Le Louis, 2 Dods. 210.]

In the United States, different opinions have been entertained in the different Circuits and Districts; and the subject is now, for the first time, before this Court.

The question, whether the slave trade is prohibited by the law of nations has been seriously propounded, and both the affirmative and negative of the proposition have been maintained with equal earnestness.

That it is contrary to the law of nature will scarcely be denied. That every man has a natural right to the fruits of his own labour, is generally admitted; and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary

result of this admission. But from the earliest times war has existed, and war confers rights in which all have acquiesced. Among the most enlightened nations of antiquity, one of these was, that the victor might enslave the vanquished. This, which was the usage of all, could not be pronounced repugnant to the law of nations, which is certainly to be tried by the test of general usage. That which has received the assent of all, must be the law of all.

Slavery, then, has its origin in force; but as the world has agreed that it is a legitimate result of force, the state of things which is thus produced by general consent, cannot be pronounced unlawful.

Throughout Christendom, this harsh rule has been exploded, and war is no longer considered as giving a right to enslave captives. But this triumph of humanity has not been universal. The parties to the modern law of nations do not propagate their principles by force; and Africa has not yet adopted them. Throughout the whole extent of that immense continent, so far as we know its history, it is still the law of nations that prisoners are slaves. Can those who have themselves renounced this law, be permitted to participate in its effects by purchasing the beings who are its victims?

Whatever might be the answer of a moralist to this question, a jurist must search for its legal solution, in those principles of action which are sanctioned by the usages, the national acts, and the general assent, of that portion of the world of which he considers himself as a part, and to whose law the appeal is made. If we resort to this standard as the test of international law, the question, as has already been observed, is decided in favour of the legality of the trade. Both Europe and America embarked in it; and for nearly two centuries, it was carried on without opposition, and without censure. A jurist could not say, that a practice thus supported was illegal, and that those engaged in it might be punished, either personally, or by deprivation of property.

In this commerce, thus sanctioned by universal assent, every nation had an equal right to engage. How is this right to be lost? Each may renounce it for its own people; but can this renunciation affect others?

No principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. A right, then, which is vested in all by the consent of all, can be devested only by consent; and this trade, in which all have participated, must remain lawful to those who cannot be induced to relinquish it. As no nation can prescribe a rule for others, none can make a law of nations; and this traffic remains lawful to those whose governments have not forbidden it.

If it is consistent with the law of nations, it cannot in itself be piracy. It can be made so only by statute; and the obligation of the statute cannot transcend the legislative power of the state which may enact it.

If it be neither repugnant to the law of nations, nor piracy, it is almost superfluous to say in this Court, that the right of bringing in for adjudication in time of peace, even where the vessel belongs to a nation which has prohibited the trade, cannot exist. The Courts of no country execute the penal laws of another; and the course of the American government on the subject of visitation and search, would decide any case in which that right had been exercised by an American cruiser, on the vessel of a foreign nation, not violating our municipal laws, against the captors.

It follows, that a foreign vessel engaged in the African slave trade, captured on the high seas in time of peace, by an American cruiser, and brought in for adjudication, would be restored.

The general question being disposed of, it remains to examine the circumstances of the particular case. . . .

Had the Arraganta been a regularly commissioned cruiser, which had committed no infraction of the neutrality of the United States, her capture of the Antelope must have been considered as lawful, and no question could have arisen respecting the rights of the original claimants. The question of prize or no prize belongs solely to the Courts of the captor. But, having violated the neutrality of the United States, and having entered our ports, not voluntarily, but under coercion, some difficulty exists respecting the extent of the obligation to restore, on the mere proof of former possession, which is imposed on this government.

If, as is charged in the libels of both the Consuls, as well as of the United States, she was a pirate, hovering on the coast with intent to introduce slaves in violation of the laws of the United States, our treaty requires that property rescued from pirates shall be restored to the Spanish owner on his making proof of his property.

Whether the General Ramirez, originally the Antelope, is to be considered as the prize of a commissioned belligerent ship of war unlawfully equipped in the United States, or as a pirate, it seems proper to make some inquiry into the title of the claimants.

In support of the Spanish claim, testimony is produced, showing the documents under which the Antelope sailed from the Havana on the voyage on which she was captured; that she was owned by a Spanish house of trade in that place; that she was employed in the business of purchasing slaves, and had purchased and taken on board a considerable number, when she was seized as prize by the Arraganta.

Whether, on this proof, Africans brought into the United States, under the various circumstances belonging to this case, ought to be restored or not, is a question on which much difficulty has been felt. It is unnecessary to state the reasons in support of the affirmative or

negative answer to it, because the Court is divided on it, and, consequently, no principle is settled. So much of the decree of the Circuit Court as directs restitution to the Spanish claimant of the Africans found on board the Antelope when she was captured by the Arraganta, is affirmed. . . .

[In an omitted part of the opinion the court examined the evidence and concluded that a proprietary interest had been established only on behalf of the Spanish claimants and on their behalf only as to ninety-three of the slaves.]

We think, then, that all the Africans, now in possession of the Marshal for the District of Georgia, and under the control of the Circuit Court of the United States for that District, which were brought in with the Antelope, otherwise called the General Ramirez, except those which may be designated as the property of the Spanish claimants, ought to be delivered up to the United States, to be disposed of according to law. So much of the sentence of the Circuit Court as is contrary to this opinion, is to be reversed, and the residue affirmed.[9]

COBBETT, CASES AND OPINIONS ON INTERNATIONAL LAW

Third Edition, Part I, pages 5–6. 1909.

Usage and Custom.—Usage means no more than habitual practice. The growth of usage and its development into custom may be likened to the formation of a path across a common. At first each wayfarer pursues his own course; gradually, by reason either of its directness or on some other ground of apparent utility, some particular route is followed by the majority; this route next assumes the character of a track, discernible but not as yet well defined, from which deviation, however, now becomes more rare; whilst in its final stage the route assumes the shape of a well-

[9] See Le Louis, 2 Dods. 210; Wildman, I, 6.

In a note of Feb. 22, 1822, from Secretary Adams to the French Minister, the United States government expressly disclaimed the right to search French or other foreign vessels upon the high seas in time of peace in enforcing laws for the suppression of the slave trade. An indemnity was later paid to France on account of the seizure of the schooner La Jeune Eugenie, *supra*, 13, and other vessels. MOORE, Dig. Int. L., II, 920.

On the abolition of the slave trade by treaty and international act in the nineteenth century, see Treaty of Paris, May 30, 1814, Hertslet, I, 20; Declaration of Vienna, Feb. 8, 1815, *ibid.*, I, 60; Treaty of Paris, Nov. 20, 1815, *ibid.*, I, 350; Resolutions of Verona, Nov. 28, 1822, *ibid.*, I, 695; Treaty of London, Dec. 20, 1841, 2 Martens, Nouv. Rec. Gén., 392, 508; General Act of Berlin, Feb. 26, 1885, art. 9, 10 *ibid.*, 2 sér., 414, 419; General Act of Brussels, July 2, 1890, 16 *ibid.*, 2 sér., 3. See also Convention of Geneva, Sept. 25, 1926, 21 Am. Jour. Int. L. Suppl. 171.

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defined path, habitually followed by all who pass that way. And yet it would be difficult to point out at what precise moment this route acquired the character of an acknowledged path. The growth of usage and formation of custom, both as between a community of individuals and the community of nations, proceeds much on the same lines. As between nations some particular practice or course of conduct arises, attributable in the first instance to some particular emergency or prompted by a common belief in its convenience or safety. But its observance is discretionary; and it exists side by side with other competing practices. Next, as between competing usages the fittest, having regard to the needs of the time, generally tends to prevail. It gathers strength by observance. It comes to be recorded, and is appealed to in cases of dispute, although not infrequently violated. Finally, it comes to command a general assent; and at this stage it may be said to take on the character of a custom, which involves not merely a habit of action, but a rule of conduct resting on general approval. The process by which usage thus crystallises into custom is well illustrated by the growth of the law affecting belligerent and neutral States, which has been so admirably sketched by Hall. But the conditions of international life are constantly changing; and new conditions ever tend to generate new usages; some of which in their turn develop into customs, that modify or supersede those hitherto observed. Within each political society and as between individual members of the community the difficulty of ascertaining custom is met by the gradual establishment of some form of political authority which, through its various organs, assumes at once to declare what customs are binding and also to enforce them on its individual members. Out of this grows the national law. But as between nations there is, of course, no such common authority; although it is not improbable that in course of time some substitute for this will be found in international conference and joint international declaration; whilst in the permanent Court of Arbitration which has now been established as one of the results of The Hague Conferences of 1899 and 1907 we have already the germ of an international tribunal. Meanwhile the two great difficulties with respect to custom are (1) the difficulty of proof, and (2) the difficulty of determining at what stage custom can be said to become authoritative.[10]

[10] "The ascertainment of a rule of international law implies consequently an investigation of the way in which customs acquire consistency and thus come to be considered as constituting rules governing international relations." NYHOLM, J., dissenting, in the Lotus Case, P. C. I. J. Publ., Series A, Judgment No. 9, p. 59.

See Schooner Exchange v. M'Faddon, 7 Cr. 116, 136; Johnson v. Twenty-one Bales, 2 Paine 601; The Charkieh, 4 Ad. & Ec. 59, 77; The Paquete Habana, 175 U. S. 677, *infra*, 42; West Rand Central Gold Mining Co. v. King [1905] 2 K. B. 391, 401, 406, *infra*, 62; The Marie Leonhardt [1921] P. 1.

Jitta, The Renovation of International Law on the Basis of a Juridical Community of Mankind

Pages 24–26. 1919.

Custom as a source of juridical rules. Custom is an old and most noble source of binding social rules. It belongs to the science of jurisprudence as a common good of mankind. Custom is composed of two elements, a material one, the series of concording acts, and an intellectual one, the conviction that the acts are in conformity with the requirements of the reasonable order of social life. The acts, constituting the material element, are always acts of men, beings with muscles and brains; the acting men may be officials or private individuals. The custom may be a national one, existing only in a special country, or an international one, which several countries have in common. It is both a source of public international law and of private international law. . . .

How is the existence of a custom to be ascertained in international social life? This is not at all an easy task. The difficulties exist as well with regard to the material element as with regard to the intellectual one. They are particularly arduous when the acts of officials, the representatives of States in public international relations, are involved in the question. Is it absolutely necessary that the series of acts is not interrupted, and that there is a clear evidence of the conviction of the acting men or bodies? This matter has often been disputed. . . . My opinion is that the question is as insoluble without an appeal to the reasonable principles as it is easily soluble with such an appeal. If the acts, from the series of which the existence of a custom is to be deduced, are in conformity with the reasonable principles, a few exceptions, interrupting the series, will not be an impediment, and the conviction of the acting men is to be admitted as soon as there is no evidence to the contrary. If the acts, on the contrary, are in opposition with the principles—or if the pretended custom is relating to a domain where there are no reasonable principles, as, for instance, the domain of the law of war—the series must be uninterrupted and each of the acts must bear the impression of a conviction.[11]

[11] "It is not without interest to observe here that a custom must by its nature be positive in character and that consequently it is impossible to classify as a custom the fact that in a certain respect there is a total absence of the recurrence of more or less numerous precedents which are generally regarded as necessary to establish a custom. The rule which it is desired to discover must be positively supported by the acts which have occurred, and, of course, as regards international law these acts must also be international in character. Altamira, J., dissenting, in the Lotus Case, P. C. I. J. Publ., Series A, Judgment No. 9, p. 96.

Pollock, The Sources of International Law

Columbia Law Review, Volume II, pages 511–512. 1902.

The Law of Nations, or International Law, is a body of rules recognized as binding on civilized independent states in their dealings with one another and with one another's subjects. Treaties and conventions between particular states may define any portion of those rules, or add to or vary the existing rules, but any conventional rule so laid down is binding only on the parties to it. Acts of this kind may go to show, according to the nature of the case and the particular circumstances, the existence of general usage which the parties wished to record for convenience in apt words and an authentic form (though this is not common), or the dissatisfaction of the parties with existing usage and their desire to improve on it, or the absence of any settled usage at all antecedent to the particular agreement.[12] It is, therefore, impracticable, with one exception to be mentioned, to make any general statement as to the value of treaties and similar instruments as evidence of the law of nations. The exceptional case, which is of increasing frequency and importance, is where an agreement or declaration is made not by two or three states as a matter of private business between themselves, but by a considerable proportion, in number and power, of civilized states at large, for the regulation of matters of general and permanent interest. Such acts have of late been the result of congresses or conferences held for that purpose, and they have been so framed as to admit of and invite the subsequent adhesions of Powers not originally parties to the proceedings. There is no doubt that, when all or most of the great Powers have deliberately agreed to certain rules of general application, the rules approved by them have very great weight in practice even among states which have never expressly consented to them. It is hardly too much to say that declarations of this kind may be expected, in the absence of prompt and effective dissent by some Power of the first rank, to become part of the universally received law of nations within a moderate time.[13]

[12] On bilateral or limited treaties as sources of the law of nations, see Dainese v. United States, 15 Ct. Cl. 64 (extraterritoriality); Kaeckenbeeck, Int. Rivers, 18–20 (navigation of international rivers); Jessup, Territorial Waters, 192 (foreign merchant ships in port). *Cf.* West Rand Central Gold Mining Co. v. King [1905] 2 K. B. 391, 402, *infra*, 63; League of Nations, Committee of Experts on Codification, Report on Extradition, L. of N. Doc., C. 51. M. 28, 1926, V., 20 Am. Jour. Int. L. Spec. Suppl. 242.

[13] On the development of the law of nations through general treaties, see Hudson, "Development of International Law Since the War," 22 Am. Jour. Int. L. 330, 339, including a significant list entitled "Multipartite International Instruments of Legislative Effect," 22 Am. Jour. Int. L. Suppl. 90. An annex to the annual supplementary report on the work of the Council and Secretariat of the League of Nations indicates the progress of ratifications of various multipartite conventions. See L. of N. Doc.,

The Scotia

United States. Supreme Court. 1871.

14 *Wallace's Reports* 170.

[A British order in council of January 9, 1863, provided certain regulations for preventing collisions at sea. Identical regulations were enacted by the Congress of the United States on April 29, 1864. Before the end of the year 1864 nearly all the commercial nations of the world had adopted the British regulations. As a result of its failure to carry the lights required by these regulations, the American ship Berkshire was run down and sunk in mid-ocean by the British steamer Scotia. The owners of the Berkshire libelled the Scotia in the United States District Court at New York to recover for the loss caused by the collision. The District Court dismissed the libel, the Circuit Court affirmed the decree, and the libellant appealed.]

[The above statement is substituted for the statement of the case in the report. Part of the argument of counsel is omitted.]

Mr. J. C. Carter, for the appellants: . . .

The argument of the other side of course will be that we did not carry the side lights prescribed by the act of Congress and by the British admiralty regulations. This is admitted by us. Thus it is said that we violated our statutes. But the act of Congress prescribing the lights which sailing vessels are to carry is but a municipal regulation of the United States; and the Scotia cannot avail herself of such a statute to convict an American vessel of a tort on the high seas. All the questions in controversy are to be determined without reference to the municipal laws of either nation, and solely according to the general maritime law; and by that law there was no obligation on the Berkshire to exhibit any side lights, or not to exhibit a white light. . . .

There can be no reasonable doubt that this case is to be governed, not by the municipal law of either the United States or Great Britain, but by the maritime law. The main question is, what is that law? It is conceded that, at least until a recent period, it imposed no obligation upon either of the vessels to carry colored lights, or precluded either from carrying a white light. Now, has this law been changed? No change has been proved, nor any evidence offered tending to show such a change. Indeed, it is believed to have been the practice at the time, and to a great extent is now, for sailing vessels not to exhibit colored lights when away from the shore. But, conceding that any number of municipal ordinances were proved, they do not make any change in the maritime law. The high seas are outside of the territory of municipal powers, and their laws

A. 10 (a), 1923, Annex; A. 8 (a), 1924, Annex; A. 7 (a), 1925, Annex; A. 6 (a), 1926, Annex; A. 6 (a), 1928, Annex. See also 10 Cornell L. Quart. 419, 437; 32 W. Va. L. Quart. 4, 21.

have no force there. Now can any force be derived from them when taken together. It cannot be maintained when the laws of Great Britain, the United States, and France have, neither separately nor collectively, any effect whatever on the sea, that still if the concurring statutes of substantially all other maritime states were added, the combined effect would be to give them effect there. How many nations must join? Who is to determine what is a maritime state, in order to know whether all have joined? Who or what is to apprise the unlettered mariner that the municipal statutes of all nations have at last been brought into harmony? . . .

Mr. Justice Strong delivered the opinion of the court . . .

[Only so much of the opinion is reproduced as deals with the effect upon the general maritime law of the adoption of identic regulations.]

. . . The question still remains, what was the law of the place where the collision occurred, and at the time when it occurred. Conceding that it was not the law of the United States, nor that of Great Britain, nor the concurrent regulations of the two governments, but that it was the law of the sea, was it the ancient maritime law, that which existed before the commercial nations of the world adopted the regulations of 1863 and 1864, or the law changed after those regulations were adopted? Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were at first of limited effect, but which when generally accepted became of universal obligation. The Rhodian law is supposed to have been the earliest system of marine rules. It was a code for Rhodians only, but it soon became of general authority because accepted and assented to as a wise and desirable system by other maritime nations. The same may be said of the Amalphitan table, of the ordinances of the Hanseatic League, and of parts of the marine ordinances of Louis XIV. They all became the law of the sea, not on account of their origin, but by reason of their acceptance as such.[14] And it is evident that unless general

[14] For a brief sketch of the historical development of the maritime law, see Ogilvie, Int. Waterways, ch. 3. On the relation of maritime law to the law of nations, see Nielsen, Commissioner, in The Daylight, Mex. U. S. Gen. Cl. Com'n., 241, 250; Evans, Cases, 2d ed., 19.

assent is efficacious to give sanction to international law, there never can be that growth and development of maritime rules which the constant changes in the instruments and necessities of navigation require. Changes in nautical rules have taken place. How have they been accomplished, if not by the concurrent assent, express or understood, of maritime nations? When, therefore, we find such rules of navigation as are mentioned in the British orders in council of January 9th, 1863, and in our act of Congress of 1864, accepted as obligatory rules by more than thirty of the principal commercial states of the world, including almost all which have any shipping on the Atlantic Ocean, we are constrained to regard them as in part at least, and so far as relates to these vessels, the laws of the sea, and as having been the law at the time when the collision of which the libellants complain took place.[15]

This is not giving to the statutes of any nation extraterritorial effect. It is not treating them as general maritime laws, but it is recognition of the historical fact that by common consent of mankind, these rules have been acquiesced in as of general obligation. Of that fact we think we may take judicial notice. Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations.

The consequences of this ruling are decisive of the case before us. The violation of maritime law by the Berkshire in carrying a white light (to say nothing of her neglect to carry colored lights), and her carrying it on deck instead of at her masthead, were false representations to the Scotia. They proclaimed that the Berkshire was a steamer, and such she was manifestly taken to be. The movements of the Scotia were therefore entirely proper, and she was without fault.

Decree affirmed, with costs.

WALKER, A HISTORY OF THE LAW OF NATIONS

Volume I, pages 334–335. 1899.

In the detailed elaboration of his principles Grotius advances far beyond all his predecessors. . . . The very fact that he employed old material was a primary condition of his success. His use of Roman Law furnishes a salient example. The Roman Law, like the Roman Faith, had resisted the shocks of the Middle Ages by the strength of an innate moral power. It had trickled through Barbarian Codes, and come in full stream through the Basilika and the Western commentators from the founts of Justinian. It had had its Professors in every great mediæval University, and the common lawyer, who repudiated its sway, had borrowed on occasion largely of its dictates. What meaning was attached by Grotius to *Jus Gentium* in the mouths of Roman jurists it is

[15] See also The Hakan [1916] P. 266.

of little more than curious interest to decide. Grotius, whilst he drew on all antiquity for precedents and proofs, had in the Roman Law an unfailing supply of principles; and he used it unsparingly. He did so with success because, made known by generations of mediæval legal thinkers, the principles of pure Roman Civil Law yet spoke in the day of Grotius with the authority of *lex scripta*. The obligatory force which men acknowledged in these principles as rules of a municipal legal system was accorded them when they were enunciated as laws of international conduct. The system of Grotius lived because it was grafted on a living tree.[16]

[16] "It will generally be found that the deficiencies of precedent, usage, and express international authority, may be supplied from the rich treasury of the Roman Civil Law. Indeed, the greater number of controversies between states would find a just solution in this comprehensive system of practical equity, which furnishes principles of universal jurisprudence, applicable alike to individuals and to states." HALLECK, 55. See also MAINE, Ancient Law, Pollock's ed., 100, 104.

"The Law of Nations is but private law 'writ large.' It is an application to political communities of those legal ideas which were originally applied to the relations of individuals. Its leading distinctions are therefore naturally those with which Private law has long ago rendered us familiar." HOLLAND, Studies, 152. *Cf.* DICKINSON, "Analogy between Natural Persons and International Persons," 26 Yale L. Jour. 564; LAUTERPACHT, Private Law Sources and Analogies of International Law; POUND, "Philosophical Theory and International Law," Bibliotheca Visseriana, I, 71.

Of the writings of publicists as a source of the law of nations, KENT remarks: "In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims; and no civilized nation, which does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers on international law." Commentaries, I, 18. *Cf.* WHEATON, Dana's 8th ed., §15. See Queen v. Keyn, 2 Ex. Div. 63, 132; The Paquete Habana, 175 U. S. 677, 700, *infra*, 42, 43. On the other hand, COCKBURN, C. J., has remarked: "writers on international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it. This assent may be express, as by treaty or the acknowledged concurrence of governments, or may be implied from established usage. . . . In the absence of proof of assent, as derived from one or other of these sources, no unanimity on the part of theoretical writers would warrant the judicial application of the law on the sole authority of their views or statements." Queen v. Keyn, 2 Ex. Div. 63, 202. See also West Rand Gold Mining Co. v. The King [1905] 2 K. B. 391, 401, *infra*, 62. And see Triquet v. Bath, 3 Burr. 1478, 1481, *infra*, 55, 56; Respublica v. De Longchamps, 1 Dall. 111, 116, *infra*, 810, 811; Wolff v. Oxholm, 6 M. & S. 92, *infra*, 57; United States v. Smith, 5 Wh. 153, 160; Queen v. Keyn, 2 Ex. Div. 63, 69, 127, 202; Hilton v. Guyot, 159 U. S. 113, 163; The Lusitania, 251 Fed. 715, 733, 734; GROTIUS, proleg., §40; ORTOLAN, 4th ed., I, 70; PHILLIMORE, 3d ed., I, 62; 26 Yale L. Jour. 564; 32 W. Va. L. Quart. 4, 12. On the significance to be attributed to the resolutions of the Institute of International Law, see The Ekaterinoslav, 2 Russ. & Jap. P. C. 1, 8.

The Statute of the Permanent Court of International Justice, Art. 38, provides: "The Court shall apply: (1) International conventions, whether general or particular, establishing rules expressly recognised by the contesting States; (2) International

SECTION 3. AUTHORITY

Lord Coleridge, C. J., in The Queen v. Keyn

Great Britain. Court for Crown Cases Reserved. 1876.

Law Reports 2 *Exchequer Division* 63, 153–154.

Strictly speaking, international law is an inexact expression, and it is apt to mislead if its inexactness is not kept in mind. Law implies a law-giver, and a tribunal capable of enforcing it and coercing its transgressors. But there is no common law-giver to sovereign states; and no tribunal has the power to bind them by decrees or coerce them if they transgress. The law of nations is that collection of usages which civilized states have agreed to observe in their dealings with one another. What these usages are, whether a particular one has or has not been agreed to, must be matter of evidence. Treaties and acts of state are but evidence of the agreement of nations, and do not in this country at least *per se* bind the tribunals. Neither, certainly, does a consensus of jurists; but it is evidence of the agreement of nations on international points; and on such points, when they arise, the English Courts give effect, as part of English law, to such agreement.

Sir Henry Berkeley, in Matter of an Arbitration between the Osaka Shosen Kaisha and the Owners of the Steamship Prometheus

Great Britain. Supreme Court of Hong Kong. 1906.

2 *Hong Kong Law Reports* 207, 225.

It was contended on behalf of the owners of the Prometheus that the term 'law' as applied to this recognised system of principles and rules known as international law is an inexact expression, that there is, in other words, no such thing as international law; that there can be no such law binding upon all nations inasmuch as there is no sanction for such law, that is to say that there is no means by which obedience to such

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custom, as evidence of a general practice accepted as law; (3) The general principles of law recognised by civilised nations; (4) Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto." 6 L. of N. T. S. 390, 403. Article 59 provides, "The decision of the Court has no binding force except between the parties and in respect of that particular case."

On sources, in general, see Oppenheim, 4th ed., I, §§15–19; Ortolan, 4th ed., I, 68; Phillimore, 3d ed., I, 14; 2 Col. L. Rev. 511.

law can be imposed upon any given nation refusing obedience thereto. I do not concur in that contention. In my opinion a law may be established and become international, that is to say binding upon all nations, by the agreement of such nations to be bound thereby, although it may be impossible to enforce obedience thereto by any given nation party to the agreement. The resistance of a nation to a law to which it has agreed does not derogate from the authority of the law because that resistance cannot, perhaps, be overcome. Such resistance merely makes the resisting nation a breaker of the law to which it has given its adherence, but it leaves the law, to the establishment of which the resisting nation was a party, still subsisting. Could it be successfully contended that because any given person or body of persons possessed for the time being power to resist an established municipal law such law had no existence? The answer to such a contention would be that the law still existed, though it might not for the time being be possible to enforce obedience to it.

GRAY, THE NATURE AND SOURCES OF THE LAW

Chapter VI, sections 278, 285. 1909.

Sec. 278. The consideration of the relations between the units of an unorganized collection of units seems to be a discussion remote from modern life, but, in truth, such relations not only exist to-day, but they are some of the most important factors in the life of the world. Such relations obtain between modern civilized nations. Each nation is an organized unit, but taken together, they do not form an organized body. The rules governing the relations of such nations between themselves constitute what is called the Law of Nations, or International Law. Is this really Law?

Sec. 285. Having cleared the ground, we come back to the question: Is International Law, so called, really Law from the point of view of independent nations? Austin denied that International Law had the qualities essential to Law[17] and, though this denial has been much carped at, it is hard to make out a case against it on any sound definition of Law. As we have seen, the rules of International Law, as they are laid down by the judges of a particular State, are the Law of that State; but the question here is: Are they the Law of the collection of civilized nations generally? They are not the rules laid down by international courts, for there are no international courts; they are not the commands of a common superior, for independent States have no common superior; they are not put in execution by joint force, for the civilized nations do not put forth their force jointly to carry them into effect. The sanction

[17] Lectures on Jurisprudence, 5th ed., I, 172, 182, 216, 225; II, 754.

which makes them operative as between nations is not a physical sanction; it is the sanction arising from the opinion of civilized nations that the rules are right, and that civilized nations are morally bound to obey them. They are, as Austin says, precepts of positive morality.

Lord Russell of Killowen, International Law and Arbitration

Reports of American Bar Association, Volume XIX, pages 253, 255. 1896.

I call the Rules which civilized nations have agreed shall bind them in their conduct *inter se*, by the Benthamite title, "International Law." And here, Mr. President, on the threshold of my subject I find an obstacle in my way. My right so to describe them is challenged. It is said by some that there is no International Law, that there is only a bundle, more or less confused, of rules to which nations more or less conform, but that International Law there is none. The late Sir James F. Stephen takes this view in his History of the Criminal Law of England, and in the celebrated "Franconia" case (to which I shall hereafter have occasion to allude) the late Lord Coleridge speaks in the same sense. He says: "Strictly speaking, 'International Law' is an inexact expression and it is apt to mislead if its inexactness is not kept in mind. Law implies a Lawgiver and a Tribunal capable of enforcing it and coercing its transgressors." Indeed it may be said that with few exceptions the same note is sounded throughout the judgments in that case. These views, it will at once be seen, are based on the definition of Law by Austin in his "Province of Jurisprudence determined," namely, that a Law is the command of a superior who has coercive power to compel obedience and punish disobedience. But this definition is too narrow; it relies too much on force as the governing idea. If the development of Law is historically considered, it will be found to exclude that body of customary law which in early stages of Society precedes Law which assumes, definitely, the character of positive command coupled with punitive sanctions. But even in Societies in which the machinery exists for the making of Law in the Austinian sense, rules or customs grow up which are laws in every real sense of the word, as for example, the Law Merchant. Under later developments of arbitrary power Laws may be regarded as the command of a Superior with a coercive power in Austin's sense: *Quod placuit principi legis vigorem habet.* In stages later still, as government becomes more frankly democratic, resting broadly on the popular will, Laws bear less and less the character of commands imposed by a coercive authority, and acquire more and more the character of customary law founded on consent. Savigny, indeed, says of all law,

that it is first developed by usage and popular faith, then by Legislation and always by internal silently-operating powers, and not mainly by the arbitrary will of the Lawgiver.

I claim, then, that the aggregate of the Rules to which nations have agreed to conform in their conduct towards one another are properly to be designated "International Law."

POLLOCK, THE SOURCES OF INTERNATIONAL LAW

Columbia Law Review, Volume II, pages 511, 514. 1902.

The imperfect state of the law of nations, in respect that it lacks a cosmopolitan judicial court with power to execute its decrees, is a well-worn topic. It has been discussed ever since Dante wrote his treatise *De Monarchia.* Some writers have used it as an argument, or have even supposed it to prove conclusively, that there is no such thing as a law of nations. With regard to this contention it seems fit to be considered that in the early history of all jurisdictions the executive power at the disposal of the courts has been rudimentary, if indeed they had such power at all. It is not universally true that even the highest courts in the most civilized modern states can always enforce their judgments. Thirty years before the American Civil War the State of Georgia defied the Supreme Court of the United States for eighteen months, with the open connivance of the President of the United States: "John Marshall has made the decision, now let him execute it." But the decision made by John Marshall stands as part of the law of the United States, and would do so even if its execution had been wholly frustrated in the particular case.[18] In the Middle Ages there was nothing uncommon in rival courts within the same political allegiance obstructing one another's process and thwarting one another's jurisdiction in every way short of violence. More than this, courts have existed with an elaborate constitution and procedure and no compulsory powers whatever. This is the state of things which we read of as prevailing in Iceland not much before the Norman Conquest. No doubt there are fabulous details even in those sagas, that of Njál, for example, which contain most historical matter; but their general account of society and institutions may be taken as truthful enough for our purpose.[19]

[18] See BEVERIDGE, Life of Marshall, IV, 539.

[19] "The want of international organisation chiefly makes itself felt, so far as concerns international rules, in the imperfection of the power to define and develop them. But that is a defect from which the law of the land is not always exempt in countries which have attained some considerable degree of advancement. Take for instance the laws of England in the period of Glanville and Bracton, say the reigns from Henry the Second to Henry the Third, when old local customs, new feudal principles and habits of action, and a good deal of Roman law, then lately made known

FOULKE, A TREATISE ON INTERNATIONAL LAW

Volume I, sections 25, 27, 30. 1920.

§25. Law, therefore, is a mental conception and an attempt to combine in one view two facts, conduct and factors, determining conduct. Law, therefore, has no motive, no activity, no purpose, is a pure philosophical speculation. The political power of the state is a fact, and the people of the state or the governors of the state may have a motive or purpose in prescribing a certain rule and affixing a sanction. The factor of the political power more nearly expresses the entire conception of law because the legislature may prescribe the conduct and apply the external factor by sanction, whether the conduct so prescribed is already determined by other external factors or not. Cases may occur where the other external factors are stronger than the power of the state, and then we have a case of law which is a dead letter. It is probable after all that the state can by its political power only add a more emphatic and forcible factor to the determination of conduct as already performed in a large part by the prevailing ideas and habits of the community. The most autocratic ruler is frequently unable to exert his power in opposition to the prejudices and habits of the people he governs. . . .

§27. Law, or rather jural conception of conduct, will be divided in three ways, according to which of three predominating elements are selected: (A) One division proceeds by classification of the objects whose conduct is involved. Thus personal law is law relating to the conduct of persons as determined by their personal status, tribal relationship, etc. Territorial law is law relating to the conduct of all persons within a certain territory. Corporation law is a law relating to the conduct of corporations. International law is law relating to the conduct of independent states. (B) Another classification proceeds by distinguishing the external factors determining the conduct in question. Thus, we have international law, without the factor of external political power; municipal law, with that factor; customary law, without the external factor of political power but determined by custom only; the law of morals, with the external factor of ethical ideas, etc. It sometimes happens, however, that the same conduct is determined by two or more external factors, in which case there will be a difficulty in separating the exact force which

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in this country, were being fused together into our common law, and that by the judges, to whom but little express legislative help was given before Edward the First. While the process was going on, uncertainty reigned over as large a part of the law of England as the part of international law over which it now reigns. And if we add the private violence, which then exceeded in frequency and impunity the public violence of European states in the nineteenth century, it may safely be said that international law is now not less certain and better obeyed than was the law of England till the process referred to was fairly complete." WESTLAKE, Principles, 8. See also PHILLIMORE, 3d ed., I, 76; WILDMAN, I, 31.

each has on the conduct in question. (C) Another division proceeds by classification of the interests, which are or are not protected by the various external factors. Thus, we have the law of real property, the law of crimes, etc. All these divisions cross each other at various points, and no one can be carried out to the exclusion of the others.

§30. . . . Law, as it relates to human conduct may be defined to be the jural conception of human conduct as determined by external factors other than the forces of nature. The definitions current in the books generally emphasize one external factor to the exclusion of the others, or fail to indicate whether the term is applied to the conduct or the factor or both. The only definition, therefore, which will include all possible meanings must include conduct and all factors. The definition must further emphasize that law is a pure conception, a product of pure reason and has no existence in fact unless the definition is narrowed to one only of the factors as is the custom with English speaking judges and practicing lawyers who use the word "law" exclusively to mean the rule of conduct as described by the political power of the state, irrespective of whether it is in fact enforced by that political power or not. This meaning of law is sufficiently clear and corresponds very closely to the popular meaning of the word. The legal philosopher, however, cannot confine himself to this narrow conception, as by so doing he will fail to grasp the external factors other than the power of the state determining conduct, which factors cannot be left out of view by the lawyer, the jurist or the statesman. The controversy over the meaning of the word "law" simply amounts to this: all agree that it embodies the conception of order, but as limited to order in human conduct there is a difference in opinion as to which one or more of the external factors is embraced in the meaning of the word, a difference of opinion so acute that it can only be removed by taking the word as extending to all the external factors.

It is not possible, furthermore, to accurately separate the effect of the various external factors. They may all unite in determining the same conduct or may work at cross-purposes. The same external factor may have different aspects to different individuals, some being more impressed by one than another, and many people have a very dim realization of any of these external factors at all. Such persons conform in their conduct, as determined by their inherent characteristics and instincts, to that determined by the external factors in the community.

Law then has no origin or existence outside the mind of the thinker although conduct and the external factors are facts which have existed and exist in the world today. Law is susceptible of various divisions, and the one which illustrates the subject of our discussion is that between conduct as determined by the external political power of the state and conduct not so determined. The only instance of the latter is that of

the conduct of independent states with which international law is concerned.[20]

JITTA, THE RENOVATION OF INTERNATIONAL LAW ON THE BASIS OF A JURIDICAL COMMUNITY OF MANKIND

Page 3. 1919.

Mankind as a juridical community. The existence of a community *de facto* of mankind is generally admitted, but it is often denied the character of a juridical community, on account of the pretended lack of an able social compulsory power. I beg to say that here we have to do with a misapprehension, the origin of which can be easily pointed out. If the true basis of international law were the community of nations—or even of the less or more civilized nations—the lack of a central compulsory power on the nations, members of the community, would undoubtedly be felt. But if we take the community of mankind as basis, it is clear that there the lack of a compulsory power does not exist. There are even three such powers, the two first of which are absolutely undeniable. The first is the State, the local representative of the public power of mankind; the second is the union of several States, representing mankind on a territory larger than a State, the third is the collectivity of the States, able to exercise the full power of mankind on the entire human species. The third power is rudimentary, but not fictitious.

SECTION 4. RELATION TO MUNICIPAL LAW

SIR WILLIAM SCOTT,[21] IN THE MARIA

Great Britain. High Court of Admiralty. 1799.

1 *Christopher Robinson's Reports* 340, 350.

This was the leading case of a fleet of Swedish merchantmen, carrying pitch, tar, hemp, deals, and iron, to several ports of France, Portugal, and the Mediterranean; and taken, Jan. 1798, sailing under convoy of a ship

[20] See BENTHAM, Works, III, 162.

[21] Sir William Scott, better known as Lord Stowell, was raised to the peerage as Baron Stowell in 1821. Concerning his influence upon the development of British prize law, Roscoe remarks: "The most remarkable feature of that body of jurisprudence is the extraordinary influence upon it of a single judge—Lord Stowell—whose decisions form the basis of British Prize Law. . . . Lord Stowell was singularly fortunate. When, in 1798, he was appointed judge of the High Court of Admiralty, and then became judge of the Prize Court, the war with France had already continued for five years, and the Prize Court was overflowing with business. But there was little definite law to guide either Bench or Bar, there was no code of British Prize Law, and but few judicial decisions were to be found recorded, and these, for the most

of war; and proceeded against for resistance of visitation and search by British cruizers. . . .

[Delivering judgment, Sir William Scott said:]

In forming that judgment, I trust that it has not escaped my anxious recollection for one moment, what it is that the duty of my station calls for from me;—namely, to consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out, without distinction to independent states, some happening to be neutral and some to be belligerent. The seat of judicial authority is, indeed, locally here, in the belligerent country, according to the known law and practice of nations: but the law itself has no locality.—[22] It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm;—to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character. If, therefore, I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered, as the universal law upon the question; a question regarding one of the most important rights of belligerent nations relatively to neutrals.[23]

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part, but imperfectly reported. The time and the man thus came together. Lord Stowell had a remarkable power of lucid exposition, he was a master of maritime and international law, and he had a keen sense of the dignity of his office and of the unique opportunity which lay before him. Unhampered by judicial dicta, or by statutes, he set out to lay down a series of propositions which, as has been said, now form the basis of English Prize Law." Reports of Prize Cases, I, v. See also Bentwich, in Great Jurists of the World, 517–531; Richards, in B. Y. B. Int. L. (1920–21) 11; Roscoe, Lord Stowell; Roscoe, History of the English Prize Court.

[22] "The High Court of Admiralty grew out of, and early in the fifteenth century superseded, local Courts which were held by the Admirals of the North, South, and West, who were in command of the fleets in those districts. The functions of these local Courts were mainly disciplinary and administrative, but, from the first, questions as to the legality of captures must have come before them, and the exclusive jurisdiction of the Admiralty to decide the question of prize or no prize has remained with the Admiralty Court, almost without question, ever since. . . . The recognition of a law of nations, to which the judgments of the Court must conform, appears incidentally in the records during the sixteenth and becomes prominent in the following century." Marsden, in 15 Jour. Soc. Comp. Leg., N. S., 90, 91.

[23] In The Recovery, 6 C. Rob. 341, 348, a case involving an American vessel libelled for violation of the British Navigation Acts, Lord Stowell said: "In the first place it is to be recollected, that this is a Court of the Law of Nations, though sitting here under the authority of the King of Great Britain. It belongs to other nations as well as to our own; and what foreigners have a right to demand from it, is the administration of the law of nations, simply, and exclusively of the introduction of principles borrowed from our own municipal jurisprudence, to which, it is well known, they have at all times expressed no inconsiderable repugnance." See also Le Caux v.

STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND

Volume II, pages 35–37. 1883.

The expression, "international law," is sometimes applied to principles and rules which obtain, or are said to obtain, as between nation and nation, and sometimes to parts of the law of one nation in which other nations are interested. In each of these senses the expression is likely to mislead, unless its inexactness and ambiguity is borne in mind. When it is applied to principles and rules prevailing between independent nations, the word "law" conveys a false idea, because the principles and rules referred to are not and cannot be enforced by any common superior upon the nations to the conduct of which they apply. When it is applied to parts of the law of each nation in which other nations are interested, the word "law" is correct, but the word "international" is likely to mislead, because though such laws are laws in the fullest sense of the word, and are enforced as such, they are the laws of each individual nation, and are not laws between nation and nation.

I will give an instance of each of the two classes of rules to which the name "international law" is applied. It is often said that treaties form a part of international law, but it is obvious, for the reason given by Lord Coleridge, that the obligation which they impose is not, properly speaking, a legal but a moral one. On the other hand, it is often said that by international law any nation may seize and condemn as prize any ship with its cargo which attempts to break a blockade. In this case there no doubt is a proceeding which in the very strictest sense of the word is legal, but if the matter is carefully considered it will, I think, appear that the law enforced is not a law common to all nations, but the law of the nation which seizes the ship. Each nation in this matter legislates concurrently for all mankind, and as upon the whole this is regarded as convenient for all mankind, no one nation objects. The law, however, is not a law made by all nations, but a law which each nation makes for all mankind, just as each nation makes a law binding upon all mankind, that no man shall commit certain kinds of piracy. The consent of nations does not impose this law. It is merely a circumstance which enables it to be imposed by individual nations, and it is not even an absolutely indispensable circumstance. Proof of this is supplied by the fact that at

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Eden, 2 Doug. 594, 610; The Walsingham Packet, 2 C. Rob. 77, 82; The Elsebe, 5 C. Rob. 173, 179; The Fox, Edw. Adm. 311, 312; Nostra Signora de los Dolores, 1 Dods. 290, 298; The Chile [1914] P. 212, 215; The Marie Glaeser [1914] P. 218, 233; The Odessa and The Cape Corso [1915] P. 52, 61; The Barenfels, 1 B. & C. P. C. 122, 129; The Hakan [1916] P. 266, 272; The Consul Corfitzon [1917] A. C. 550, 555; The Wilhelmina [1923] P. 112, 123; PHILLIMORE, 3d ed., III, 648. *Cf.* The Happy Couple, Stewart's Rep. 65, 71; The Ekaterinoslav, 2 Russ. & Jap. P. C. 1, 8; The Elida, 10 Am. Jour. Int. L. 916, 917.

different times different nations have held different views as to belligerent rights, and their respective admiralty courts have always given effect to those views in preference to any others. The English courts no doubt administer in such cases what they conceive to be the principles accepted by all nations, but they do so because they are part of the law of England.

The Paquete Habana and The Lola

United States. Supreme Court. 1900.

175 *United States Reports* 677.

The cases are stated in the opinion of the court.

[The names of counsel and part of the opinion are omitted.]

Mr. Justice Gray delivered the opinion of the court.

These are two appeals from decrees of the District Court of the United States for the Southern District of Florida, condemning two fishing vessels and their cargoes as prize of war.

Each vessel was a fishing smack, running in and out of Havana, and regularly engaged in fishing on the coast of Cuba; sailed under the Spanish flag; was owned by a Spanish subject of Cuban birth, living in the city of Havana; was commanded by a subject of Spain, also residing in Havana; and her master and crew had no interest in the vessel, but were entitled to shares, amounting in all to two thirds, of her catch, the other third belonging to her owner. Her cargo consisted of fresh fish, caught by her crew from the sea, put on board as they were caught, and kept and sold alive. Until stopped by the blockading squadron, she had no knowledge of the existence of the war, or of any blockade. She had no arms or ammunition on board, and made no attempt to run the blockade after she knew of its existence, nor any resistance at the time of the capture. . . .

Both the fishing vessels were brought by their captors into Key West. A libel for the condemnation of each vessel and her cargo as prize of war was there filed on April 27, 1898; a claim was interposed by her master, on behalf of himself and the other members of the crew, and of her owner; evidence was taken, showing the facts above stated; and on May 30, 1898, a final decree of condemnation and sale was entered, "the court not being satisfied that as a matter of law, without any ordinance, treaty or proclamation, fishing vessels of this class are exempt from seizure." . . .

[In an omitted part of the opinion the court considered and sustained its jurisdiction to hear and determine the appeals.]

We are then brought to the consideration of the question whether, upon the facts appearing in these records, the fishing smacks were subject

to capture by the armed vessels of the United States during the recent war with Spain.

By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war.

This doctrine, however, has been earnestly contested at the bar; and no complete collection of the instances illustrating it is to be found, so far as we are aware, in a single published work, although many are referred to and discussed by the writers on international law, notably in 2 Ortolan, *Règles Internationales et Diplomatie de la Mer*, (4th ed.) *lib.* 3, c. 2, pp. 51–56; in 4 Calvo, *Droit International*, (5th ed.) §§2367–2373, in De Boeck, *Propriété Privée Ennemie sous Pavillon Ennemi*, §§191–196; and in Hall, International Law, (4th. ed.) §148. It is therefore worth the while to trace the history of the rule, from the earliest accessible sources, through the increasing recognition of it, with occasional setbacks, to what we may now justly consider as its final establishment in our own country and generally throughout the civilized world. . . .

[In an omitted part of the opinion the court traced the history of the alleged usage, reviewing in some detail the evidence indicating that the usage had ripened into a rule of international law.]

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. Hilton v. Guyot, 159 U. S. 113, 163, 164, 214, 215.

Wheaton places, among the principal sources of international law, "Text-writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent." As to these he forcibly observes: "Without wishing to exaggerate the importance of these writers, or to substitute, in any case, their authority for the principles of reason, it may be affirmed that they are generally impartial in their judgment. They are witnesses of the sentiments and usages of civilized nations, and the weight of their testimony increases every time that their authority is invoked by statesmen, and

every year that passes without the rules laid down in their works being impugned by the avowal of contrary principles." Wheaton's International Law, (8th ed.) §15.

Chancellor Kent says: "In the absense of higher and more authoritative sanctions, the ordinances of foreign States, the opinions of eminent statesmen, and the writings of distinguished jurists, are regarded as of great consideration on questions not settled by conventional law. In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims; and no civilized nation, that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers on international law." 1 Kent Com. 18. . . .

[In an omitted part of the opinion the court reviewed at length the opinions of jurists and commentators on the question at issue.]

This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent States, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war. . . .

This rule of international law is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter. . . .

Upon the facts proved in either case, it is the duty of this court, sitting as the highest prize court of the United States, and administering the law of nations, to declare and adjudge that the capture was unlawful, and without probable cause; and it is therefore, in each case,

Ordered, that the decree of the District Court be reversed, and the proceeds of the sale of the vessel, together with the proceeds of any sale of her cargo, be restored to the claimant, with damages and costs.[24]

[Three justices dissented on the ground that the exemption of enemy fishing craft from capture is an act of grace, not a matter of right, and is

[24] "The court of prize is emphatically a court of the law of nations; and it takes neither its character nor its rules from the mere municipal regulations of any country." Story, J., in The Schooner Adeline, 9 Cr. 244, 284. See also Talbot v. Commanders and Owners of Three Brigs, 1 Dall. 95, 105, 106; Miller v. Miller, 2 Dall. 1; Talbot v. Janson, 3 Dall. 133, 161; The Rapid, 8 Cr. 155, 162; Thirty Hogsheads of Sugar v. Boyle, 9 Cr. 191, 197; The Nereide, 9 Cr. 388, 423; L'Invincible, 1 Wh. 238, 257. *Cf.* Williams v. Armroyd, 7 Cr. 423; The Invincible, 2 Gall. 29, 44; Maisonnaire v. Keating, 2 Gall. 325, 344.

in the control of the executive authority. The dissenting opinion is omitted.]

The Zamora

Great Britain. Judicial Committee of the Privy Council. 1916.

Law Reports [1916] 2 *Appeal Cases* 77.

Appeal from an order of the Prize Court (England); reported [1916] P. 27.

[The statement of the case, the arguments of counsel, and part of the opinion are omitted. The facts are stated sufficiently in the opinion.]

The judgment of their Lordships was delivered by

Lord Parker of Waddington. On April 8, 1915, the Zamora, a Swedish steamship bound from New York to Stockholm with a cargo of grain and copper, was stopped by one of His Majesty's cruisers between the Faroe and Shetland Islands and taken for purposes of search first to the Orkney Islands and then to Barrow-in-Furness. She was seized as prize in the latter port on April 19, 1915, and in due course placed in the custody of the marshal of the Prize Court. It is admitted, on the one hand, that the copper was contraband of war, and, on the other hand, that the steamship was ostensibly bound for a neutral port. The question whether either steamship or cargo was lawful prize must therefore depend on whether the steamship had a concealed or ulterior destination in an enemy country, or whether the copper was by means of transhipment or otherwise, in fact, destined for the enemy.

On May 14, 1915, a writ was issued by His Majesty's Procurator-General claiming confiscation of both vessel and cargo, and on June 14, 1915, the President, at the instance of the Procurator-General, made an order under Order xxix., r. 1, of the Prize Court Rules giving leave to the War Department to requisition the copper, but subject to an undertaking being given in accordance with the provisions of Order xxix., r. 5. This appeal is from the President's order of June 14, 1915.

It will be convenient in the first place to consider the precise terms of Order xxix. of the Prize Court Rules. In so doing it must be borne in mind that though the Order in terms applies to ships only, it is by virtue of Order i., r. 2, of the Prize Court Rules equally applicable to goods. The first rule of Order xxix. provides that where it is made to appear to the judge on the application of the proper officer of the Crown that it is desired to requisition, on behalf of his Majesty, a ship in respect of which no final decree of condemnation has been made, he shall order that the ship be appraised, and upon an undertaking being given in accordance with r. 5 of the Order, the ship shall be released and delivered to the Crown. The 3rd rule of the Order provides that where in any case of requisition under the Order it is made to appear to the judge on behalf

of the Crown that the ship is required for the service of His Majesty forthwith, the judge may order the same to be forthwith released and delivered to the Crown without appraisement. In such a case the amount payable by the Crown is to be fixed by the judge under r. 4 of this Order. The 5th rule of the Order provides that in every case of requisition under the Order an undertaking in writing shall be filed by the proper officer of the Crown for payment into Court on behalf of the Crown of the appraised value of the ship or of the amount fixed under r. 4 of the Order, as the case may be, at such time or times as the Court shall declare that the same or any part thereof is required for the purpose of payment out of Court.

The first observation which their Lordships desire to make on this Order is that the provisions of r. 1 are *prima facie* imperative. The judge is to act in a certain way whenever it is made to appear to him that it is desired to requisition the vessel or goods in question on His Majesty's behalf. If this be the true construction of the rule and the judge is, as a matter of law, bound thereby, there is nothing more to be said and the appeal must fail. If, however, it appear that the rule so construed is not, as a matter of law, binding on the judge, it will have, if possible, to be construed in some other way. Their Lordships propose, therefore, to consider in the first place whether the rule construed as an imperative direction to the judge is to any and what extent binding.

The Prize Court Rules derive their force from Orders of His Majesty in Council. These Orders are expressed to be made under the powers vested in His Majesty by virtue of the Prize Court Act, 1894, or otherwise. The Act of 1894 confers on the King in Council power to make rules as to the procedure and practice of the Prize Courts. So far, therefore, as the Prize Court Rules relate to procedure and practice they have statutory force and are, undoubtedly, binding. But Order XXIX., r. 1, construed as an imperative direction to the judge is not merely a rule of procedure or practice. It can only be a rule of procedure or practice if it be construed as prescribing the course to be followed if the judge is satisfied that according to the law administered in the Prize Court the Crown has, independently of the rule, a right to requisition the vessel or goods in question, or if the judge is minded in exercise of some discretionary power inherent in the Prize Court to sell the vessel or goods in question to the Crown. If, therefore, Order XXIX., r. 1, construed as an imperative direction be binding, it must be by virtue of some power vested in the King in Council otherwise than by virtue of the Act of 1894. It was contended by the Attorney-General that the King in Council has such a power by virtue of the Royal prerogative, and their Lordships will proceed to consider this contention.

The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by Courts

of law in this country is out of harmony with the principles of our Constitution. It is true that, under a number of modern statutes, various branches of the Executive have power to make rules having the force of statutes, but all such rules derive their validity from the statute which creates the power, and not from the executive body by which they are made. No one would contend that the prerogative involves any power to prescribe or alter the law administered in Courts of Common Law or Equity. It is, however, suggested that the manner in which Prize Courts in this country are appointed and the nature of their jurisdiction differentiate them in this respect from other Courts.

Prior to the Naval Prize Act, 1864, jurisdiction in matters of prize was exercised by the High Court of Admiralty, by virtue of a commission issued by the Crown under the Great Seal at the commencement of each war. The commission no doubt owed its validity to the prerogative, but it cannot on that account be properly inferred that the prerogative extended to prescribing or altering the law to be administered from time to time under the jurisdiction thereby conferred. The Courts of Common Law and Equity in like manner originated in an exercise of the prerogative. The form of commission conferring jurisdiction in prize on the Court of Admiralty was always substantially the same. Their Lordships will take that quoted by Lord Mansfield in Lindo v. Rodney [2 Doug. 612 n., 614 n. (1782)] as an example. It required and authorized the Court of Admiralty "to proceed upon all and all manner of captures, seizures, prizes, and reprisals, of all ships and goods, that are, or shall be, taken; and to hear and determine, according to the course of the Admiralty, and the law of nations." If these words be considered, there appear to be two points requiring notice, and each of them, so far from suggesting any reason why the prerogative should extend to prescribing or altering the law to be administered by a Court of Prize, suggests strong grounds why it should not.

In the first place, all those matters upon which the Court is authorized to proceed are, or arise out of, acts done by the sovereign power in right of war. It follows that the King must, directly or indirectly, be a party to all proceedings in a Court of Prize. In such a Court his position is in fact the same as in the ordinary Courts of the realm upon a petition of right which has been duly fiated. Rights based on sovereignty are waived and the Crown for most purposes accepts the position of an ordinary litigant. A Prize Court must of course deal judicially with all questions which come before it for determination, and it would be impossible for it to act judicially if it were bound to take its orders from one of the parties to the proceedings.

In the second place, the law which the Prize Court is to administer is not the national or, as it is sometimes called, the municipal law, but the law of nations—in other words, international law. It is worth while

dwelling for a moment on this distinction. Of course, the Prize Court is a municipal Court, and its decrees and orders owe their validity to municipal law. The law it enforces may therefore, in one sense, be considered a branch of municipal law. Nevertheless, the distinction between municipal and international law is well defined. A Court which administers municipal law is bound by and gives effect to the law as laid down by the sovereign State which calls it into being. It need inquire only what that law is, but a Court which administers international law must ascertain and give effect to a law which is not laid down by any particular State, but originates in the practice and usage long observed by civilized nations in their relations towards each other or in express international agreement. It is obvious that, if and so far as a Court of Prize in this country is bound by and gives effect to Orders of the King in Council purporting to prescribe or alter the international law, it is administering not international but municipal law; for an exercise of the prerogative cannot impose legal obligation on any one outside the King's dominions who is not the King's subject. If an Order in Council were binding on the Prize Court, such Court might be compelled to act contrary to the express terms of the commission from which it derived its jurisdiction.

There is yet another consideration which points to the same conclusion. The acts of a belligerent Power in right of war are not justiciable in its own Courts unless such Power, as a matter of grace, submit to their jurisdiction. Still less are such acts justiciable in the Courts of any other Power. As is said by Story J. in the case of The Invincible [2 Gall. 28, 44], "the acts done under the authority of one Sovereign can never be subject to the revision of the tribunals of another Sovereign; and the parties to such acts are not responsible therefor in their private capacities." It follows that but for the existence of Courts of Prize no one aggrieved by the acts of a belligerent Power in times of war could obtain redress otherwise than through diplomatic channels and at the risk of disturbing international amity. An appropriate remedy is, however, provided by the fact that, according to international law, every belligerent Power must appoint and submit to the jurisdiction of a Prize Court to which any person aggrieved by its acts has access, and which administers international as opposed to municipal law—a law which is theoretically the same, whether the Court which administers it is constituted under the municipal law of the belligerent Power or of the Sovereign of the person aggrieved, and is equally binding on both parties to the litigation. It has long been well settled by diplomatic usage that, in view of the remedy thus afforded, a neutral aggrieved by any act of a belligerent Power cognizable in a Court of Prize ought, before resorting to diplomatic intervention, to exhaust his remedies in the Prize Courts of the belligerent Power. A case for such intervention arises only if the decisions of those Courts are such as to amount to a gross miscarriage of

justice. It is obvious, however, that the reason for this rule of diplomacy would entirely vanish if a Court of Prize, while nominally administering a law of international obligation, were in reality acting under the direction of the Executive of the belligerent Power.

It cannot, of course, be disputed that a Prize Court, like any other Court, is bound by the legislative enactments of its own sovereign State. A British Prize Court would certainly be bound by Acts of the Imperial Legislature. But it is none the less true that if the Imperial Legislature passed an Act the provisions of which were inconsistent with the law of nations, the Prize Court in giving effect to such provisions would no longer be administering international law. It would in the field covered by such provisions be deprived of its proper function as a Prize Court. Even if the provisions of the Act were merely declaratory of the international law, the authority of the Court as an interpreter of the law of nations would be thereby materially weakened, for no one could say whether its decisions were based on a due consideration of international obligations, or on the binding nature of the Act itself. The fact, however, that the Prize Courts in this country would be bound by Acts of the Imperial Legislature affords no ground for arguing that they are bound by the executive orders of the King in Council.

In connection with the foregoing considerations, their Lordships attach considerable importance to the Report dated January 18, 1753, of the Committee appointed by His Britannic Majesty to reply to the complaints of Frederick II. of Prussia as to certain captures of Prussian vessels made by British ships during the war with France and Spain, which broke out in 1744. By way of reprisals for these captures the Prussian King had suspended the payment of interest on the Silesian Loan. The Report, which derives additional authority from the fact that it was signed by Mr. William Murray, then Solicitor-General, afterwards Lord Mansfield, contains a valuable statement as to the law administered by Courts of Prize. This is stated to be the law of nations, modified in some cases by particular treaties. "If," says the Report, "a subject of the King of Prussia is injured by, or has a demand upon any person here, he ought to apply to your Majesty's Courts of justice, which are equally open and indifferent to foreigner or native; so, *vice versa*, if a subject here is wronged by a person living in the dominions of His Prussian Majesty, he ought to apply for redress in the King of Prussia's Courts of justice. If the matter of complaint be a capture at sea during war, and the question relative to prize, he ought to apply to the judicatures established to try these questions. The law of nations, founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage, does not allow of reprisals, except in case of violent injuries directed or supported by the State, and justice absolutely denied *in re minime dubia* by all the tribunals and afterwards by the Prince. Where

the judges are left free, and give sentence according to their conscience, though it should be erroneous, that would be no ground for reprisals. Upon doubtful questions different men think and judge differently; and all a friend can desire is, that justice should be impartially administered to him, as it is to the subjects of that Prince in whose Courts the matter is tried." The Report further points out that in England "the Crown never interferes with the course of justice. No order or intimation is ever given to any judge." It also contains the following statement: "All captures at sea, as prize, in time of war, must be judged of in a Court of Admiralty, according to the law of nations and particular treaties, where there are any. There never existed a case where a Court, judging according to the laws of England only, took cognizance of prize. . . . it never was imagined that the property of a foreign subject, taken as prize on the high seas, could be affected by laws peculiar to England." [See *Collectanea Juridica*, I, 138, 147, 152.] This Report is, in their Lordships' opinion, conclusive that in 1753 any notion of a Prize Court being bound by the executive orders of the Crown, or having to administer municipal as opposed to international law, was contrary to the best legal opinion of the day.

The Attorney-General was unable to cite any case in which an Order of the King in Council had as to matters of law been held to be binding on a Court of Prize. He relied chiefly on the judgment of Lord Stowell in the case of The Fox. [Edw. 311; 2 Eng. P. C. 61.] The actual decision in that case was to the effect that there was nothing inconsistent with the law of nations in certain Orders in Council made by way of reprisals for the Berlin and Milan Decrees, though if there had been no case for reprisals the Orders would not have been justified by international law. The decision proceeded upon the principle that, where there is just cause for retaliation, neutrals may by the law of nations be required to submit to inconvenience from the acts of a belligerent Power greater in degree than would be justified had no just cause for retaliation arisen, a principle which had been already laid down in The Lucy. [Edw. 122.]

The judgment of Lord Stowell contains, however, a remarkable passage quoted in full in the Court below, which refers to the King in Council possessing "legislative rights" over a Court of Prize analogous to those possessed by Parliament over the Courts of common law. At most this amounts to a dictum, and in their Lordships' opinion, with all due respect to so great an authority, the dictum is erroneous. It is, in fact, quite irreconcilable with the principles enunciated by Lord Stowell himself. For example, in The Maria [1 C. Rob. 340, 350; 1 Eng. P. C. 152, 153], a Swedish ship, his judgment contains the following passage: "The seat of judicial authority is, indeed, locally here, in the belligerent country, according to the known law and practice of nations: but the

law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm: to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character." It is impossible to reconcile this passage with the proposition that the Prize Court is to take its law from Orders in Council. Moreover, if such a proposition were correct the Court might at any time be deprived of the right which is well recognized of determining according to law whether a blockade is rendered invalid either because it is ineffective, or because it is partial in its operation: see The Franciska. [10 Moo. P. C. 37; 2 Eng. P. C. 346.] Moreover, in The Lucy, above referred to, Lord Stowell had, in effect, refused to give effect to the Order in Council on which the captors relied.

Lord Stowell's dictum gave rise to considerable contemporaneous criticism, and is definitely rejected by Sir R. Phillimore (International Law, 3rd ed., vol. 3, s. 436). It is said to have been approved by Story J. in the case of Maisonnaire v. Keating [2 Gall. 324], but it will be found that Story J.'s remarks, on which some reliance seems to have been placed by the President in this case, are directed not to the liability of captors in their own Courts of Prize, but to their liability in the Courts of other nations. He is in effect repeating the opinion he expressed in the case of The Invincible [2 Gall. 28], to which their Lordships have already referred. An act, though illegal by international law, will not on that account be justiciable in the tribunals of another Power—at any rate, if expressly authorized by order of the Sovereign on whose behalf it is done.

Their Lordships have come to the conclusion, therefore, that, at any rate prior to the Naval Prize Act, 1864, there was no power in the Crown, by Order in Council, to prescribe or alter the law which Prize Courts have to administer. It was suggested that the Naval Prize Act, 1864, confers such a power. Under that Act the Court of Admiralty became a permanent Court of Prize, independent of any commission issued under the Great Seal. The Act, however, by s. 55, while saving the King's prerogative on the one hand, saves, on the other hand, the jurisdiction of the Court to decide judicially and in accordance with international law. Subject, therefore, to any express provisions contained in other sections, it leaves matters exactly as they stood before it was passed. The only express provisions which confer powers on the King in Council are (1.) those contained in s. 13 (now repealed and superseded by s. 3 of the Prize Court Act, 1894), conferring a power of making rules as to the practice or procedure of Prize Courts, and (2.) those contained in s. 53, conferring power to make such orders as may be necessary for the better execution of the Act.

Their Lordships are of opinion that the latter power does not extend to prescribing or altering the law to be administered by the Court, but merely to giving such executive directions as may from time to time be necessary. In all respects material to the present question the law therefore remains the same as it was before the Act, nor has it been affected by the substitution under the Supreme Court of Judicature Acts, 1873 and 1891, of the High Court of Justice for the Court of Admiralty as the permanent Court of Prize in this country.

There are two further points requiring notice in this part of the case. The first arises on the argument addressed to the Board by the Solicitor-General. It may be, he said, that the Court would not be bound by an Order in Council which is manifestly contrary to the established rules of international law, but there are regions in which such law is imperfectly ascertained and defined; and, when this is so, it would not be unreasonable to hold that the Court should subordinate its own opinion to the directions of the Executive. This argument is open to the same objection as the argument of the Attorney-General. If the Court is to decide judicially in accordance with what it conceives to be the law of nations, it cannot, even in doubtful cases, take its directions from the Crown, which is a party to the proceedings. It must itself determine what the law is according to the best of its ability, and its view, with whatever hesitation it be arrived at, must prevail over any executive order. Only in this way can it fulfil its function as a Prize Court and justify the confidence which other nations have hitherto placed in its decisions.

The second point requiring notice is this. It does not follow that, because Orders in Council cannot prescribe or alter the law to be administered by the Prize Court, such Court will ignore them entirely. On the contrary, it will act on them in every case in which they amount to a mitigation of the Crown rights in favour of the enemy or neutral, as the case may be. As explained in the case of The Odessa [[1916] A. C. 145], the Crown's prerogative of bounty is unaffected by the fact that the proceeds of the Crown rights or admiralty droits are now made part of the Consolidated Fund, and do not replenish the Privy Purse. Further, the Prize Court will take judicial notice of every Order in Council material to the consideration of matters with which it has to deal, and will give the utmost weight and importance to every such Order short of treating it as an authoritative and binding declaration of law. Thus, an Order declaring a blockade will *prima facie* justify the capture and condemnation of vessels attempting to enter the blockaded ports, but will not preclude evidence to show that the blockade is ineffective and therefore unlawful. An Order authorizing reprisals will be conclusive as to the facts which are recited as showing that a case for reprisals exists, and will have due weight as showing what, in the opinion of His Majesty's advisers, are the best or only means of meeting the emergency; but this

will not preclude the right of any party aggrieved to contend, or the right of the Court to hold, that these means are unlawful, as entailing on neutrals a degree of inconvenience unreasonable, considering all the circumstances of the case. Further, it cannot be assumed, until there be a decision of the Prize Court to that effect, that any executive order is contrary to law, and all such orders, if acquiesced in and not declared to be illegal, will, in the course of time, be themselves evidence by which international law and usage may be established: see Wheaton's International Law, 4th English ed., pp. 25 and 26.

On this part of the case, therefore, their Lordships hold that Order XXIX., r. 1, of the Prize Court Rules, construed as an imperative direction to the Court, is not binding. Under these circumstances the rule must, if possible, be construed merely as a direction to the Court in cases in which it may be determined that, according to international law, the Crown has a right to requisition the vessel or goods of enemies or neutrals. There is much to warrant this construction, for the Order in Council, by which the Prize Court Rules were made, conforms to the provisions of the Rules Publication Act, 1893, and on reference to that Act it will be found inapplicable to Orders in Council, the validity of which depend on an exercise of the prerogative. It is reasonable, therefore, to assume that the words "or otherwise," contained in the Order of Council, refer to such other powers, if any, as the Crown possesses of making rules, and not to powers vested in the Crown by virtue of the prerogative. . . .

[In an omitted part of the opinion the court considered the right of a belligerent to requisition vessels or goods of neutrals in the custody of its prize courts and concluded that the order appealed from was wrong, not because there was no right to requisition, but because there had been presented no satisfactory evidence showing a case for the exercise of the right.]

The proper course, therefore, in the present case, is to declare that upon the evidence before the President he was not justified in making the order the subject of this appeal, and to give the appellants leave, in the event of their ultimately succeeding in the proceedings for condemnation, to apply to the Court below for such damages, if any, as they may have sustained by reason of the order and what has been done under it. Their Lordships will humbly advise His Majesty accordingly; but inasmuch as the case put forward by the appellants has succeeded in part only, they do not think that any order should be made as to the costs of the appeal.[25]

[25] *Cf.* MARSDEN, "Prize Law," 15 Jour. Soc. Comp. Leg., N. S., 90; PYKE, "Law of the Prize Court," 32 L. Quart. Rev. 144. *Cf.* also later prize cases arising under retaliatory orders, particularly The Leonora [1918] P. 182, [1919] A. C. 974; RICHARDS, "British Prize Courts and the War," B. Y. B. Int. L. (1920–21) 11, 13, 29; YNTEMA, "Retaliation and Neutral Rights," 17 Mich. L. Rev. 564. See WRIGHT, "Conflicts of International Law with National Laws and Ordinances," 11 Am. Jour. Int. L. 1, 12.

OPPENHEIM, INTERNATIONAL LAW

Third Edition, Volume II, page 626, section 434. 1921.

§434. Although belligerents have, under certain circumstances, according to International Law, the right to capture neutral vessels, and although they have the duty to bring these vessels for trial before a Prize Court, such trials are in no way an international matter. Just as Prize Courts are municipal institutions, so trials of captured neutral vessels by these Prize Courts are municipal matters. The neutral home States of the vessels are not represented and are not, directly at any rate, concerned in the trial. Nor, as commonly maintained in England and the United States, is the law administered by Prize Courts International Law. These courts apply the law of their country, although a country may have adopted as municipal law the principles of International Law concerning prizes. Great Britain and the United States have done this. The best proof that Prize Courts administer their own municipal law is to be found in the fact that the practice of the Prize Courts of the several countries differs in many points. Thus, for instance, the question of enemy character, the question what is, and what is not, contraband, and the question when an attempt to break blockade begins, and when it ends, have been differently answered by the practice of different States.

PICCIOTTO, THE RELATION OF INTERNATIONAL LAW TO THE LAW OF ENGLAND AND OF THE UNITED STATES OF AMERICA

Page 41. 1915.

Now, even if we applied the modern test of International Law—namely, uniformity of practice—it should be noted, firstly, there was at the time the judgments of Stowell were delivered no such uniformity, nor anything in the smallest degree approaching it; and, in the second place, International Law did not at that period in the main rest upon the basis of practice, but largely upon the *a priori* speculation of writers. We are therefore driven to say that, although the decisions and practice of the Prize Courts of one State differed, even widely, from those of another, yet those Courts were administering not each the law of its own country, but its own view and interpretation of the general Law of Nations. When put thus the question seems to be little more than academic. Between the statement that the Prize Court of each nation administers its own law and the statement that it administers its own view of International Law, the dividing line seems to be slender indeed; and at that we must leave it.[26]

[26] On the law administered by prize courts, in general, see COLOMBOS, Law of Prize, ch. 1; GARNER, Prize Law, ch. 4; PICCIOTTO, Relation of Int. L., ch. 2; PYKE, "Law of the Prize Court," 32 L. Quart. Rev. 144; VERZIJL, Le Droit des Prises, ch. 3.

Triquet and Others v. Bath

Great Britain. Court of King's Bench. 1764.

3 *Burrow's Reports* 1478.

Mr. Blackstone, Mr. Thurlow, and Mr. Dunning, on behalf of the plaintiffs, shewed cause why the bill of Middlesex in each of these causes should not be set aside, and the bail-bond be cancelled.

The rule was made upon affidavits "Of the defendant's being a domestic servant of a foreign minister; and having taken all the proper steps to intitle him to the privilege of such domestics."

The only question was, "Whether the defendant (Chrispher Bath) was really and truly and *bona fide* a domestic servant of Count Haslang, the Bavarian minister"; or, "Whether his service was only colourable, and a mere sham and pretence calculated to protect him from the just demands of his creditors." . . .

[The arguments of counsel and part of the opinion are omitted.]

Lord Mansfield—This privilege of foreign ministers and their domestic servants depends upon the law of nations. The act of parliament of 7 Ann c. 12.[27] is declaratory of it. All that is new in this act, is the clause which gives a summary jurisdiction for the punishment of the infractors of this law.

The act of parliament was made upon occasion of the Czar's ambassador being arrested. If proper application had been immediately made for his discharge from the arrest, the matter might and doubtless would have been set right. Instead of that, bail was put in, before any complaint was made. An information was filed by the then attorney general against the persons who were thus concerned, as infractors of the law of nations: and they were found guilty; but never brought up to judgment.

The Czar took the matter up, highly. No punishment would have been thought, by him an adequate reparation. Such a sentence as the Court could have given, he might have thought a fresh insult.

Another expedient was fallen upon and agreed to: this act of parliament passed, as an apology and humiliation from the whole nation. It was sent to the Czar, finely illuminated by an ambassador extraordinary, who made excuses in a solemn oration.

A great deal relative to this transaction and negotiation, appears in the annals of that time; and from a correspondence of the secretary of state there printed.

But the act was not occasioned by any doubt "Whether the law of nations, particularly the part relative to public ministers, was not part of the law of England; and the infraction, criminal; nor intended to vary, an iota from it."

[27] *Infra*, 562.

I remember in a case before Lord Talbot, of Buvot v. Barbut [Cas. t. Talb. 281 (1737)], upon a motion to discharge the defendant, (who was in execution for not performing a decree,) "Because he was agent of commerce, commissioned by the king of Prussia, and received here as such;" the matter was very elaborately argued at the bar; and a solemn deliberate opinion given by the court. These questions arose and were discussed.—"Whether a minister could, by any act or acts, wave his privilege."—"Whether being a trader was any objection against allowing privilege to a minister, personally."—"Whether an agent of commerce, or even a consul, was intitled to the privileges of a public minister."—"What was the rule of decision: the act of parliament; or, the law of nations." Lord Talbot declared a clear opinion—"That the law of nations, in its full extent, was part of the law of England."—"That the act of parliament was declaratory; and occasioned by a particular incident."—"That the law of nations was to be collected from the practice of different nations, and the authority of writers." Accordingly, he argued and determined from such instances, and the authority of Grotius, Barbeyrac, Binkershoek, Wiquefort, &c; there being no English writer of eminence, upon the subject.

I was counsel in this case; and have a full note of it.

I remember, too, Lord Hardwicke's declaring his opinion to the same effect; and denying, that Lord Chief Justice Holt ever had any doubt as to the law of nations being part of the law of England, upon the occasion of the arrest of the Russian ambassador.

Mr. Blackstone's principles are right: but as to the facts in the present case, the affidavits on the part of the defendant have out-sworn those on the part of the plaintiffs. (And his lordship, as well as Mr. Justice Wilmot, took notice, that the person who drew the affidavits on the part of the defendant, had very exactly pursued the course of the cases that had been determined upon questions of this kind; and had taken care to meet and answer all objections that might arise from them.) Lord Mansfield observed also, that the defendant was employed in the service of Monsieur Haslang, before the plaintiff took out his writ.

It was not to be expected, he said, that every particular act of the service should be particularly specified: it is enough, if an actual *bona fide* service be proved. And if such a service be sufficiently proved by affidavit, we must not, upon bare suspicion only, suppose it to have been merely colourable and collusive. . . .

Per Cur'.—Both Rules were made absolute; but without costs, by reason of the suspicious circumstances of this case.[28]

[28] That the law of nations is part of the English common law has been frequently asserted. See, in addition to the principal case, Lockwood v. Coysgarne, 3 Burr. 1676, 1678; Heathfield v. Chilton, 4 Burr. 2015, 2016; Darling v. Atkins, 3 Wilson 33, 35; Hopkins v. De Robeck, 3 T. R. 79, 80; Viveash v. Becker, 3 M. & S. 284, 292, 298;

G. Wolff and Others, Assignees of J. Wolff and J. Dorville, Bankrupts, v. Oxholm

Great Britain. Court of King's Bench. 1817.

6 *Maule & Selwyn* 92.

[Oxholm, a Danish subject resident in Denmark, was indebted to Wolff, a British subject resident in Great Britain, and a suit to recover the debt had been instituted by Wolff's assignee in the courts of Denmark. While this suit was pending war was declared between Denmark and Great Britain. The government of Denmark sequestered debts due British subjects and ordered payment into the Danish treasury. Oxholm paid the debt to the Danish authorities pursuant to the order and received a receipt. Upon the presentation of this receipt the proceedings against him in the Danish court were quashed. After the war Oxholm went to Great Britain, where he was arrested and held to bail for the debt by Wolff's assignee in bankruptcy.]

[The above statement is substituted for the statement of the case in the report.]

Novello v. Toogood, 1 Barn. & Cress. 554, 562, *infra*, 569, 570; DeWütz v. Hendricks, 2 Bing. 314, 315; Service v. Castaneda, 2 Coll. 56, 59; De Haber v. Queen of Portugal, 17 A. & E., N. S., 171, 207; Magdalena Steam Navigation Co. v. Martin, 2 E. & E. 94, 114, *infra*, 564, 567; Emperor of Austria v. Day, 2 Giff. 628, 678, *infra*, 815, 816; Musurus Bey v. Gadban [1894] 2 Q. B. 352, 356, 361; In re Suarez [1918] 1 Ch. 176, 192, 196; Johnstone v. Pedlar [1921] 2 A. C. 262, 295, *infra*, 843, 846; Lord Finlay, dissenting, in the Lotus Case, P. C. I. J. Publ., Series A, Judgment No. 9, p. 54; Blackstone, Commentaries, IV, 67; Holt, Law of Libel, 1st Am. from 2d London ed., 86; Picciotto, Relation of Int. L., ch. 5. *Cf.* Stephen, History, II, 4, 41; Stephen, in 2 Jurid. Soc. Papers 67, 79.

Delivering the opinion of the Supreme Court of the United States, in Rose v. Himely, 4 Cr. 241, 277, Chief Justice Marshall declared that "the law of nations is the law of all tribunals in the society of nations, and is supposed to be equally understood by all." The doctrine that the law of nations is part of the common law in the United States has been frequently asserted. See the Resolution of Nov. 23, 1781, of the Continental Congress, 21 Journals, Hunt's ed., 1136–7; Chief Justice Jay's charge to the Grand Jury, Wharton St. Tr. 49, 52, 53; Waters v. Collot, 2 Dall. 247, 248; Ware v. Hylton, 3 Dall. 199, 281; United States v. Smith, 5 Wh. 153, 161, 182; United States v. La Jeune Eugenie, 2 Mason 409, 449, *supra*, 13, 17; Heirn v. Bridault and Wife, 37 Miss. 209, 229, *infra*, 80, 81; Dainese v. United States, 15 Ct. Cl. 64, 72; Ker v. Illinois, 119 U. S. 436, 444; Hilton v. Guyot, 159 U. S. 113, 163; Eastern Extension, Etc., Telegraph Co. v. United States, 46 Ct. Cl. 646, 653–4; The Lusitania, 251 Fed. 715, 732; Beale, in 36 Harv. L. Rev. 241, 242. In a few instances the doctrine has been strikingly applied. See Respublica v. De Longchamps, 1 Dall. 111, *infra*, 810; Matter of Washburn, 4 Johns. Ch. 106, *infra*, 694. *Cf.* Eastern Extension, Etc., Telegraph Co. v. United States, 48 Ct. Cl. 33, 49.

See also the note appended to the recent decision of a Chinese court, Rizaeff Frères v. Soviet Mercantile Fleet, North-China Daily News, Nov. 14, 1927.

For the plaintiffs three points were made; first, which was the principal point, that the Danish confiscatory ordinance was void, being contrary to the acknowledged practice and law of nations, and therefore affording no just ground of defence to this action. . . .

[The arguments of counsel and part of the opinion are omitted.]

Lord Ellenborough C. J. now delivered the judgment of the Court. This case was very ably argued before us at Serjeants' Inn. Upon the facts stated, it appears that the action was brought for the recovery of a debt contracted in England, by a Danish subject resident in Denmark, with a house of trade established here, and in a time of peace between the two countries. . . . It further appears, that with a view to deprive the defendant of some supposed claim of set off, which he was expected to make in the Danish courts against the suit of the original creditors, they had assigned the debt to a third person in trust for themselves; and that their assignee commenced a suit in his own name in one of the courts of Denmark against the defendant; who, in order to avoid the effect of this assignment, instituted a cross suit in the same court against them and their assignee, to which they appeared; and in this state of things a war broke out between the two countries, and no further proceedings were had in either of the suits for several years, nor until they were quashed upon the application of the defendant on the production of the commissioners' receipt mentioned in the case. . . . And this brings us to the consideration of what is the material question in the cause, *viz.* the legal effect of the Danish ordinance of confiscation promulgated on the 16th of August 1807, and the facts that took place after it, which constituted the main ground of the defence. If this ordinance is to be considered merely as a penal law, it is clear that the courts of this country ought not to take notice of it, because no country regards the penal laws of another. Folliott v. Ogden, 1 H. Black. 135. . . . But, it was contended, that this ordinance was a proceeding founded upon and conformable to the law of nations, and that as the defendant paid the debt to the persons appointed by the ordinance to receive the confiscated debts, he has a good discharge as to the debt itself according to the law of nations, to which the municipal courts of this country, as well as of all others, ought to give effect. To prove that this ordinance was grounded upon and conformable to the law of nations, two passages were cited from Vattel's treatise, the first from book 2. chap. 18. sect. 344., where, speaking on the subject of reprizals, the author says, "Between state and state whatever is the property of the members is considered as belonging to the body, and is answerable for the debts of the body; whence it follows, that in reprisals they seize the goods of the subject, in the same manner as those of the state or the sovereign. Every thing that belongs to the nation is subject to reprisals wherever it can be found, provided it be not a deposit entrusted to the public faith." The other passage is in book 3. ch. 5.

sect 77. "Among the rights belonging to the enemy, are likewise incorporeal things, all his rights, titles, and debts, excepting, however, those kind of rights granted by a third person, and in which the grantor is so far concerned that it is not a matter of indifference to him in what hands they are vested. Such, for instance, are the rights of commerce. But as debts are not of this number, war gives us the same rights over any sums of money due by neutral nations to our enemy, as it can give over his other property. When Alexander by conquest became absolute master of Thebes, he remitted to the Thessalians a hundred talents which they owed to the Thebans. The sovereign has naturally the same right over what his subjects may owe to enemies. He may therefore confiscate debts of this nature, if the term of payment happen in the time of war, or at least he may prohibit his subjects from paying while the war continues." To the proviso at the end of the first of these passages, the author himself immediately subjoins the following words: "As it is only in consequence of that confidence which the proprietor has placed in our good faith that we happen to have such deposit in our hands, it ought to be respected even in case of open war. Such is the conduct observed in France, England, and elsewhere, with respect to the money which foreigners have placed in the public funds." Now it is obvious that this reason will apply with equal force to a debt owing to an individual in the course of commerce; such individual trusted to the good faith of the individual with whom he dealt, and to the justice of the state of which that individual was a subject; and if it be contrary to good faith for a state to confiscate and convert to its own use debts owing by the state itself in its aggregate capacity, it cannot be less contrary to good faith to sequester and convert to the use of the state debts owing by its own subjects in their individual capacities. The concluding sentence of the second passage quoted by the defendant's counsel, and which was the main support of his argument, is expressed in such a manner as to shew that the author himself doubted of the right of confiscating debts due from individuals to individuals. He says, "at least the sovereign may prohibit his subjects from paying while the war continues." And, indeed, this is the actual limit of this right, *viz.* as it operates *in personam* upon the subject of the state, or upon his property, within the reach and controul of such state. And in the very next sentence the author further qualifies his doctrine, and adds, "But, at present, a regard to the advantage and safety of commerce had induced all the sovereigns of Europe to act with less rigour in this point. And as this custom has been generally received, he who should act contrary to it would violate the public faith; for strangers trusted his subjects only from a firm persuasion that the general custom would be observed." We have not, however, been able to discover that there ever was a time when greater rigour generally prevailed on this subject, as Vattel appears to have supposed. Some instances,

indeed, of similar confiscations in the sixteenth and seventeenth centuries are mentioned by Bynkershook in his *Questiones Juris Publici et Privati*, c. 7., and appear to be considered by that writer as warranted by the law of nations, and available to the debtor where payment has been actually enforced from him by the authority of his own government. And there was a decision about the middle of the sixteenth century by a court at Paris in favour of a Frenchman, against the claim of a Fleming, to recover a debt paid by the Frenchman to the treasury of his own country, in obedience to a French decree of this kind during a war between the two nations. It could not be expected that a French court should decide otherwise with reference to a decree of its own government. Sir Matthew Hale, also, in his Pleas of the Crown, vol. i. p. 95. says, "that by the law of England debts and goods found in this realm belonging to alien enemies belong to the king, and may be seized by him;" but the books referred to do not furnish an instance of the seizure of debts, or a decided case in support of the legality of such a seizure. And by the statute of Magna Charta, cap. 30. merchant strangers are, upon the breaking out of a war, to be attached and kept without harm to body or goods, until it shall be known how the English merchants are treated by the sovereign of their state, and if the latter are safe there, the former are to be safe here. So that foreign merchants could suffer nothing in England unless by way of retaliation and reprizal. So early as the time of Grotius opinions had been entertained against the right of confiscating incorporeal things; and there is nothing to be found in the great work of that very learned author which can give countenance to such a right. On the contrary, in lib. iii. c. 7. s. 4. of the Treatise *de Jure Gentium*, there is an allusion to the opinion of some "*qui dicunt incorporalia, belli jure, non acquiri;*" and Grotius himself does not controvert this opinion in general, but supposes it to admit of qualification in the case of a captive slave; and alludes to it in that way, after having remarked that, "*res omnes quæ captæ fuerant, cum persona acquiruntur domino.*" But the proposition last mentioned does not, in truth, furnish any qualification of the opinion to which Grotius alludes; for incorporeal things cannot be taken; and the dominion of corporeal things actually taken is in general acquired by the capture of them, and the title of the captor to them is not less valid where their owner is not taken, than where he is; as is observed by Puffendorff, at the end of the 22d sect. of lib. viii. c. 6. of the Treatise *de Jure Naturali et Gentium*. At the beginning of that section this learned author gives the rule as follows: "*Circa adquisitionem incorporalium in bello peculiariter observandum, ista non adquiri, nisi cum subjecto, cui inherent.*" He then proceeds to notice, that incorporeal rights may be annexed to corporeal things conquered, as to farms, rivers, harbours, towers, and countries, (but even as to these he observes that the nature of the original annexation must be regarded,) or to persons; and as to the latter, he distinguishes

between those who live "*extra civitatem in statu mere naturali,*" (all whose things he says are taken with the person, or may be, because there is no one to oppose it,) and those who live *in civitate;* as to whom he says, "*unde si civis ab hoste captus fuerit, bona istius, quæ simul capta non fuerunt, non adquiruntur capienti; sed ad eum perveniunt, quem leges civiles ad successionem vocabant si iste naturali morte functus esset.*" Now if things belonging to a captive enemy, but not actually taken, do not pass to the conquering enemy, how can things belonging to a person not made captive be legally acquired by an enemy, who is not a conquerer either as to the person or the things; which is the case of the creditors and of the debt in question? . . . It was admitted that, notwithstanding all the violent measures to which recourse has been had during the extraordinary warfare, that we have witnessed in our own times, this ordinance of the Court of Denmark stands single and alone, not supported by any precedent, nor adopted as an example in any other state. The ordinance itself, however, so far as we can learn from this case, was not followed up by any practical measure of compulsion upon the subjects of Denmark. Nothing in the nature of process against the defendant to enforce the payment of this particular debt, nothing analogous to the seizure or condemnation of corporeal things taken in the time of war occurred on this occasion; and although the commissioners appointed under the ordinance to receive the sequestrated monies were informed of this debt as early as the year 1807, yet the defendant did not pay the money until 1812. . . . Considering, therefore, that the right of confiscating debts contended for on the authority of these citations from Vattel is not recognised by Grotius, and is impugned by Puffendorff and others, that such confiscation was not general at any period of time, and that no instance of it, except the ordinance in question, is to be found for something more than a century, we think our judgment would be pregnant of mischief to future times, if we did not declare, that in our opinion this ordinance, and the payment to the commissioners appointed under it, do not furnish a defence to the present action; and if they cannot do this of themselves, neither can they do so by the aid of the proceedings in the Danish court. The parties went into that court expecting justice, according to the then existing laws of the country, and are not bound by the quashing of their suit, in consequence of a subsequent ordinance, not conformable to the usage of nations, and which, therefore, they could not expect, nor are they or we bound to regard.

Postea to the plaintiffs.[29]

[29] *Cf.* Ware v. Hylton, 3 Dall. 199; Brown v. United States, 8 Cr. 110; In re Ferdinand, Ex-Tsar of Bulgaria [1921] 1 Ch. 107. *Cf.* also The Helena, 4 C. Rob. 3, *infra*, 82; Williams v. Armroyd, 7 Cr. 423; Williams v. Suffolk Insurance Co., 13 Pet. 415, *infra*, 69; Oetjen v. Central Leather Co., 246 U. S. 297, *infra*, 99.

LORD ALVERSTONE, C. J., IN WEST RAND CENTRAL GOLD MINING COMPANY, LIMITED, v. THE KING[30]

Great Britain. High Court of Justice; King's Bench Division. 1905.

Law Reports [1905] 2 *King's Bench Division* 391, 401, 406.

[This was a petition of right by the West Rand Central Gold Mining Co. It was alleged that parcels of gold belonging to the petitioners had been seized by the Government of the late South African Republic shortly before the outbreak of war with Great Britain, that the Government of the Republic became obligated by its laws to return the gold or its value, that Great Britain had subsequently conquered and annexed the Republic, and that the obligations of the Republic passed upon annexation to and became binding upon the conqueror. The Attorney-General on behalf of the Crown demurred to the petition. Lord Robert Cecil argued for the petitioners, "First, that, by international law, the Sovereign of a conquering State is liable for the obligations of the conquered; secondly, that international law forms part of the law of England; and, thirdly, that rights and obligations, which were binding upon the conquered State, must be protected and can be enforced by the municipal Courts of the conquering State."]

[Delivering the judgment of the court, LORD ALVERSTONE said:]

In support of his first proposition Lord Robert Cecil cited passages from various writers on international law. In regard to this class of authority it is important to remember certain necessary limitations to its value. There is an essential difference, as to certainty and definiteness, between municipal law and a system or body of rules in regard to international conduct, which, so far as it exists at all (and its existence is assumed by the phrase "international law"), rests upon a consensus of civilized States, not expressed in any code or pact, nor possessing, in case of dispute, any authorized or authoritative interpreter; and capable, indeed, of proof, in the absence of some express international agreement, only by evidence of usage to be obtained from the action of nations in similar cases in the course of their history. It is obvious that, in respect of many questions that may arise, there will be room for difference of opinion as to whether such a consensus could be shewn to exist. Perhaps it is in regard to the extra-territorial privileges of ambassadors, and in regard to the system of limits as to territorial waters, that it is least open to doubt or question. The views expressed by learned writers on international law have done in the past, and will do in the future, valuable service in helping to create the opinion by which the range of the consensus of civilized nations is enlarged. But in many instances their pronouncements must be regarded rather as the embodiments of their

[30] *Infra*, 943.

views as to what ought to be, from an ethical standpoint, the conduct of nations *inter se*, than the enunciation of a rule or practice so universally approved or assented to as to be fairly termed, even in the qualified sense in which that word can be understood in reference to the relations between independent political communities, "law." The reference which these writers not infrequently make to stipulations in particular treaties as acceptable evidence of international law is as little convincing as the attempt, not unknown to our Courts, to establish a trade custom which is binding without being stated, by adducing evidence of express stipulations to be found in a number of particular contracts. . . .

The second proposition urged by Lord Robert Cecil, that international law forms part of the law of England, requires a word of explanation and comment. It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must shew either that the particular proposition put forward has been recognised and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized State would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognised, are not in themselves sufficient. They must have received the express sanction of international agreement, or gradually have grown to be part of international law by their frequent practical recognition in dealings between various nations. We adopt the language used by Lord Russell of Killowen in his address at Saratoga in 1896 on the subject of international law and arbitration: "What, then, is international law? I know no better definition of it than that it is the sum of the rules or usages which civilized States have agreed shall be binding upon them in their dealings with one another." In our judgment, the second proposition for which Lord Robert Cecil contended in his argument before us ought to be treated as correct only if the term "international law" is understood in the sense, and subject to the limitations of application, which we have explained. The authorities which he cited in support of the proposition are entirely in accord with and, indeed, well illustrate our judgment upon this branch of the arguments advanced on behalf of the suppliants; for instance, Barbuit's Case [Cas. t. Talb. 281], Triquet v. Bath [3 Burr. 1478], and Heathfield v. Chilton [4 Burr. 2016] are cases in which the Courts of law have recognised and have given

effect to the privilege of ambassadors as established by international law. But the expressions used by Lord Mansfield when dealing with the particular and recognised rule of international law on this subject, that the law of nations forms part of the law of England, ought not to be construed so as to include as part of the law of England opinions of text-writers upon a question as to which there is no evidence that Great Britain has ever assented, and *a fortiori* if they are contrary to the principles of her laws as declared by her Courts. The cases of Wolff v. Oxholm [6 M. & S. 92] and Rex v. Keyn [2 Ex. D. 63] are only illustrations of the same rule—namely, that questions of international law may arise, and may have to be considered in connection with the administration of municipal law.[31]

PICCIOTTO, THE RELATION OF INTERNATIONAL LAW TO THE LAW OF ENGLAND AND OF THE UNITED STATES OF AMERICA

Pages 75–77. 1915.

Is customary International Law part of the Common Law?

In this enquiry there are two propositions which we should bear well in mind:—

(*a*) That to the lawyers of the eighteenth and the early part of the nineteenth century, the Common Law was still the expression of the rules of "right reason" or "natural justice." Even Lord Stowell and Sir Robert Phillimore in passages already quoted lay it down as the plain duty of a judge to disregard an Act of Parliament repugnant to those principles of right on which the Common Law rested.

(*b*) That until some sixty years ago the Naturalistic conception of International Law was not clearly separated from the Positivistic. International Law was still regarded as consisting of principles of right and moral action for States, resting in the main upon the *a priori* speculations of jurists. In other words, the conception of the law as it is was not clearly separated from the conception of the law as it ought to be. These *a priori* speculations were to some extent supported by evidence of practice, but it is certain that this played the lesser part. The combined effect of these two propositions is that since International Law rests upon rules of true morality, and since the Common Law is the embodiment of such rules, International Law must be part of the Common Law. Accordingly we are able to see the changing notion of the basis of International Law reflected in the judgments of the English Courts. We shall see how the early decisions of the eighteenth century declare in sweeping terms

[31] See also Queen v. Keyn, 2 Ex. D. 63, 202, *infra*, 462, 480; Mortensen v. Peters, 8 Sess. Cas. 93, 101, *infra*, 65, 67; The Lottawanna, 21 Wall. 558, 572; The Western Maid, 257 U. S. 419, 432; The Over The Top, 5 F. (2d) 838, 842.

that International Law is part of the Common Law in its full extent, while those of more modern times accept the proposition only with many safeguards and hedged around with the most careful limitations, until we reach the culminating point, the judgment in the West Rand Central Gold Mining Company v. Rex, which may be described as the *locus classicus* on the subject.[32]

Mortensen v. Peters

Great Britain. High Court of Justiciary of Scotland. 1906.

8 *Session Cases* 93.

[Parts of the statement of the case, of the arguments of counsel, and of the Lord Justice-General's opinion are omitted.]

Emmanuel Mortensen, residing at 24 Montague Street, Grimsby, was charged in the Sheriff Court at Dornoch on a complaint, dated 15th January 1906, under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and Criminal Procedure (Scotland) Act, 1887, at the instance of David Peters, Procurator-fiscal of the Court. The complaint set forth that the accused had been guilty of a contravention of the Sea Fisheries Acts and the Herring Fisheries (Scotland) Acts, in so far as on 30th November 1905 he, being the master of the Norwegian steam-trawler "Niobe," S. D. 5, of Sandefiord, Norway, did, contrary to the bye-laws and sections of the statutes after mentioned, use the method of fishing known as otter-trawling in a part of the Moray Firth five miles or thereby east by north from Lossiemouth, which lies within a line drawn from Duncansby Head, in Caithness, to Rattray Point, in Aberdeenshire[33] . . .

On 13th February 1906 the Sheriff (Guthrie), in respect of the evidence adduced, found Mortensen guilty of the contravention charged, and imposed a fine of £50, with the alternative of imprisonment for fifteen days.

Mortensen obtained a case for appeal. . . .

The questions of law submitted for the opinion of the High Court were:—"1. Whether, in view of the facts stated as proved, and having regard to the bye-laws and the enactments of the sections of the statutes

[32] "The true view would seem to be that so far from International Law being in any sense whatever a part of the Common Law of England it is merely a source of law, and that this fundamental confusion between cause and effect has vitiated the whole controversy." Picciotto, *op. cit.*, 105.

[33] The 7th section of the Herring Fishery Act enacted as follows: "The Fishery Board may, by byelaw or byelaws, direct that the methods of fishing known as beam trawling and otter trawling shall not be used within a line drawn from Duncansby Head, in Caithness, to Rattray Point, in Aberdeenshire, in any area or areas to be defined in such byelaw." (52 & 53 Vict. c. 23.) The byelaw of the Fishery Board provided that the foregoing provision should apply to the whole area specified in the statute.

above mentioned, the appellant was subject to the jurisdiction of Dornoch Sheriff Court? 2. Whether, having regard to the provisions of the Sea Fisheries Regulation (Scotland) Act, 1895, and in particular to the provisions of sections 10, subsections 4 and 6 thereof, the conviction and sentence imposed on the appellant are legal and competent?" . . .

At the hearing before a full Bench, on 29th May 1906, the appellant argued;—The appellant was a Dane, and the trawler of which he was master was registered in Norway. Denmark was, but Norway was not, one of the signatory powers to the North Sea Fisheries Convention of 1883. The spot where the appellant was charged with having contravened the statutes and bye-laws libelled was outside a line drawn three miles from the adjacent coast, and also more than three miles outside a straight line drawn across the Moray Firth "in the part nearest the entrance at the first point where the width does not exceed ten miles." (1) The statutes and bye-laws alleged to have been contravened, being British municipal legislation, only conferred jurisdiction over (a) British subjects, and (b) Foreign subjects within British territory. The universality of the language of sec. 10 (4) of the Act of 1895—"any person"—was subject to construction. It meant "any person over whom our Courts have jurisdiction." In interpreting a statute, it was not to be presumed that the Legislature either meant to exceed its jurisdiction or to violate the established rules of international law. The general rule was that legislation was primarily territorial. It might apply to British subjects outside British territory, but it could never be intended to extend to foreigners outside British territory. . . . In determining whether a spot was within British territory, our Courts (in the absence of express legislative enactment or judicial decision) applied the principles of international law, which was part of our common law. By international law, territorial jurisdiction ended at the three-miles limit, subject to the exception of bays *intra fauces terræ*. The *locus in quo* was not *intra fauces terræ*, as that expression had been interpreted by the authorities. . . .

Lord Justice-General.—The facts of this case are that the appellant being a foreign subject, and master of a vessel registered in a foreign country, exercised the method of fishing known as otter-trawling at a point within the Moray Firth, more than three miles from the shore, but to the west of a line drawn from Duncansby Head, in Caithness, to Rattray Point in Aberdeenshire; that being thereafter found within British territory, to wit, at Grimsby, he was summoned to the Sheriff Court at Dornoch to answer to a complaint against him for having contravened the 7th section of the Herring Fishery Act, 1889, and the bye-law of the Fishery Board, thereunder made, and was convicted. . . .

I apprehend that the question is one of construction, and of construction only. In this Court we have nothing to do with the question of whether the Legislature has or has not done what foreign powers may

consider a usurpation in a question with them. Neither are we a tribunal sitting to decide whether an Act of the Legislature is *ultra vires* as in contravention of generally acknowledged principles of international law. For us an Act of Parliament duly passed by Lords and Commons and assented to by the King, is supreme, and we are bound to give effect to its terms. The counsel for the appellant advanced the proposition that statutes creating offences must be presumed to apply only (1) to British subjects; and (2) to foreign subjects in British territory; and that short of express enactment their application should not be further extended. The appellant is admittedly not a British subject, which excludes (1); and he further argued that the *locus delicti*, being in the sea beyond the three-mile limit, was not within British territory; and that consequently the appellant was not included in the prohibition of the statute. Viewed as general propositions the two presumptions put forward by the appellant may be taken as correct. This, however, advances the matter but little, for like all presumptions they may be redargued, and the question remains whether they have been redargued on this occasion.

The first thing to be noted is that the prohibition here, a breach of which constitutes the offence, is not an absolute prohibition against doing a certain thing, but against doing it in a certain place. Now, when the Legislature, using words of admitted generality,—"It shall not be lawful," &c., "Every person who," &c.—conditions an offence by territorial limits, it creates, I think, a very strong inference that it is, for the purposes specified, assuming a right to legislate for that territory against all persons whomsoever. This inference seems to me still further strengthened when it is obvious that the remedy to the mischief sought to be obtained by the prohibition would be either defeated or rendered less effective if all persons whosoever were not affected by the enactment. It is obvious that the latter consideration applies in the present case. Whatever may be the views of anyone as to the propriety or expediency of stopping trawling, the enactment shews on the face of it that it contemplates such stopping; and it would be most clearly ineffective to debar trawling by British subjects while the subjects of other nations were allowed so to fish.

It is said by the appellant that all this must give way to the consideration that International Law has firmly fixed that a *locus* such as this is beyond the limits of territorial sovereignty, and that consequently it is not to be thought that in such a place the Legislature could seek to affect any but the King's subjects.

It is a trite observation that there is no such thing as a standard of international law extraneous to the domestic law of a kingdom, to which appeal may be made. International law, so far as this Court is concerned, is the body of doctrine regarding the international rights and duties of states which has been adopted and made part of the law of

Scotland. Now, can it be said to be clear by the law of Scotland that the *locus* here is beyond what the Legislature may assert right to affect by legislation against all whomsoever for the purpose of regulating methods of fishing?

I do not think I need say anything about what is known as the three-mile limit. It may be assumed that within the three miles the territorial sovereignty would be sufficient to cover any such legislation as the present. It is enough to say that that is not a proof of the counter proposition that outside the three miles no such result could be looked for. The *locus* although outside the three-mile limit, is within the bay known as the Moray Firth, and the Moray Firth, says the respondent, is *intra fauces terræ*. Now, I cannot say that there is any definition of what *fauces terræ* exactly are. But there are at least three points which go far to shew that this spot might be considered as lying therein.

1st. The *dicta* of the Scottish institutional writers seem to shew that it would be no usurpation, according to the law of Scotland, so to consider it. . . .

2d. The same statute puts forward claims to what are at least analogous places. If attention is paid to the schedule appended to section 6, many places will be found far beyond the three-mile limit—e. g., the Firth of Clyde near its mouth. I am not ignoring that it may be said that this in one sense is proving *idem per idem*, but none the less I do not think the fact can be ignored.

3d. There are many instances to be found in decided cases where the right of a nation to legislate for waters more or less landlocked or land-embraced, although beyond the three-mile limit, has been admitted. They will be found collected in the case of the Direct United States Cable Company v. Anglo-American Telegraph Company [L. R. 2 A. C. 394], the bay there in question being Conception Bay, which has a width at the mouth of rather more than 20 miles.

It seems to me therefore, without laying down the proposition that the Moray Firth is for every purpose within the territorial sovereignty, it can at least be clearly said that the appellant cannot make out his proposition that it is inconceivable that the British Legislature should attempt for fishery regulation to legislate against all and sundry in such a place. And if that is so, then I revert to the considerations already stated which as a matter of construction made me think that it did so legislate. . . .

I am therefore of opinion that the conviction was right, that both questions should be answered in the affirmative, and that the appeal should be dismissed.

[The Lord Justice-Clerk, Lord M'Laren, and Lord Mackenzie concurred in the opinion of the Lord Justice-General. Concurring opinions of Lord Kyllachy, in which Lord Stormonth-Darling, Lord Low, Lord

Pearson, Lord Ardwall, and Lord Mackenzie concurred, of Lord Johnston, in which Lord Dundas concurred, and of Lord Salvesen are omitted.]

Lord Kinnear was absent.

The Court answered both questions in the affirmative, and dismissed the appeal.[34]

Charles L. Williams v. The Suffolk Insurance Company

United States. Supreme Court. 1839.

13 *Peters' Reports* 415.

On a certificate of Division from the Circuit Court of the United States for the district of Massachusetts.

[Part of the statement of the case, the arguments of counsel, and part of the opinion are omitted.]

[34] "If Parliament were to pass an act expressly and avowedly opposed to the law of nations, the English courts would administer it in preference to the law of nations, whatever that may be. For instance, it is commonly said that by the law of nations the person of an ambassador is, generally speaking, inviolable, and by the law of England it is a misdemeanour to violate his privileges; but if Parliament were to pass an act putting ambassadors upon the same footing in all respects as private persons, the courts, in case of need, would apply that like any other act of Parliament to any particular case which might arise. . . . If (to take an impossible case) Parliament were to pass an act to the effect that the whole criminal law of England should apply to the conduct of Frenchmen in France, and that the Central Criminal Court should have jurisdiction over all offences against that law committed in France; and if a Frenchman who had murdered another Frenchman in Paris were brought for trial before the court, the court would try him as it would try an Englishman who had committed a murder in London, but the result might probably be war between France and England." Stephen, History, II, 36–7. See Wolff v. Oxholm, 6 M. & S. 92, 102, *supra*, 57, 60; Schibsby v. Westenholz, 6 Q. B. 155, 159, *infra*, 288, 290; Queen v. Keyn, 2 Ex. D. 63, 121, 160, 207, *infra*, 473, 484; Direct United States Cable Co. v. Anglo-American Telegraph Co., 2 A. C. 394, 420, *infra*, 358, 363; Ware v. Hylton, 3 Dall. 199, 223, 229, 265; Ex parte McNeeley, 36 W. Va. 84, 93, 94–5; United States v. Siem, 299 Fed. 582, 583; The Over the Top, 5 F. (2d) 838, 842; Holland, Studies, 176; Picciotto, Relation of Int. L., ch. 3.

"For where the language of a statute is general, and may include foreigners or not, the true canon of construction is to assume that the legislature has not so enacted as to violate the rights of other nations." Cockburn, C. J., in Queen v. Keyn, 2 Ex. D. 63, 210. See also Le Louis, 2 Dods. 210, 239; The Zollverein, Swa. Adm. 96, 98; Cope v. Doherty, 2 De G. & J. 614; The Annapolis, Lush. 295, 306; General Iron Screw Collier Co. v. Schurmanns, 1 J. & H. 180, 192. "It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country." Marshall, C. J., in The Charming Betsy, 2 Cr. 64, 118. See also Talbot v. Seeman, 1 Cr. 1, 43; United States v. Percheman, 7 Pet. 51; The Over the Top, *supra;* Bishop, Criminal Law, I, §112. The Revised Laws of Hawaii, 1925, Title XXXVI, Criminal Law, Chapter 216, Territorial Jurisdiction, section 3911, provide: "Nothing in this chapter contained shall be construed contrary to the law and usages of nations."

This was an action brought by the plaintiff, a citizen of the state of Connecticut, against the Suffolk Insurance Company of Boston, Massachusetts, to recover a loss, on part of the schooner Harriet, and part of her cargo, they having been insured by the defendants. There was a similar action against the defendants to recover losses sustained on the schooner Breakwater and her cargo. Both the cases were brought from the Circuit Court of Massachusetts, on certificates of division of opinion of the judges of the Circuit Court.

The cases were stated in the record as follows:— . . .

"The causes came on to be heard together, by the Court, upon certain facts and statements agreed by the parties. . . . It appeared from these facts and statements, that both of the vessels insured were bound on a sealing voyage, and proceeded to the Falkland islands in pursuance thereof; and were there both seized by one Lewis Vernet, acting as governor of those islands, under the appointment and authority of the government of Buenos Ayres. The Harriet was seized on the 30th of July, 1831, and was subsequently carried by the captors to Buenos Ayres; where certain proceedings were had against her in the tribunals, and under the sanction of the government of Buenos Ayres. She has never been restored to the defendants, but has been condemned for being engaged in the seal trade at the Falkland islands.

"The Breakwater was seized at the islands, on or about the 18th day of August, 1831, and was afterwards re-captured by the mate and crew, who remained on board; and was by them brought home to the United States; and after her arrival was libelled for salvage in the district Court of Connecticut district, and salvage was awarded of one-third part of the proceeds of vessel and property.

"Copies of the orders and decrees of the Courts of Buenos Ayres respecting the seal fisheries, of the appointment of Vernet as governor of the Falkland islands, of the proceedings against the Harriet, of the correspondence of the American government with the Buenos Ayrean government, relative to the jurisdiction of the Falkland islands; were produced and read, *de bene esse*, in the case."

The following points and questions occurred in the case, on which the judges of the Circuit Court were divided in opinion; and they were stated and ordered to be certified to the Supreme Court to be finally decided:—

1. Whether, inasmuch as the American government has insisted and does still insist, through its regular executive authority, that the Falkland islands do not constitute any part of the dominions within the sovereignty of the government of Buenos Ayres,[35] and that the seal fishery at those islands is a trade free and lawful to the citizens of the United States, and beyond the competency of the Buenos Ayrean government to regulate, prohibit, or punish; it is competent for the Circuit Court in this cause, to

[35] See GOEBEL, Struggle for the Falkland Islands.

inquire into and ascertain by other evidence, the title of said government of Buenos Ayres to the sovereignty of the said Falkland islands; and if such evidence satisfies the Court, to decide against the doctrines and claims set up and supported by the American government on this subject; or whether the action of the American government on this subject is binding and conclusive on this Court, as to whom the sovereignty of those islands belongs.

2. Whether, if the seizure of the Harriet, by the authority of the Buenos Ayrean government, for carrying on the seal fishery at the Falkland islands, was illegal and contrary to the law of nations, on account of the said islands not being within the territorial sovereignty of the said Buenos Ayrean government, and the master of the Harriet had warning from the government of the said islands under the government of Buenos Ayres, that he should seize the said Harriet if she should engage in the seal fishery, and after such warning, the master of the Harriet engaged in such seal fishery, and the Harriet was illegally seized and condemned therefor, the loss by such seizure and condemnation was a loss for which the plaintiff is entitled to recover in this case; if the master of the Harriet acted, in engaging in such seal fishery *bona fide*, and with a sound and reasonable discretion, and under a belief that he was bound so to do, as a matter of duty to his owners, and all others interested in the voyage, and in the vindication of the rights recognised and claimed by the American government; or whether he was bound by law to abandon the voyage under such a threat and warning of such illegal seizure. . . .

Mr. Justice M'Lean delivered the opinion of the Court:— . . .

As the fact is stated in the first point certified, that there is a controversy between this government and that of Buenos Ayres, whether the jurisdiction is rightful, which is assumed to be exercised over the Falkland islands by the latter; and that this right is asserted on the one side and denied by the other, it will not be necessary to look into the correspondence between the two governments on the subject.

To what sovereignty any island or country belongs, is a question which often arises before Courts in the exercise of a maritime jurisdiction; and also in actions on policies of insurance.

Prior to the revolution in South America, it is known that the Malvinas, or Falkland islands, were attached to the vice-royalty of La Plata, which included Buenos Ayres. And if this were an open question, we might inquire whether the jurisdiction over these islands did not belong to some other part, over which this ancient vice-royalty extended, and not to the government of Buenos Ayres; but we are saved from this inquiry by the attitude of our own government, as stated in the point certified.

And can there be any doubt, that when the executive branch of the government, which is charged with our foreign relations, shall in its

correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it the province of the Court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions, he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union.

If this were not the rule, cases might often arise in which, on the most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one of these departments, a foreign island or country might be considered as at peace with the United States; whilst the other would consider it in a state of war. No well regulated government has ever sanctioned a principle so unwise, and so destructive of national character.

In the cases of Foster vs. Neilson, 2 Peters, 253, 307, and Garcia vs. Lee, 12 Peters, 511, this Court have laid down the rule, that the action of the political branches of the government in a matter that belongs to them, is conclusive.

And we think in the present case, as the executive, in his message, and in his correspondence with the government of Buenos Ayres, has denied the jurisdiction which it has assumed to exercise over the Falkland islands; the fact must be taken and acted on by this Court as thus asserted and maintained.

The decision of the first point materially affects the second, which turns upon the conduct of the master.

If these islands are not within the jurisdiction of the Buenos Ayrean government, the power assumed and exercised by Governor Vernet was unauthorized, and the master was not bound to regard it. He was not necessarily to be diverted from the objects of his voyage, and the exercise of rights which belonged in common to the citizens of the United States by an unauthorized threat of the seizure of his vessel. He might well consider the prohibition of Vernet as influenced by personal and sinister motives, and would not be enforced. If the principle were admitted, that the assured were bound to regard every idle threat of any individual who might assume to exercise power, as in this case, it would be most injurious, and in many cases destructive, to commercial rights.

The inquiry is, whether the master, under all the circumstances of the case, acted in good faith, and with ordinary prudence.

If he acted fraudulently, he was guilty of barratry; and the underwriters are discharged.

In 4 Taunton, 858, Mr. Justice Gibbs, in giving the opinion of the Court, lays down the true rule. "The master," says he, "being asked why he had not British colours and British papers, said, I cannot have

them, because I have not a British register. He stands on his strict rights. He says, I will do nothing to endanger my owners; I am a neutral, and I have a right to enter your port. The master really communicated the true facts of the case when she was searched; and says, I cannot go off, because of my charter-party. The other says: Then I will seize you. We think, then, each party stands on his strict rights; and we are now to consider the strict point of law, not the question whether it would have been more prudent for him to go to Tercera, but whether he acted *bona fide*."

And so in the present case, the question is not whether the master of the Harriet would not have acted with more prudence had he yielded to the inhibition of Vernet; but whether, in placing himself upon his strict rights, he did not exercise a proper discretion.

He violated no regulation which he was bound to respect. In touching at the Falkland islands, for the purpose of taking seal, he acted strictly within the limits of his commercial enterprise; and did not voluntarily incur a risk which should exonerate the insurers.

It was the duty of the master to prosecute his voyage, and attain the objects of it, for the benefit of his owners: and, in doing this, he was not bound to abandon the voyage by any threat of illegal seizure. We think, therefore, that the underwriters are not discharged from liability, by the conduct of the master, as stated in the second point.

The other case depending upon the same principles, the same certificate will be affixed to that case.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States, for the district of Massachusetts, and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this Court, 1st, That, inasmuch as the American government has insisted and still does insist, through its regular executive authority, that the Falkland islands do not constitute any part of the dominions within the sovereignty of the government of Buenos Ayres, the action of the American government on this subject is binding on the said Circuit Court, as to whom the sovereignty of those islands belongs. And, secondly: That the seizure and condemnation of the Harriet was a loss for which the plaintiff is entitled to recover in this case, under the circumstances as stated in the second point certified. Whereupon, it is ordered and adjudged by this Court, that it be so certified to the said Circuit Court, accordingly.[36]

[36] See also Foster v. Globe Venture Syndicate, 69 L. J. Ch. 375.

"A political question is one that, according to the required or habitual distribution of sovereignty, is properly determinable by the executive or legislative branches of the

government. The interest therein of the *'polis'* or public community is regarded as so dominant and controlling that it swallows up any element of private interest or controversy. It is not a question of private, of judicial, *meum aut tuum* at all.

"Nakedly and separately regarded, the resolution of such a question does not fall within the field of judicial power. Where it is involved in a justiciable controversy and it has been expressly or impliedly decided by the proper political authority, the courts will respect and follow such decision." WILLIAMS, Federal Practice, 2d ed., 14.

The following are examples of cases involving questions which the courts have regarded as political in nature: Jones v. United States, 137 U. S. 202 (acquisition of territory by discovery and occupation); Van Deventer v. Hancke and Mossop, Transvaal L. R. [1903] T. S. 401, *infra*, 311 (acquisition of territory by conquest and annexation); Wilson v. Shaw, 204 U. S. 24 (acquisition of territory by treaty of cession); The Fagernes [1927] P. 311 (extent of territory); Foster and Elam v. Neilson, 2 Pet. 253 (disputed boundary); Garcia v. Lee, 12 Pet. 511 (*ditto*); Watts v. United States, 1 Wash. Terr. 288, *infra* 1021 (*ditto*); The Marianna Flora, 11 Wh. 1, 39 (jurisdiction on the sea); In re Cooper, 143 U. S. 472 (*ditto*); The Grace and Ruby, 283 Fed. 475 (*ditto*); Barclay v. Russell, 3 Ves. Jr. 424, *infra*, 919 (state succession); West Rand Central Gold Mining Co. v. King [1905] 2 K. B. 391, *infra*, 943 (*ditto*); Vilas v. City of Manila, 220 U. S. 345, *infra*, 983 (*ditto*); Chinese Exclusion Case, 130 U. S. 581, *infra*, 828 (exclusion of aliens); Fong Yue Ting v. United States, 149 U. S. 698 (expulsion of aliens); Holzendorf v. Hay, 20 App. D. C. 576, aff'd 194 U. S. 373 (protection of nationals abroad); United States v. Benner, Baldw. 234 (reception of foreign diplomats); The Rogdai, 278 Fed. 294 (*ditto*); The Gul Djemal, 296 Fed. 563 (rupture of diplomatic relations); The Three Friends, 166 U. S. 1, *infra*, 139 (recognition of insurgents); United States v. Palmer, 3 Wh. 610 (recognition of belligerents); Duff Development Co. v. Government of Kelantan [1924] A. C. 797 (recognition of foreign government); Cushing, Adm'r, v. United States, 22 Ct. Cl. 1 (prosecution of claims against foreign government); Doe d. Clark v. Braden, 16 How. 635, *infra*, 1071 (capacity of foreign government to make treaty); University v. Miller, 14 N. C. 188 (capacity of foreign state to execute treaty); Terlinden v. Ames, 184 U. S. 270, *infra*, 960 (*ditto*); Taylor v. Morton, 2 Curtis 454 (performance of treaty obligation); Head Money Cases, 112 U. S. 580, *infra*, 1068 (*ditto*); Ware v. Hylton, 3 Dall. 199, 258 (abrogation of treaty); Hooper, Adm'r, v. United States, 22 Ct. Cl. 408 (*ditto*); Techt v. Hughes, 229 N. Y. 222, *infra*, 1116 (*ditto*); United Shoe Machinery Co. v. Duplessis Shoe Machinery Co., 155 Fed. 842, 849 (interpretation of treaty); Charlton v. Kelly, 229 U. S. 447, 468, *infra*, 719, 722 (*ditto*); O'Reilly de Camara v. Brooke, 209 U. S. 45 (validity of act of government abroad); Gladstone v. Ottoman Bank, 1 H. & M. 505, *infra*, 548 (validity of act of foreign government); Underhill v. Hernandez, 168 U. S. 250 (*ditto*); Oetjen v. Central Leather Co., 246 U. S. 297, *infra*, 99 (*ditto*); Hewitt v. Speyer, 250 Fed. 367 (*ditto*); The Nereide, 9 Cr. 388, 422, 432 (retaliation or reprisal); United States v. 129 Packages, 27 Fed. Cas. 284 (peace or war); Gray, Adm'r, v. United States, 21 Ct. Cl. 340 (*ditto*); Hamilton v. McClaughry, 136 Fed. 445 (*ditto*); The Protector, 12 Wall. 700 (beginning and end of war); The Zamora [1916] 2 A. C. 77, 98, *supra*, 45, 52 (circumstances justifying retaliation in war); Neely v. Henkel, 180 U. S. 109 (duration of military occupation).

See FIELD, "Doctrine of Political Questions in the Federal Courts," 8 Minn. L. Rev. 485; 19 Am. Jour. Int. L. 157; 22 Mich. L. Rev. 29, 118.

"Municipal Courts do not take it upon themselves to review the dealings of State with State or of Sovereign with Sovereign. They do not control the acts of a foreign State done within its own territory, in the execution of sovereign powers, so as to criticise their legality or to require their justification. What the Crown does to foreigners by its agents without the realm is State action also, and is beyond the scope of domestic jurisdiction." LORD SUMNER, in Johnstone v. Pedlar [1921] 2 A. C.

THE CONSTITUTION OF GERMANY

Article 4. 1919.

Anschüss, Die Verfassung des Deutschen Reichs vom 11 *August* 1919, *page* 44.

Art. 4. The generally recognized rules of the law of nations are considered as binding component parts of the German imperial law.[37] [Editor's transl.]

262, 290. On the "act of state" doctrine, see Buron v. Denman, 2 Exch. 167; Walker v. Baird [1892] A. C. 491; Cook v. Sprigg [1899] A. C. 572; Johnstone v. Pedlar [1921] 2 A. C. 262, *infra*, 843; O'Reilly de Camara v. Brooke, 209 U. S. 45; The Paquete Habana, 189 U. S. 453; Tiaco v. Forbes, 228 U. S. 549; KINGSBURY, "The 'Act of State' Doctrine," 4 Am. Jour. Int. L. 359; MOORE, Act of State in English Law; POLLOCK, Torts, 12th ed., 112; STEPHEN, History, II, 61.

[37] The Constitution of Austria, 1920, art. 9, provides: "The universally recognized rules of international law are accepted as integral parts of the law of the Austrian Republic." And art. 145 provides: "The Supreme Constitutional Court shall render judgment upon violations of international law in accordance with the provisions of a special federal law." MCBAIN and ROGERS, 256, 257, 290. See also Constitution of Esthonia, 1920, art. 4, *ibid.*, 454, 455; MIRKINE-GUETZEVITCH, "Les tendances internationales des nouvelles constitutions européennes," 2 L'Esprit International 531.

See Constitution of Brazil, 1926, art. 60, Pan Am. Union, L. & T. S. No. 5, p. 34; Constitution of Colombia, 1886, art. 151, RODRIGUEZ, II, 318, 355; Constitution of Honduras, 1924, art. 134, Pan Am. Union, L. & T. S. No. 2, p. 25; Constitution of United States, 1789, art. 1, §8, par. 10; Constitution of Uruguay, 1829, art. 96, RODRIGUEZ, II, 158, 179.

On the relation of the law of nations to private international law or the conflict of laws, see BECKETT, "What is Private International Law," B. Y. B. Int. L. (1926) 73; WESTLAKE, "Relations between Public and Private International Law," Collected Papers, 285.

On the relation of the law of nations to municipal law, in general, see BALDWIN, "The Part Taken by Courts of Justice in the Development of International Law," 35 Am. L. Rev. 214; DIENA, "L'individu devant l'autorité judiciaire et le droit international," 16 Rev. Gén. de Dr. Int. Pub. 57; KELSEN, "Les rapports de système entre le droit interne et le droit international public," 14 Académie de Dr. Int. 231; KOHLER, "Völkerrecht als Privatrechtstitel," 2 Z. f. V. 209; MOORE, "Relation of International Law to National Law in the American Republics," Am. Soc. Int. L. Proc. (1915) 11; OPPENHEIM, 4th ed., I, §§20–25; PICCIOTTO, Relation of Int. L.; SCOTT, "Legal Nature of International Law," 1 Am. Jour. Int. L. 831; TRIEPEL, "Les rapports entre le droit interne et le droit international," 1 Académie de Dr. Int. 77; TRIEPEL, Völkerrecht und Landesrecht; WESTLAKE, "Is International Law a Part of the Law of England," Collected Papers, 498; WILLOUGHBY, "Legal Nature of International Law," 2 Am. Jour. Int. L. 357; 22 Harv. L. Rev. 66.

CHAPTER II

PERSONS IN THE LAW OF NATIONS

SECTION 1. WHO ARE INTERNATIONAL PERSONS?

The United States v. Schooner Active and Cargo

United States. Circuit Court, Mississippi Territory. 1814.

3 *Wheeler's Criminal Cases* 264.

[Part of the opinion is omitted.]

Toulman, J. This is the case of a vessel and cargo belonging to the enemy, taken in sight of the fort at Mobile Point, by the troops stationed at that place under the command of Major William Lawrence. . . . The libel prays the condemnation of the vessel and cargo as good and lawful prize to the United States. A plea, however, is filed by Lewis Judson, (in the character of consignee and agent for the captors,) to the jurisdiction of the court, on the ground that as this court has jurisdiction only in cases in which the United States are parties, it cannot legally entertain a suit in which the private captors, (as it is alleged) are the only parties who have a right to claim the captured property. The said plea farther alleges that the "schooner Active and cargo were captured by Wm. Lawrence and others, on the high seas, and not in the enemy's forts, camps, or barracks; and, therefore, by the usages of the laws of nations and the laws of war, as enemy's property, become forfeited to the said private captors."

No question has been made as to the regularity of the plea, nor as to the legitimacy of the conclusion, that the government is in no sense to be regarded as a party, if the proceeds of a capture are suffered to go to the troops engaged in making the capture; but the whole has been liberally left by the attorney prosecuting on behalf of the U. States, to depend on the simple question whether the troops of the U. States, thus making a prize, are entitled by law to the benefit of it? The general belief that they are so entitled, the want of a knowledge of correspondent cases, and the little attention which, in this part of the country, we have had occasion to give to inquiries of this nature, have apparently created doubts even in the mind of the attorney acting for the U. States, and have rendered both parties desirous that the question should be judicially settled. The most satisfactory mode, probably, of coming to a conclusion on this subject, will be to have recourse to general principles. . . .

[In an omitted part of the opinion the court considered the nature, objects, and rights of war, referring particularly to the treatises of Bynkershoek and Vattel.]

. . . It is contended that the law of nations gives the booty in this case to the captors, and the principal authority appealed to is that passage in Vattel . . . where, as I conceive, he is simply narrating the usages of some governments, and not laying down principles which are binding upon all.

What, indeed, is the law of nations? It is that rule of conduct which regulates the intercourse of nations with one another; or in the words of the author last cited, "the law of nations is the science of the law subsisting between nations or states, and of the obligations that flow from it." (Vattel, 49.) It is a law for the government of national communities as to their mutual relations, and not for the government of individuals of those communities in their relation towards one another—nor can it control the conduct of nations towards their own citizens, except in cases involving the rights of other nations. Property once transferred by capture, must be subject to the laws of the nation by which the capture is made. The question whether it shall be public or private property, must depend on the regulations adopted by the nation making the capture, and cannot naturally be regarded as subject to the control of a system of laws which has respect to the laws and duties of nations towards one another. What our author states as to the practice of nations towards their own citizens, is not, truly speaking, a delineation of the laws of nations. The conduct of nations towards their own citizens must depend on their own municipal regulations. It is by the laws of nations that we must determine the circumstances under which prizes may be taken; but what is to become of them when taken under the sanction of that law cannot depend upon the law of nations, but must depend upon the will of the nation by which the capture is made. Individuals of the capturing nation can have no right independent of the nation to which they belong. . . .

[In an omitted part of the opinion the court considered English authorities and also the laws of the United States with respect to captures made by the public forces.]

It has been stated that a case occurred in New-England soon after the war commenced, where a vessel, which had approached near to a fort of the United States, was condemned for the benefit of the troops by whom it was captured: and it is likewise urged that libels have been filed in behalf of military captors in the federal court of the state of Louisiana. As to the former case, it is only stated on a recollection, which I cannot help believing to be, in this instance, somewhat inaccurate: and as to the latter, how much soever it may afford a precedent sufficient to justify a practitioner at the bar in putting in a claim, it can afford no

precedent to justify a court in sustaining it. In the whole view of the case, therefore, now before the court, it is adjudged and decreed, that the plea be over-ruled and dismissed, with costs in court occasioned by the plea, and that the schooner Active and cargo be condemned as good and lawful prize to the United States.

BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD

Section 9, pages 16–18. 1915.

It seems unnecessary to review at any length the learned discussions in which particularly the German and Italian writers on international law have engaged in an endeavor to define the exact position of the individual in international law. Using the term "subjects" of law to connote those upon whom the law confers rights and imposes duties, the weight of authority considers states alone as the subjects of international law, and individuals as objects of international law. This conclusion is based on the theory that international law cannot ascribe rights and duties to individuals directly, and that individuals cannot invoke for their protection a rule of international law which has not been incorporated in municipal law, *i. e.*, to use Jellinek's term, individuals have no subjective rights based upon international law. Some writers like Heffter, Fiore, Martens, Kaufmann and Bonfils consider individuals as subjects of international law. This conclusion is based upon different reasons, and finds some support in the following circumstances: (1) by the Washington conventions of 1907, an individual was given the right to sue one of the Central American states before the Court of Justice established at Cartago, and two such suits appear to have been brought; (2) by the unratified Prize Court convention concluded at The Hague in 1907, individuals were given the right to bring a suit in their own names; and (3) by the law of the United States and Great Britain, international law has been accepted as part of the common law, and in the United States, treaties are declared to be the supreme law of the land, the rights arising out of which an alien may invoke in municipal courts.[1] Heilborn regards the first two circumstances as exceptional phenomena proving the general rule, and the third he explains by showing that the courts must by decision embody the international rule in municipal law before individuals may derive rights from it and that in invoking treaty rights the individual in the case posited invokes municipal and not international law.

[1] "It would be pedantic to deny that the pirate and the blockaderunner are subjects of international law, but it is only by virtue of rules prevailing between states that they are so." WESTLAKE, Collected Papers, 2. *Cf.* LORIMER, II, 130.

It would seem that the theory of the majority is correct, namely, that the rules of international law are binding upon and create rights and liabilities between states only. These rules have in view the conduct of states toward aliens, by imposing upon states manifold duties whose object is to assure the protection and well-being of aliens. Individuals indeed are the beneficiaries of the rights and duties which international law ascribes to states. The state fulfills these duties by means of its municipal law, and under this law aliens have subjective rights which they may invoke in municipal courts. But when there has been an alleged violation of international law with respect to a particular alien, the state cannot plead its own municipal law or a decision of its own courts construing a treaty obligation as a defense against an international reclamation of another state. Nor does the alleged violation of international law give rise to any right of the individual to invoke the responsibility of the state, unless the rule violated is also incorporated in the states's municipal law. The remedy, then, is confined to that permitted by municipal law. As the rules of international law and treaties constitute obligations between states, their violation creates international responsibility, not to the individual, but to the state of which he is a member. This state, in demanding redress, does not represent the individual who has sustained the injury, and does not give effect to his right, but to its own right, the right, namely, that its citizen may be treated by other states in the manner prescribed by international law. This legal relation between states, however, may and usually does have as a consequence the indemnification of the individual injured, although he has no legally enforceable right either to the protection of his own state or to the payment of the indemnity when received.[2]

[2] See also CHRÉTIEN, §78; HEILBORN, 58; JELLINEK, System der subjektiven öffentlichen Rechte, 2d ed., 324; OPPENHEIM, 4th ed., I, §§13, 63, 288–292; TRIEPEL, 20.

But *cf.* Mexico and United States, General Claims Commission, opinion in North American Dredging Co. Case, Mex. U. S. Gen. Cl. Com'n. 21, 23; DIENA, "L'individu devant l'autorité judiciaire et le droit international," 16 Rev. Gén. de Dr. Int. Pub. 57; FAUCHILLE, I, Pt. I, 757; FIORE, Int. L. Cod., 108; HEFFTER, 8th ed., §14; KAUFMANN, Die Rechtskraft des internationalen Rechtes, 3; MARTENS, F., I, 307, 427; REHM, "Untertanen als Subjekte völkerrechtlicher Pflichten," 1 Z. f. V. 53.

"Nor must we forget that there is a certain artificiality which may result from too rigid an insistence on the general principle that international law is concerned solely with states and not with individuals. Formally, no doubt, this is true, and in the actual practice of international intercourse the rule is of importance. The Permanent Court of International Justice knows no litigants that are not states. But the rule is on a broad view in essence procedural. States are a method of grouping and regulating human beings, and they derive their importance and vitality from the human beings so regulated and grouped." WILLIAMS, in B. Y. B. Int. L. (1926) 24, 33.

F. B. Heirn, Excr. &c., v. E. Bridault and Wife

United States. High Court of Errors and Appeals of Mississippi. 1859.

37 *Mississippi Reports* 209.

Appeal from the Court of Probates of Harrison County: Hon. George Holly, judge.

[The statement of the case, the arguments of counsel, and part of the opinion are omitted. The facts are stated sufficiently in the opinion.]

Harris, J., delivered the opinion of the court:

The appellees filed their petition in the Probate Court, in behalf of Mrs. Bridault, claiming to be the heir at law of Francis Hall, deceased; alleging that appellant, as executor of said Hall, had possessed himself of certain personal estate belonging to said decedent, by virtue of a pretended will in favor of one Marcelette Marceau, widow Chatteau, a free woman of color, whom the testator brought from the State of Louisiana, of which State she was a citizen, to reside with him in this State, in fraud of the laws and policy thereof. The petitioner prays that the will in favor of said free woman of color may be set aside, and the petitioner declared entitled to the estate as the sole heir and distributee of the said decedent. To this petition, there was a demurrer, which was overruled. The appellant answered the petition, denying the several allegations thereof. Proofs were taken and submitted to the judge of probates on final hearing, whose judgment was, by agreement appearing on the record, to have the effect of the verdict of a jury. A decree was thereupon entered in favor of the appellees, on all the points made by the petition: from which decree this appeal is prosecuted. . . .

That the legatee under the will, purporting to dispose of his whole estate, was a "free woman of color," we think beyond doubt, from the evidence in the record. And that, by the description of "free woman of color," is to be understood one of African descent, we think equally clear, from the frequent use of the same or similar language, by both the legislative and judicial departments of our State and National Governments, as synonymous with "free negro."

The only remaining question for our consideration, therefore, is, whether a "free negro" from another State, without any legislative intervention in his behalf here, or without permission by our laws, is capable of taking property by will in this State.

What, then, is the status of the African race in the State of Mississippi?

In the absence of positive law here, securing to them rights, neither the citizens nor inhabitants of other states or nations have any rights in the State of Mississippi, except those resulting from comity. . . .

[In an omitted part of the opinion the court referred to Dredd Scott v. Sandford, 19 How. 393, and concluded that persons of the African race were not citizens under the federal constitution and were entitled to "no

status, civil or political, in this country, save such as each State may choose to confer by special legislation in its own jurisdiction."]

It is only by virtue of the municipal law of each state or nation, or by the law of civilized nations, which is regarded as a part of the municipal law of each, that aliens have any rights at all; and neither the municipal law, nor the law of nations, has any extra territorial operation. As the municipal law is limited in its operation to the territory of the nation by which it is established, and whose citizens have agreed to be governed by its rules, and does not extend to any other nation or people who have not thus consented to its obligations; so the law of nations, having its origin in the necessities growing out of commercial, social, and diplomatic intercourse of civilized nations, and being founded upon the express or implied assent of such nations, cannot be extended to embrace those nations or people who neither respect nor acknowledge the laws of God or man, and are wholly incapable, from their nature and constitution, of civilized intercourse. "The law of nations is a system of rules, which reason, morality, and custom have established among civilized nations as their public law." 1 Kent, 1; 1 Black. Com. 43.

Mr. Wheaton, in his work on International Law, after examining the definition and sources of international law, as discussed by Grotius, Hobbes, Puffendorf, Rutherforth, Bynkershoek, Heffter, Vattel, Montesquieu, and others, and the character of its obligations, and upon what nations it operates, thus defines it: "International law, as understood among civilized nations, may be defined as consisting of those rules of conduct which reason deduces as consonant to justice, from the nature of the society, existing among independent nations; with such definitions and modifications as may be established by general consent," and for this he cites Mr. Madison. See International Law, 46.

"There is, then," he says in another place, "according to these writers, no universal, immutable law of nations, binding upon the whole human race, which mankind, in all ages and countries, ancient and modern, savage and civilized, Christian and Pagan, have recognized in theory or in practice, have professed to obey, or in fact have obeyed. . . . The obligation of the ordinary *jus gentium* depends upon the persuasion that other nations will observe the same rules in their intercourse with us, which we observe towards them; or if they fail to observe these rules, that they will incur the general hostility of nations. But this persuasion cannot exist, as to those races of men who do not recognize one law of nations." Wheaton, International Law, 40; 1 Burlamaqui, 137–8.

Having shown, as we think, that the African is neither embraced by the terms of the Federal Constitution, nor by the laws of international comity, we will next inquire how he is regarded by our municipal laws. . . .

[In an omitted part of the opinion the court considered the position of persons of the African race in the municipal law of the State of

Mississippi and concluded that they were regarded by that law as *prima facie* slaves.]

It is, therefore, the policy of this State to interdict all intercourse, commerce, and comity with this race; and by law, expressly provided, we enforce the strictest doctrines of the ancient law, as applicable to alien enemies, except as to life or limb, against them. We enslave them for life, if they dare set their foot on our soil, and omit to leave on notice in ten days. And this not upon the principle, supposed by some, of enmity, inhumanity, or unkindness, to such inferior race, but on the great principles of self-preservation, which have induced civilized nations in every age of the world to regard them as only fit for slaves, as wholly incapable, morally and mentally, of appreciating or practising, without enlightenment, the principles and precepts of the Divine and natural law, upon which the laws of international comity are founded.

In the entire absence of all law, conferring such right, the African can neither take nor hold property in this State, by deed or devise, by descent or purchase, except those free persons of color who are residing here *permissi*.

The freed negro does not become a citizen by virtue of his manumission here. It requires the act of the State to clothe him with civil and political rights, as well as with freedom from servitude. Before such act, conferring civil and political rights, notwithstanding manumission, he stands in the position of an alien friend, or alien enemies "*permissi*," or specially permitted by law. Hence, free negroes in this State, lawfully here, are capable of all those customary rights which are founded on the *jus naturali* or *jus gentium*. Cobb on the Law of Slavery, 312, 313, §384.

But free negroes or persons of color, not so specially permitted, or who are here in violation of our laws and policy, are entitled to no such rights. They are to be regarded as alien enemies or strangers *prohibiti*, and without the pale of comity, and incapable of acquiring or maintaining rights of property in this State which will be recognized by our courts.

It follows from these views, that the bequest to the free woman of color, by the appellant's testator, was void, and that the decree of the Probate Court should be affirmed.

SMITH, C. J., concurred.

[The dissenting opinion of Handy, J., is omitted.]

THE HELENA, HESLOP MASTER

Great Britain. High Court of Admiralty. 1801.

4 *Christopher Robinson's Reports* 3.

This was a case of a British ship, which had been taken, on a voyage from Saffee to Lisbon, by an Algerine corsair, and sold by the dey of Algiers to a merchant of Minorca, and by him sold, on the surrender of the island of Minorca to the British arms, to the present holder, a mer-

chant of London. On coming into the port of London, a warrant had been applied for to arrest this ship on the part of the former British proprietor; but the Court refused a warrant, and directed a monition to issue, calling on the possessor to shew cause, why she should not be restored to the former British owner.

[The arguments of counsel and part of the opinion are omitted.]

Sir W. Scott.—This is a question arising on a ship, which has been purchased by a British merchant of a Spaniard: A claim is now given on the part of the original British proprietor, on a suggestion that the vessel, while sailing as his property, was captured and carried into the Barbary States, and there sold to the Spanish merchant, from whom the present holder purchased. . . . This ship appears to have been taken by the Algerines, and it is argued, that the Algerines are to be considered in this act as pirates, and that no legal conversion of property can be derived from their piratical seizure.[3] Certain it is, that the African States were so considered many years ago, but they have long acquired the character of established governments, with whom we have regular treaties, acknowledging and confirming to them the relations of legal states. So long ago, as the time of Charles 2d, Molloy speaks of them in language, which, though sufficiently quaint, expresses the true character in which they were considered in his time.—"Pirates that have reduced themselves into a government or state, as those of Algier, Sally, Tripoli, Tunis, and the like, some do conceive ought not to obtain the rights or solemnities of war, as other towns or places: for though they acknowledge the supremacy of the Port, yet all the power of it cannot impose on them more than their own wills voluntarily consent to. The famous Carthage having yielded to the victorious Scipio, did in some respect continue, and began to raise up her drooping towers, till the knowing Cato gave council for the total extirpation; out of the ruins of which arose Tunis, the revenging ghost of that famous city, who now what open hostility denied, by thieving and piracy continue; as stinking elders spring from those places where noble oaks have been felled; and in their art are become such masters, and to that degree, as to disturb the mightiest nations on the western empire; and though the same is small in bigness, yet it is great in mischief: the consideration of which put fire into the breast of the aged Lewis IX. to burn up this nest of wasps, who having equipt out a fleet in his way for Palestine, resolved to besiege it: whereupon a council of war being called, the question was, whether the same should be summoned, and carried, it should not; for it was not fit the solemn ceremonies of war, should be lavished away

[3] *A piratis et latronibus capta dominium non mutant.* See Digest, XLIX, xv, 19 & 24; Anonymous, Cro. Eliz. 685; Bonnet's Trial, 15 How. St. Tr. 1231, 1236; 27 Edw. III, c. 13; 13 & 14 Vict. c. 26, §5; Grotius, III, ix, 16; Kent, Commentaries, I, 172; 38 Harv. L. Rev. 334, 338.

on a company of thieves and pirates. Notwithstanding this, Tunis and Tripoli and their Sister Algier do at this day (though nests of pirates) obtain the right of legation. So that now (though indeed pirates) yet having acquired the reputation of a government, they cannot properly be esteemed pirates, but enemies." Molloy, p. 33. sect. iv.

Although their notions of justice, to be observed between nations, differ from those which we entertain, we do not, on that account, venture to call in question their public acts. As to the mode of confiscation, which may have taken place on this vessel, whether by formal sentence or not, we must presume it was done regularly in their way, and according to the established custom of that part of the world.[4] That the act of capture and condemnation was not a mere private act of depredation, is evident from this circumstance, that the Dey himself appears to have been the owner of the capturing vessel; at least he intervenes to guarantee the transfer of the ship in question to the Spanish purchaser. There might perhaps be cause of confiscation, according to their notions, for some infringement of the regulations of treaty; as it is by the law of treaty only that these nations hold themselves bound, conceiving (as some other people have foolishly imagined) that there is no other law of nations, but that which is derived from positive compact and convention. Had there been any demand for justice in that country on the part of the owners, and the Dey had refused to hear their complaints, there might perhaps have been something more like a reasonable ground to induce this Court to look into the transaction, but no such application appears to have been made. The Dey intervened in the transaction, as legalizing the act. The transfer appears, besides, to have been passed in a solemn manner before the public officer of the Spanish government, the Spanish consul; and in the subsequent instance, the property is again transferred to the present possessor, under the public sanction of the Judge of the Vice Admiralty Court of Minorca.

Under these circumstances, I think it is now much too late for this Court to interfere for the purpose of annulling these several acts of transfer, which appear to have been made, in both instances, with perfect good faith on the part of the several purchasers, and for an equivalent consideration. Without considering at all the question, what rule would have been applied to the case of a *bonâ fide* purchase from a piratical captor, I shall dismiss the party, and decree the ship to be delivered to the British purchaser.

Party dismissed.[5]

[4] See Hudson v. Guestier, 4 Cr. 293, 6 Cr. 281; Williams v. Armroyd, 7 Cr. 423.

[5] See also The Hurtige Hane, 3 C. Rob. 324; The Madonna del Burso, 4 C. Rob. 169.

"Albericus Gentilis, and several other writers are of opinion, that those nations of Africa, whom we call Barbarians, are to be considered as pirates, and that captures made by them, work no change of property; but that opinion cannot be defended on

In re Taylor

United States. District Court, District of Massachusetts. 1902.

118 *Federal Reporter* 196.

Petition for Writ of Habeas Corpus.

[The names of counsel and part of the opinion are omitted.]

Lowell, District Judge. The petitioner for *habeas corpus* was arrested and held by the United States commissioner for extradition to Great Britain. The complaint on which he was arrested alleges that the offence was committed "between October 1, 1899, and February 1, 1900, at Johannesburg, within the jurisdiction of his Britannic majesty." At the time in question, Johannesburg was in the physical and political control of the South African Republic, and Lord Roberts' proclamation annexing the territories of that republic to Great Britain had not been issued. By order of the court, the United States district attorney was informed of the pendency of these proceedings, and it is understood that he has sought instructions from the department of justice. He has not addressed this court either in support of or in opposition to the issuance of the writ.

The counsel for the British government contends:

1. That this court cannot pass upon or consider the political status of Johannesburg, or any other place mentioned in extradition proceedings, but is bound to accept the statement of the complaint,—at all events, if supported, like this complaint, by a certificate of the United States ambassador in London that the offense is "alleged to have been committed in his majesty's colony of the Transvaal." He contends that the political status of Johannesburg is to be determined solely by the secretary of state. That *habeas corpus* will issue to release a person held for extradition to Great Britain on account of a crime alleged to have been committed in Paris, for example, is too plain for argument, and the

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any rational principle. The Algerines, Tripolitans, Tunisians, and those of Salee, are not pirates, but regularly organized societies, who have a fixed territory and an established government, with whom we are now at peace and now at war, as with other nations, and who, therefore, are entitled to the same rights as other independent states. The sovereigns of Europe often enter into treaties with them, and the states-general have done it in several instances. Cicero defines a regular enemy 'one who hath a commonwealth, a court of justice, a treasury, the consent and agreement of the citizens, and who pays some regard to treaties of peace and alliance.' All these things are to be found among the Barbarians of Africa, for they pay the same regard to treaties of peace and alliance that other nations do, who generally attend more to their convenience than to their engagements. And if they should not observe the faith of treaties with the most scrupulous respect, it cannot be well required of them; for, it would be required in vain of other sovereigns. Nay, if they should even act with more injustice than other nations do, they should not on that account, as Huberus very properly observes, lose the rights and privileges of sovereign states." Bynkershoek, Quæstiones Juris Publici, I, xvii, p. 123. [Du Ponceau's transl.]

case would not be different if the complaint alieged that Paris was within the dominions of his Britannic majesty. If the legislative or executive department of the government of the United States has taken action regarding the diplomatic or international status of any place or country, this court is ordinarily bound by that action.[6] But it is bound, also, to inquire what that action has been, and to govern itself accordingly. The court does not, as was suggested by the learned counsel for the British consul, refuse to take any action for fear that its decision may not be approved thereafter by the legislative or executive department. It investigates the question presented, follows the decisions made by the legislative and executive departments, where these decisions exist, and, in their absence, decides for itself upon such information as it deems most trustworthy. Jones v. U. S., 137 U. S. 202, 216, 11 Sup. Ct. 80, 34 L. Ed. 691. Thus, in Terlinden v. Ames, 184 U. S. 270, 22 Sup. Ct. 484, 46 L. Ed. 534, the court consulted not only the public acts of the United States, but those of foreign countries, such as their treaties, statutes, and the decisions of their courts bearing upon the question involved.

2. If this court can consider the political status of Johannesburg before Lord Roberts' proclamation, counsel for the British consul contends that, at the time this offense is alleged to have been committed, Johannesburg was within the British dominions, so that the British government could then have demanded extradition for a crime committed there. The legislative and executive branches of our government have recognized officially that the South African Republic was not in an unqualified sense within the dominion of his Britannic majesty prior to the proclamation of Lord Roberts. Congress provided for a consul to Pretoria, which place is stated in the act to be within the South African Republic. 30 Stat. 269, 830. Following Jones v. U. S., *ubi supra*, this court has inquired of the department of state, and has been informed that the commission of the consul at Pretoria contained no reference to the British government, and that his exequatur was granted by the government of the South African Republic. These facts do not show that that republic was completely independent of Great Britain, but they do show that its territory was not part of the British dominions in an ordinary or unqualified sense. Moreover, there is ample evidence that the British government itself did not before 1900 claim unqualified jurisdiction over Johannesburg. What may have been the meaning of the convention of 1881, it boots not to inquire, but by article 4 of the convention of 1884 the South African Republic was permitted to make treaties with foreign powers generally, and these treaties were to be deemed valid unless objected to within six months by the British government. 75 Hertslet, State Papers, p. 10. Such treaties were made, in one case formally approved by the British government (76 Hertslet,

[6] See Williams v. Suffolk Insurance Co., 13 Pet. 415, *supra*, 69.

State Papers, p. 264); in another case, not formally objected to (*Id.* p. 512); and these treaties made some provision for extradition. The international status of the South African Republic, as recognized by Great Britain and the other countries of the world, is illustrated by the universal postal convention. 30 Stat. 1629. There Great Britain and the British colonies are not treated as including the South African Republic. See, especially, pages 1658, 1659, 1692. That by virtue of the treaty of 1889 between Great Britain and the United States the latter would have sought before 1900 to obtain from Great Britain extradition to this country of a fugitive from American justice found in Johannesburg is not to be supposed. If this be true, as reciprocity is ordinarily an element in extradition, it follows that Great Britain would not before 1900 have deemed itself entitled to demand from this country the extradition of a person charged with a crime committed in Johannesburg. This court is informed by the department of state that no record is found in the department of any request for the extradition of a person alleged to have committed crime in the South African Republic and a fugitive in the United States, or of a person alleged to have committed crime in the United States and a fugitive in the South African Republic. For the purposes of this case, Johannesburg must be treated as without the purview of the treaty of 1889 at the time the offense in question is alleged to have been committed. In spite of the learned and ingenious argument of counsel for the British consul, I have not the slightest doubt that any British court would agree to this proposition. . . .

[An omitted part of the opinion is reproduced *infra*. 966.]

Writ to issue.[7]

OPPENHEIM, INTERNATIONAL LAW

Third Edition, Volume I, pages 182–184, section 105. 1920.

§105. When, in 1870, Italy annexed the Papal States and made Rome her capital, she had to undertake the task of creating a position for the Holy See and the Pope which was consonant with the importance of the latter to the Roman Catholic Church. It seemed impossible that the Pope should become an ordinary Italian subject and that the

[7] *Cf.* the position of the Free City of Danzig under the Treaty of Versailles, June 28, 1919, arts. 100–108, 13 Am. Jour. Int. L. Suppl. 151, 206; the Convention of Paris, Nov. 9, 1920, 6 L. of N. T. S. 189; and the Constitution of May 11, 1922, 118 Br. & For. S. P. 119. See DE LANNOY, "Le règlement de la question de Dantzig," 2 Rev. de Dr. Int., 3 sér., 436; LEWIS, "The Free City of Danzig," B. Y. B. Int. L. (1924) 89; PICCIONI, "Le statut international de Dantzig," 28 Rev. Gén. de Dr. Int. Pub., 2 sér. 84.

"International law has no concern with the form, character, or power of a state, if, through the medium of a government, it has such an independent existence as to render it capable of entertaining international relations with other states." SIR ROBERT PHILLIMORE, in The Charkieh, 4 Ad. & Ec. 59, 78, *infra*, 120.

Holy See should be an institution under the territorial supremacy of Italy. For many reasons no alteration was desirable in the administration by the Holy See of the affairs of the Roman Catholic Church or in the position of the Pope as the inviolable head of that Church. To meet the case the Italian Parliament passed an Act regarding the guaranties granted to the Pope and the Holy See, which is commonly called the "Law of Guaranty." According to this the position of the Pope and the Holy See is in Italy as follows:—

The person of the Pope is sacred and inviolable (Article 1), although he is subjected to the civil courts of Italy. An offence against his person is to be punished in the same way as an offence against the King of Italy (Article 2). He enjoys all the honours of a sovereign, retains the privileges of precedence conceded to him by the Roman Catholic monarchs, has the right to keep an armed bodyguard of the same strength as before the annexation for the safety of his person and of his palaces (Article 3), and receives an allowance of 3,225,000 francs (Article 4). The Vatican, the seat of the Holy See, and the palaces where a conclave for the election of a new Pope or where an Oecumenical Council meets, are inviolable, and no Italian official is allowed to enter them without consent of the Holy See (Articles 5–8). The Pope is absolutely free in performing all the functions connected with his mission as head of the Roman Catholic Church, and so are his officials (Articles 9 and 10). The Pope has the right to send and to receive envoys, who enjoy all the privileges of the diplomatic envoys sent and received by Italy (Article 11). The freedom of communication between the Pope and the entire Roman Catholic world is recognised, and the Pope has therefore the right to a post and telegraph office of his own in the Vatican or any other place of residence, and to appoint his own post-office clerks (Article 12). And, lastly, the colleges and other institutions of the Pope for the education of priests in Rome and the environments remain under his exclusive supervision, without any interference on the part of the Italian authorities (Article 13).

No Pope has as yet recognised this Italian Law of Guaranty, nor had foreign States an opportunity of giving their express consent to the position of the Pope in Italy created by that law. But in practice foreign States as well as the Popes themselves, although the latter have never ceased to protest against the condition of things created by the annexation of the Papal States, have made use of the provisions of that law. Several foreign States send, side by side with their diplomatic envoys accredited to Italy, special envoys to the Pope, and the latter sends envoys to several foreign States.[8]

[8] See Fauchille, I, Pt. I, 727; Holtzendorff, II, 151; Oppenheim, 4th ed., I, §§104–107; Phillimore, 3d ed., II, 343–531; Westlake, 2d ed., I, 37. But see Treaty between Italy and the Vatican, Feb. 11, 1929, 23 Am. Jour. Int. L. Suppl. 187; 23 Am. Jour. Int. L. 371.

HYDE, INTERNATIONAL LAW

Volume I, page 17, note 3. 1922.

The participation of the Dominion of Canada, the Commonwealth of Australia, the Union of South Africa, the Dominion of New Zealand and India in the Peace Conference of 1919, the signing of the Treaty of Versailles with Germany, of June 28, 1919, by representatives of each in behalf of their respective portions of the British Empire, and their acceptance as original members of the League of Nations, must be taken to signify that, with the consent of Great Britain, each of these self-governing dominions has attained an international personality, and is to be dealt with accordingly. It would be consistent with the status which each has acquired should any one of them, such as Canada, be accorded the right to maintain permanent diplomatic relations with a neighboring State.[9]

WILLIAMS, THE STATUS OF THE LEAGUE OF NATIONS IN INTERNATIONAL LAW

International Law Association, Report of the Thirty-Fourth Conference (1926) pages 675, 692, 694.

"Every system of law that has attained a certain stage of its development seems compelled by the ever-increasing complexity of human affairs to add to the number of persons provided for it by the natural world, to create persons who are not men."[10] International Law has now reached this stage of development; the complexity of inter-State relations increases every day and with every new stride of mental and material progression; States cannot manage their business without improving the mechanism of their society. Thus we have witnessed

[9] See ALLIN, "International Status of the British Dominions with Respect to the League of Nations," 4 Minn. L. Rev. 190; ALLIN, "Le statut international des Dominions Britanniques," 6 Rev. de Dr. Int., 3 sér., 760; ALLIN, "Canada's Treaty Making Power," 24 Mich. L. Rev. 249; ALLIN, "Recent Developments in the Constitutional and International Status of the British Dominions," 10 Minn. L. Rev. 100; DUNN, "New International Status of the British Dominions," 13 Va. L. Rev. 354; FAUCHILLE, I, Pt. I, 219, 254; HALL, 8th ed., 34; KEITH, Responsible Government in the Dominions, 2d ed., II, 840, 882, 893, 909, 998, 1251; LEWIS, "International Status of the British Self-Governing Dominions," B. Y. B. Int. L. (1922–23) 21; LEWIS, "Treaty-Making Power of the Dominions," B. Y. B. Int. L. (1925) 31; LOWELL, "Treaty-Making Power of Canada," 2 Foreign Affairs 12; MOORE, "The Dominions and Treaties," 8 Jour. Soc. Comp. Leg., 3d series, 21; OPPENHEIM, 4th ed., I, §§94a, 94b; READ, "Canada as a Treaty Maker," 5 Can. Bar. Rev. 229, 301; Report of Inter-Imperial Relations Committee of the Imperial Conference, 1926, 21 Am. Jour. Int. L. Suppl. 21.

[10] POLLOCK and MAITLAND, History of English Law, 1st ed., I, 469.

the creation of bodies of international origin which are not States to deal with matters in which more than one State is interested: the International Association of the Congo, the predecessor of the Congo Free State—now the Belgian Congo: the European Commission of the Danube,[11] created after the Crimean War, and recently recognised by the Treaty of Versailles (Article 352), as entitled to recover compensation for damage to its property done during the war; the Reparation Commission, created by the Treaty of Versailles, of which more hereafter: all these bodies have rights, including property rights, and duties of their own, and can hardly be denied a species of personality—a personality in the international world similar to that of the corporation in the world of natural persons. . . .

The personality of the League is thus no sudden jump in the theory or practice of International Law: it is, on the contrary, a development which was to be expected as International Law becomes less primitive and grows with the growth of the race. The League is a new collectivity in a society of collectivities, and it possesses with far more scientific truth than that whole human society to which Vattel attributed corporate personality, a mind, a will and a strength which are its own. About such a personality there is, it is hardly necessary to emphasise, nothing fictitious: the lawyers do not imagine (as sometimes for the better attainment of justice they were wont to do) a person—a John Doe or a Richard Roe—to whom—or to which—nothing in the world of realities corresponds: they take the facts as they find them and they shape the law accordingly, even if their law in this matter arises before there is a government corresponding to the law.[12]

SECTION 2. RECOGNITION OF INTERNATIONAL PERSONS

Oppenheim, International Law

Third Edition, Volume I, pages 134–135, section 71. 1920.

§71. As the basis of the Law of Nations is the common consent of the civilised States, statehood alone does not imply membership of the Family of Nations. There are States in existence, although their

[11] "The European Commission is not a State, but an international institution with a special purpose." Permanent Court of International Justice, Jurisdiction of the European Commission of the Danube between Galatz and Braila, P. C. I. J. Publ., Series B, Advisory Opinion No. 14, p. 64. "C'est un syndicat international, ayant des attributions à la fois importantes et variées, ayant une véritable personnalité, formant une sorte de petit Etat dont les recettes sont fournies par ceux qui profitent des services rendus." Renault, in Demorgny, La Question du Danube, ix.

[12] See Corbett, "What is the League of Nations?" B. Y. B. Int. L. (1924) 119; Oppenheim, "Le caractère essentiel de la Société des Nations," 1 Rev. Gén. de Dr. Int. Pub., 2 sér., 234; Oppenheim, 4th ed., I, §167c; Williams, *op. cit.*

number decreases gradually, which are not, or not fully, members of that family, because their civilisation, if any, does not enable them and their subjects to act in conformity with the principles of International Law. Those States which are members are either original members because the Law of Nations grew up gradually between them through custom and treaties, or they are members which have been recognised by the body of members already in existence when they were born. For every State that is not already, but wants to be, a member, recognition is therefore necessary. A State is, and becomes, an International Person through recognition only and exclusively.

Many writers do not agree with this opinion. They maintain that, if a new civilised State comes into existence either by breaking off from an existing recognised State, as Belgium did in 1831, or otherwise, such new State enters of right into the Family of Nations and becomes of right an International Person. They do not deny that in practice such recognition is necessary to enable every new State to enter into official intercourse with other States. Yet they assert that theoretically every new State becomes a member of the Family of Nations *ipso facto* by its rising into existence, and that recognition supplies only the necessary evidence for this fact.[13]

If the real facts of international life are taken into consideration, this opinion cannot stand. It is a rule of International Law that no new State has a right as against other States to be recognised by them, and that no State has a duty to recognise a new State. It is generally agreed that a new State before its recognition cannot claim any right which a member of the Family of Nations has as against other members. It can, therefore, not be seen what the function of recognition could be, if a State entered at its birth really of right into the membership of the Family of Nations. There is no doubt that statehood itself is independent of recognition. International Law does not say that a State is not in existence as long as it is not recognised, but it takes no notice of it before its recognition.[14] Through recognition only and exclusively a State becomes an International Person and a subject of International Law.

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The decision of each individual State, on the vital point of recognition, is thus not only technically and formally, but, in the majority of cases, really final. It cannot be called in question even diplomatically,

[13] *Cf.* GAREIS, 2d ed., 64; HALL, 8th ed., 19, 103; RIVIER, I, 57; STIER-SOMLO, I, 58; ULLMANN, §30.

[14] On international persons *de facto*, see ch. 2, §5, *infra*, 137.

as may be done with the judgment of a prize court; because, previous to recognition, there are no diplomatic relations between political communities. The judgment of the individual State can thus be disputed only *vi et armis;* and this judgment, be it remarked, extends not only to the facts, but to the law by which these facts are to be measured. Each State is to say, not only whether or not a given community fulfils the requirements of international existence, but is, moreover, left to determine what these requirements are. It can thus twist both facts and law to the gratification of its passions or its prejudices. So long as the definition of State existence is thus exposed to the influences which so often distort the judgments of individual States on the occasions on which treaties are negotiated, it is obvious that international law can possess but very partially the character of a positive system.[15]

The Gagara

Great Britain. The Court of Appeal. 1919.

Law Reports [1919] *Probate Division* 95.

Appeal from a decision of Hill J., sitting in Admiralty, setting aside a writ *in rem* and all subsequent proceedings against the steamship Gagara.

[The Gagara was a Russian merchant ship which had been taken by the Bolsheviki Government, under a decree declaring the mercantile fleet national property, repaired and loaded with a cargo of wood, and sent on a commercial voyage to Copenhagen. In the course of the voyage the ship put into Reval where it was captured by the Esthonians. It was condemned by the Esthonian Government as prize of war. It was then registered as belonging to the Esthonian Republic, placed in charge of a master and crew appointed by the Provisional Government of Esthonia, and directed to London, where it was arrested on behalf of the former Russian owners.]

[The above statement is substituted for the statement of the case in the report. The arguments of counsel are omitted.]

Bankes L. J. This is an appeal from a decision of Hill J., which was given in the following circumstances: An action was brought *in rem* by the West Russian Steamship Co., Ld., against the steamship Gagara, now sailing under the name of the Kajak, and the parties interested in the steamship. There was a second action, also brought by the same

[15] On the question whether admission to membership in the League of Nations implies recognition by other members of the League, see Coucke, "Admission dans la Société des Nations et reconnaissance de Jure," 2 Rev. de Dr. Int., 3 sér., 320; Scelle, "L'admission des nouveaux membres de la Société des Nations par l'Assemblée de Genève," 3 Rev. Gén. de Dr. Int. Pub., 2 sér., 122.

plaintiffs, against the freight. The plaintiffs alleged that they were the owners of the steamship. They claimed a declaration to that effect, and an injunction against persons removing the ship or her cargo, or permitting the same to be removed, and a decree condemning the defendants in costs and damages.

An appearance was entered under protest. A motion was then made in the Admiralty Court to set aside the writ and all subsequent proceedings, on the ground that the Court had no jurisdiction to entertain the action. (His Lordship stated the grounds set out in the notice of motion, and continued:) Hill J. dealt with the case in reference to the claim that the vessel was the property of the Esthonian Government, and had been lawfully condemned as prize by a decree of that Government, and he gave no decision in reference to the point that the dispute was between two foreigners as to a foreign ship. From that decision this appeal is made.

The question which Hill J. decided, and which we have to decide, is whether the Esthonian National Council has been recognized by the Government of this country as having the status of a foreign Sovereign. If it has been so recognized it is not disputed that the Courts of this country would not allow that Council to be impleaded in any of these courts.[16] The principle upon which that practice proceeds was laid down in the case of The Parlement Belge [(1880) 5 P. D. 197, 214], and the passage I am going to read is quoted by Lord Esher in the case of Mighell v. Sultan of Johore [[1894] 1 Q. B. 149, 159]: "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction."

It appears from that passage that the principle arises from international comity, and the rule is there laid down with reference to matters in respect of which the Court will not exercise its territorial jurisdiction. In giving judgment, Hill J. indicated the reasons why he thought this particular case came within the rule so laid down. In a passage in his judgment which I will read, he says: "In the first place the Esthonian Government is in actual possession of the ship, and that Government states that the ship is being used by it for public purposes. The plaintiffs invite the Court to take that possession away by arrest of the ship and

[16] See ch. 6, *infra*, 526.

ultimately by decree to transfer it to the plaintiffs. But to permit the arrest is to compel the Esthonian Government either to submit to the jurisdiction of the Court or to lose their *de facto* possession, and to compel the Esthonian Government to submit to this Court the question of the ownership of the Gagara. In accordance with the principles laid down in The Parlement Belge and The Broadmayne [[1916] P. 64], I conceive I cannot compel the Esthonian Government to submit to the jurisdiction. But if that difficulty could be got over, there remains this further difficulty. The Esthonian Government seized the ship *jure belli*, and condemned her as the property of their enemy, the Bolshevist Government."

On these grounds Hill J. came to the conclusion that the case was one with reference to which the Court would not exercise jurisdiction, provided the Court was satisfied that the foreign Government were recognized by our Government as a foreign sovereign. With that part of his judgment I entirely agree.

The question therefore which remains is whether the learned judge was right in coming to the conclusion that the evidence before him was such that he ought to come to the conclusion that the Esthonian National Council had been recognized as having the status of a foreign sovereign. Upon that point I desire to refer to a passage in Lord Esher's judgment in Mighell v. Sultan of Johore [[1894] 1 Q. B. 149, 158, 161], and to a passage in the judgment of Kay L. J., as to the materials upon which the Court is justified in acting and the materials on which the Court is constrained to act in such a matter. Lord Esher says: "I am of opinion that . . . when once there is the authoritative certificate of the Queen through her minister of state as to the status of another sovereign, that in the Courts of this country is decisive. Therefore this letter is conclusive that the defendant is an independent sovereign." Kay, L. J., deals with the point at greater length. He says: "The status of a foreign sovereign is a matter of which the Courts of this country take judicial cognizance—that is to say, a matter which the Court is either assumed to know or to have the means of discovering, without a contentious inquiry as to whether the person cited is or is not in the position of an independent sovereign. Of course, the Court will take the best means of informing itself on the subject, if there is any kind of doubt, and the matter is not as notorious as the status of some great monarch such as the Emperor of Germany." And then he goes on to say, dealing with the letter from the Colonial Office, signed by an official there, and purporting to be written by the direction of the Secretary of State for the Colonies: "Proceeding as it does from the office of one of the principal secretaries of state, and purporting to be written by his direction, I think it must be treated as equivalent to a statement by Her Majesty herself, and, if Her Majesty condescends to state to one of her Courts of Justice that an individual cited before it is

an independent sovereign, I think that statement must be taken as conclusive."

In the present case the statement is in the fullest sense authoritative. It emanates from the Foreign Office, and it was presented to Hill J. by His Majesty's Attorney-General. The only question is whether it amounts to a statement that the Esthonian National Council has the status of a foreign independent sovereign. Upon that the materials before the Court consist partly of certain letters which passed between the Foreign Office and some gentlemen who addressed the Foreign Office as being the authorized representatives of Esthonia, and partly of a statement by the Attorney-General and by junior counsel for the Treasury at the Bar before Hill J.

The submission of counsel for the appellants, as I understand it, is that, so far as the statements in the letters of the Foreign Office are concerned, they are deliberately ambiguous statements of a benevolent character, and not such an emphatic and deliberate statement of fact as the Court should require. Further, he says that no statement as to the recognition of a sovereign state can be sufficient unless it appears that the recognition is irrevocable; and on that last point he cited two passages from Westlake's International Law and Oppenheim's International Law. He has also cited passages from Hall, Halleck, and Wheaton. It does not appear, however, that these writers are entirely agreed on that particular point. At any rate, the statements of these writers have reference to conditions very different from the exceptional conditions existing as regards the status of States in Europe at the time this dispute arose.

I read the letters of the Foreign Office as being statements which do recognize, and recognize to the full, the sovereignty of Esthonia, but with the limitation that in the exceptional conditions due to the setting up of the Peace Conference no undertaking could be given to continue the recognition if conditions altered; and, speaking for myself, I think that that would be a sufficient statement to require and compel the Court to decline jurisdiction in reference to any matter which comes within the principles laid down in the passage which I have read from the judgment in The Parlement Belge. But, however that may be, I am of opinion that the statements which were made by the law officers of the Crown are free from the objections that counsel suggested were to be found in the letters of the Foreign Office. The Attorney-General says that: "Our own Government—and looking at the affidavits in this case I see the statement is no less true whether of the Government of France or the Government of Italy—has for the time being provisionally, and with all necessary reservations as to the future, recognized the Esthonian National Council as a *de facto* independent body, and accordingly has received a certain gentleman as the informal diplomatic repre-

sentative of that Provisional Government. The state of affairs is of necessity provisional and transitory. The matter remains to be determined in the way that has been described." Junior counsel for the Treasury, at a later stage, said: "If it will assist the Court—I am sorry the Attorney-General is not here now—but I have had the opportunity of putting to him the point which has arisen, and I have his authority for stating to the Court that, in the present view of His Majesty's Government, and without in any way binding itself as to the future, the Esthonian Government is such a Government as could, if it thought fit, set up a Prize Court."

Reading these deliberate statements of the Law Officers of the Crown, as expressing the attitude of the Government towards this Esthonian National Council, I cannot but feel that if the Court claimed to exercise, and did exercise, jurisdiction in respect of such a dispute as arises in this action, they would not be acting in accordance with what was pointed out in the Parlement Belge as being the principle of international comity, and that there would be a divergence of action as between the Courts of this country and the statements that have been made by the Government of the country as to the attitude which this country was prepared to take.

On these grounds, in my opinion, the view taken by Hill J. was right.

Warrington L. J. I am of the same opinion, for the same reasons, and have nothing to add.

Duke L. J. I entirely agree.

Appeal dismissed.

The Annette; The Dora

Great Britain. High Court of Justice; Probate, Divorce, and Admiralty Division. 1919.

Law Reports [1919] *Probate Division* 105.

Motions to set aside writs, warrants of arrest, and all subsequent proceedings against two Russian sailing vessels, the Annette and the Dora.

[Part of the statement of the case, the arguments of counsel, and part of the opinion are omitted.]

The plaintiff in the case of the Annette was Arton Altenbrun, and in the case of the Dora, C. Markson. Both were Esthonian subjects. Each claimed "on behalf of himself and all others the owners" of the Annette and Dora respectively. The defendants were "the persons in possession" of the respective vessels "and all others claiming any right or interest therein." . . .

From the affidavits filed in support of the motions it appeared that the Annette, a vessel of 161 tons, of the port of Nava, and the Dora, a vessel of 137 tons, of the port of Riga, had been lying for two years at Archangel and were then sequestered and / or requisitioned by the Provisional Government of Northern Russia in or about September, 1918. Certificates in lieu of bills of sale were then given by the director of Naval Transports in Archangel to the Co-operative Labour Association of the Russian merchant fleet known as the "Polyarnaya Zvyezda" (Polar Star), which stated that by agreement dated September 20, 1918, the vessels were hired to the Polar Star Association "for the purpose of trading, the members of the association personally co-operating in the execution of all work connected with the exploitation of the vessels for their mutual account and risk." It also appeared that the trading was to be under the control of the director of Naval Transports. In pursuance of these agreements the Polar Star Association loaded cargoes of tar in the two vessels for Liverpool where they were arrested in the present actions by the plaintiffs, who alleged that the vessels had been left at Archangel, as it was impossible to get them away owing to the fact that the Russians were fighting amongst themselves, and the owners were entirely shut off from Archangel. The affidavits to lead the warrants of arrest were made by the Esthonian consular agent for Liverpool.

When the motions came before the Court on February 17 Hill J. said that he would require information from the Foreign Office as to the status of the Provisional Government of Northern Russia and adjourned the hearing for this purpose. At the adjourned hearing the following letter from the Foreign Office to the Admiralty Marshal was read:

"Sir,—I am directed by Earl Curzon of Kedleston to acknowledge the receipt of your letter of the 17th inst., requesting that Sir Maurice Hill, Judge of the Admiralty Court, might be furnished with a certificate in writing setting forth the status and position of the Provisional Government of Northern Russia—namely, as to whether such government is one duly recognised by His Majesty's Government and has all the attributes of a sovereign state.

"In reply I am to inform you that the Provisional Government of Northern Russia is composed of Russian groups who do not recognise the authority of the Russian Central Soviet Government established at Moscow. The seat of the Government is Archangel, and it extends its authority over the territory surrounding that port and to the west of the White Sea up to the Finnish frontier. As the title assumed by that Government indicates, it is merely provisional in nature, and has not been formally recognised either by His Majesty's Government or by the Allied Powers as the Government of a sovereign independent state.

His Majesty's Government and the Allied Powers are however at the present moment co-operating with the Provisional Government in the opposition which that Government is making to the forces of the Russian Soviet Government, who are engaged in aggressive military operations against it, and are represented at Archangel by a British Commissioner. The representative of the Provisional Government in London is Monsieur Nabokoff, through whom His Majesty's Government conduct communications with the Archangel Provisional Government.

"I am, Sir, etc."

HILL J. I will deal first with the Annette. In this case a writ *in rem* has been issued by Anton Altenbrun, "on behalf of himself and all others, the owners of the sailing vessel Annette," against "the persons in possession of the sailing vessel Annette, and all others claiming any rights or interest therein." A warrant of arrest has also been taken out and executed, the ship is under the arrest of the Court, and the writ has been served *in rem* upon the ship. . . .

I will deal first with the main point, which is that the vessel is in the possession of a Government which for the time being is a sovereign Government, and is being used by that Government for public purposes; and accordingly that the Court cannot allow arrest of the ship and cannot compel the Government by arrest to submit to a jurisdiction to which it is under no obligation to submit unless it chooses to do so. In my opinion the answer to that depends upon the consideration of two or possibly three matters. First, is this Government for the time being—I think it is sufficient if it is for the time being—recognized by the British Government as a sovereign power? Secondly, is it in fact in possession of the vessel? And, thirdly, it might be necessary to consider, if it is in possession, is it using the vessel for public purposes?[17] I am not sure that if I were satisfied that the Provisional Government was a sovereign power, and was in possession, I should consider myself at liberty to look any further.

On the question whether this Government which claims to be a *de facto* sovereign power is so recognized, I invited the assistance of the Foreign Office, and I have their letter. Having read the letter with great care, I am unable to draw from it the conclusion that the Provisional Government of Northern Russia is recognized by the British Government as a sovereign power. (His Lordship read the letter set out above and continued:)

The position upon this letter seems to me to be very different from the position in The Gagara [[1919] P. 95], where statements were made to the Court by the Law Officers of the Crown as to the recognition of the Esthonian Provisional Government. I have here a mere negative statement that the Provisional Government of Northern Russia "has

[17] See ch. 6, §3, *infra*, 594.

not been formally recognised" by his Majesty's Government. I am asked to infer from that that it has been "informally recognised" as a sovereign state. I do not think I ought to draw that conclusion. I must be satisfied before I can recognize the Provisional Government of Northern Russia as a sovereign state, for the purposes of this case, that the British Government so recognize it. I am not satisfied. . . .

[In an omitted part of the opinion the court examined the affidavits and concluded that they wholly failed to show that the vessels were in the possession of the Provisional Government, even if the Provisional Government were to be regarded as the government of a sovereign power.]

The motions in both cases are dismissed with costs.[18]

Oetjen v. Central Leather Company

United States. Supreme Court. 1918.

246 *United States Reports* 297.

The cases are stated in the opinion.

[The names of counsel are omitted.]

Mr. Justice Clarke delivered the opinion of the court.

These two cases involving the same question, were argued and will be decided together. They are suits in replevin and involve the title

[18] See McNair, "Judicial Recognition of States and Governments, and the Immunity of Public Ships," B. Y. B. Int. L. (1921–22) 57.

On the conclusive effect in the courts of the political department's decision on a question of recognition, see The Manilla, Edw. Adm. 1; The Happy Couple, Stewart 65; The Pelican, Edw. Adm. App. D; Republic of Peru v. Peruvian Guano Co., 36 Ch. D. 489; Mighell v. Sultan of Johore [1894] 1 Q. B. 149, *infra*, 554; Luther v. Sagor & Co. [1921] 1 K. B. 456, [1921] 3 K. B. 532; Duff Development Co. v. Government of Kelantan [1924] A. C. 797, 805–9, 810–16, 822–8, 830, *infra*, 639, 640, 643; Rose v. Himely, 4 Cr. 241, *infra*, 502; Clark v. United States, 3 Wash. C. C. 101; United States v. Hutchings, 2 Wheeler's C. C. 543; Gelston v. Hoyt, 3 Wh. 246; United States v. Palmer, 3 Wh. 610; The Divina Pastora, 4 Wh. 52; Kennett v. Chambers, 14 How. 38, *infra*, 802; The Hornet, 12 Fed. Cas. 529; The Ambrose Light, 25 Fed. 408; Agency of Canadian Car and Foundry Co. v. American Can Co., 253 Fed. 152, 258 Fed. 363; Lehigh Valley R. Co. v. State of Russia, 21 F. (2d) 396, *infra*, 905; Bluntschli, §122; Despagnet, 4th ed, §83; Dickinson, "The Unrecognized Government or State in English and American Law," 22 Mich. L. Rev. 29, 118; Dickinson, "Recent Recognition Cases," 19 Am. Jour. Int. L. 263; Henry, Les Gouvernements de Fait devant le Juge, 63; Le Normand, La Reconnaissance Internationale, 277. See also ch. 1, §4, n. 36, *supra*, 73; ch. 2. §5, *infra*, 137.

On the appropriate procedure for ascertaining the political department's decision, see Taylor v. Barclay, 2 Sim. 213; Mighell v. Sultan of Johore [1894] 1 Q. B. 149, *infra*, 554; Luther v. Sagor & Co. [1921] 3 K. B. 532; Jones v. United States, 137 U. S. 202, 216; Underhill v. Hernandez, 168 U. S. 250, 253; In re Taylor, 118 Fed. 196, 197, *supra*, 85, 86; Russian Government v. Lehigh Valley R. Co., 293 Fed. 133, 135.

to two large consignments of hides, which the plaintiff in error claims to own as assignee of Martinez & Company, a partnership engaged in business in the city of Torreon, Mexico, but which the defendant in error claims to own by purchase from the Finnegan-Brown Company, a Texas corporation, which it is alleged purchased the hides in Mexico from General Francisco Villa, on January 3, 1914.

The cases were commenced in a Circuit Court of New Jersey, in which judgments were rendered for the defendants, which were affirmed by the Court of Errors and Appeals, and they are brought to this court on the theory, that the claim of title to the hides by the defendant in error is invalid because based upon a purchase from General Villa, who, it is urged, confiscated them contrary to the provisions of the Hague Convention of 1907 respecting the laws and customs of war on land; that the judgment of the state court denied to the plaintiff in error this right which he "set up and claimed" under the Hague Convention or treaty; and that this denial gives him the right of review in this court.

A somewhat detailed description will be necessary of the political conditions in Mexico prior to and at the time of the seizure of the property in controversy by the military authorities. It appears in the record, and is a matter of general history, that on February 23, 1913, Madero, President of the Republic of Mexico, was assassinated; that immediately thereafter General Huerta declared himself Provisional President of the Republic and took the oath of office as such; that on the twenty-sixth day of March following General Carranza, who was then Governor of the State of Coahuila, inaugurated a revolution against the claimed authority of Huerta and in a "Manifesto addressed to the Mexican Nation" proclaimed the organization of a constitutional government under "The Plan of Guadalupe," and that civil war was at once entered upon between the followers and forces of the two leaders. When General Carranza assumed the leadership of what were called the Constitutionalist forces he commissioned General Villa his representative, as "Commander of the North," and assigned him to an independent command in that part of the country. Such progress was made by the Carranza forces that in the autumn of 1913 they were in military possession, as the record shows, of approximately two-thirds of the area of the entire country, with the exception of a few scattered towns and cities, and after a battle lasting several days the City of Torreon in the State of Coahuila was captured by General Villa on October 1 of that year. Immediately after the capture of Torreon, Villa proposed levying a military contribution on the inhabitants, for the support of his army, and thereupon influential citizens, preferring to provide the required money by an assessment upon the community to having their property forcibly seized, called together a largely attended meeting and, after negotiations with General Villa as to the amount

to be paid, an assessment was made on the men of property of the city, which was in large part promptly paid. Martinez, the owner from whom the plaintiff in error claims title to the property involved in this case, was a wealthy resident of Torreon and was a dealer in hides in a large way. Being an adherent of Huerta, when Torreon was captured Martinez fled the city and failed to pay the assessment imposed upon him, and it was to satisfy this assessment that, by order of General Villa, the hides in controversy were seized and on January 3, 1914, were sold in Mexico to the Finnegan-Brown Company. They were paid for in Mexico, and were thereafter shipped into the United States and were replevied, as stated.

This court will take judicial notice of the fact that, since the transactions thus detailed and since the trial of this case in the lower courts, the Government of the United States recognized the Government of Carranza as the *de facto* government of the Republic of Mexico, on October 19, 1915, and as the *de jure* government on August 31, 1917. Jones v. United States, 137 U. S. 202; Underhill v. Hernandez, 168 U. S. 250.

On this state of fact the plaintiff in error argues that the "Regulations" annexed to the Hague Convention of 1907 "Respecting Laws and Customs of War on Land" constitute a treaty between the United States and Mexico; that these "Regulations" forbid such seizure and sale of property as we are considering in this case; and that, therefore, somewhat vaguely, no title passed by the sale made by General Villa and the property may be recovered by the Mexican owner or his assignees when found in this country.

It would, perhaps, be sufficient answer to this contention to say that the Hague Conventions are international in character, designed and adapted to regulate international warfare, and that they do not, in terms or in purpose, apply to a civil war. Were it otherwise, however, it might be effectively argued that the declaration relied upon that "private property cannot be confiscated" contained in Article 46 of the Regulations does not have the scope claimed for it, since Article 49 provides that "money contributions" . . . "for the needs of the army" may be levied upon occupied territory, and Article 52 provides that "Requisitions in kind and services shall not be demanded . . . except for the needs of the army of occupation," and that contributions in kind shall, as far as possible, be paid for in cash, and when not so paid for a receipt shall be given and payment of the amount due shall be made as soon as possible. And also for the reason that the "Convention" to which the "Regulations" are annexed, recognizing the incomplete character of the results arrived at, expressly provides that until a more complete code is agreed upon, cases not provided for in the "Regulations" shall be governed by the principles of the law of nations.

But, since claims similar to the one before us are being made in many cases in this and in other courts, we prefer to place our decision upon the application of three clearly settled principles of law to the facts of this case as we have stated them.

The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—"the political"—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision. United States v. Palmer, 3 Wheat. 610; Foster v. Neilson, 2 Pet. 253, 307, 309; Garcia v. Lee, 12 Pet. 511, 517, 520; Williams v. Suffolk Ins. Co., 13 Pet. 415, 420; In re Cooper, 143 U. S. 472, 499. It has been specifically decided that "Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but is a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances." Jones v. United States, 137 U. S. 202, 212.

It is also the result of the interpretation by this court of the principles of international law that when a government which originates in revolution or revolt is recognized by the political department of our government as the *de jure* government of the country in which it is established, such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence. Williams v. Bruffy, 96 U. S. 176, 186; Underhill v. Hernandez, 168 U. S. 250, 253. See s. c. 65 Fed. Rep. 577.

To these principles we must add that: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves." Underhill v. Hernandez, 168 U. S. 250, 253; American Banana Co. v. United Fruit Co., 213 U. S. 347.

Applying these principles of law to the case at bar, we have a duly commissioned military commander of what must be accepted as the legitimate government of Mexico, in the progress of a revolution, and when conducting active independent operations, seizing and selling in Mexico, as a military contribution, the property in controversy, at the time owned and in the possession of a citizen of Mexico, the assignor of the plaintiff in error. Plainly this was the action, in Mexico, of the legitimate Mexican government when dealing with a Mexican citizen, and, as we have seen, for the soundest reasons, and upon repeated

decisions of this court such action is not subject to reëxamination and modification by the courts of this country.

The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of a court, such as we have here, as it was held to be to the cases cited, in which claims for damages were based upon acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign State to be reëxamined and perhaps condemned by the courts of another would very certainly "imperil the amicable relations between governments and vex the peace of nations."[19]

It is not necessary to consider, as the New Jersey court did, the validity of the levy of the contribution made by the Mexican commanding general, under rules of international law applicable to the situation, since the subject is not open to reëxamination by this or any other American court.

The remedy of the former owner, or of the purchaser from him, of the property in controversy, if either has any remedy, must be found in the courts of Mexico or through the diplomatic agencies of the political department of our Government. The judgments of the Court of Errors and Appeals of New Jersey must be

Affirmed.[20]

OPPENHEIM, INTERNATIONAL LAW

Third Edition, Volume I, page 139, section 75. 1920.

§75. Recognition of a new State must not be confounded with other recognitions. Recognition of insurgents as a belligerent Power has already been mentioned. Besides this, recognition of a change in the headship of a State, or in the form of its Government, or of a change in the title of an old State, are matters of importance. But the granting or refusing of these recognitions has nothing to do with recognition of

[19] See Blad v. Bamfield, 3 Swanst. 604; Dobree v. Napier, 2 Bing. N. C. 781; Regina v. Lesley, Bell's C. C. 220, *infra*, 420; Phillips v. Eyre, 6 Q. B. 1; Car v. Fracis Times & Co. [1902] A. C. 176; Luther v. Sagor & Co. [1921] 3 K. B. 532; Underhill v. Hernandez, 65 Fed. 577, 168 U. S. 250; American Banana Co. v. United Fruit Co., 213 U. S. 347, *infra*, 408; Ricaud v. American Metal Co., 246 U. S. 304; Hewitt v. Speyer, 250 Fed. 367. See also ch. 1, n. 36, *supra*, 73.

[20] See also Luther v. Sagor & Co. [1921] 3 K. B. 532; White, Child, & Beney, Ltd., v. Simmons, 127 L. T. R. 571; Murray v. Vanderbilt, 39 Barb. 140; Underhill v. Hernandez, 168 U. S. 250; State of Yucatan v. Argumedo, 157 N. Y. Supp. 219; Ricaud v. American Metal Co. 246 U. S. 304; Oliver American Trading Co. v. Government of Mexico, 5 F. (2d) 659; 35 Harv. L. Rev. 607; 22 Mich. L. Rev. 29, 44.

And see M'Ilvaine v. Coxe's Lessee, 4 Cr. 209; Harcourt v. Gaillard, 12 Wh. 523.

the State itself. If a foreign State refuses the recognition of a new head, or of a change in the form of the Government of an old State, the latter does not thereby lose its recognition as an International Person, although no official intercourse is henceforth possible between the two States as long as recognition is not given either expressly or tacitly. And if recognition of a new title of an old State is refused, the only consequence is that such State cannot claim any privileges connected with the new title. However this may be, if a State has not recognised insurgents in a foreign State as a belligerent Power, or has not recognised the new head or a change in the form of Government of a foreign State, the courts of the State refusing recognition cannot on their own account grant such recognition, which is purely a matter for their Government.[21]

SECTION 3. LEGAL CAPACITY OF INTERNATIONAL PERSONS

KENT, COMMENTARIES ON AMERICAN LAW

Volume I, page 21. 1826.

Nations are equal in respect to each other, and entitled to claim equal consideration for their rights, whatever may be their relative dimensions or strength, or however greatly they may differ in government, religion, or manners. This perfect equality, and entire independence of all distinct states, is a fundamental principle of public law. It is a necessary consequence of this equality, that each nation has a right to govern itself as it may think proper, and no one nation is entitled to dictate a form of government, or religion, or a course of internal policy, to another. No state is entitled to take cognizance or notice of the domestic administration of another state, or of what passes within it as between the government and its own subjects.[22]

LORIMER, THE INSTITUTES OF THE LAW OF NATIONS

Volume I, page 171. 1883.

If all that was meant were that all States are equally entitled to assert such rights as they have, and that they have thus an equal interest in the vindication of law, the assertion would be true of States, as of citizens and individuals. Small States might be more dependent on

[21] See The Rogdai, 278 Fed. 294; The Rogday, 279 Fed. 130; Russian Government v. Lehigh Valley R. Co., 293 Fed. 133, 135; Lehigh Valley R. Co. v. State of Russia, 21 F. (2d) 396, *infra*, 905; 17 Am. Jour. Int. L. 742; 19 *ibid.* 264.

[22] See Le Louis, 2 Dods. 210, 243; The Parlement Belge, L. R. 5 P. D. 197, 206, 214; Schooner Exchange v. M'Faddon, 7 Cr. 116, 136–7, *infra*, 594, 596; La Jeune Eugenie, 2 Mason 409, 452, *supra*, 13, 19; The Antelope, 10 Wh. 66, 122, *supra*, 20, 23.

positive law than great States, but the same may be said of small men as compared with great men. This, however, is not the meaning of the doctrine at all. If we look into the authorities we shall find that what is meant, though of course by no means consistently maintained, is really what is said—*viz.*, that the rights of States are equal in themselves, and not merely the right of asserting their rights.

FIORE, TRATTATO DI DIRITTO INTERNAZIONALE PUBBLICO

Fourth Edition, Volume I, page 289, sections 420–421. 1904.

420. Every state has the right to be considered in the international society as the equal of others in whatever concerns its juridical capacity, the faculty of exercising its rights, and the extent of its international obligations. Whether states are great or small, weak or strong, a superiority or limitation not common to all cannot be lawful.

421. Consequently we may formulate the following rules:

(a) Whatever is lawful, equitable, or just for one state should be equally lawful, equitable or just for others;

(b) The greater or less extent of territory, number of population, and power can never modify the perfect juridical equality of states in all that concerns the exercise of their rights and the fulfilment of their duties. [Editor's transl.]

DICKINSON, THE EQUALITY OF STATES IN INTERNATIONAL LAW

Harvard Studies in Jurisprudence, Volume III, pages 189, 221. 1920.

It has been pointed out that equality among members of the society of nations is a matter of capacity. Limitations upon capacity may be either internal or external; internal as they are the result of the state's organic constitution, and external as they are the consequence of relations with other members of international society.

Internal limitations upon equality are imposed by the fundamental organization of the state. Before it can acquire personality in the law of nations the state must have *de facto* existence. This existence requires a considerable population, occupying a definite territory, having a separate political organization or government, and capable of entering into relations, by means of its government, with members of the society of nations. The *de facto* entity thus constituted acquires *de jure* personality through recognition by members of the international community.

As a juristic person in the society of nations the state can express itself only through its government, which is defined and limited in its organic constitution. As Despagnet says: "The relations of the con-

stitutional law of each country to international law are easy enough to understand. We know indeed that by the very necessity of things states can enter into relations among themselves only by means of an agency which is invested, from this point of view, with the powers of the state, and which represents the latter, considered as a moral person, either as it acquires rights or attempts to enforce rights previously acquired, or as it is obliged to respond to its obligations." [2 *Rev. Gén. de Dr. Int. Pub.* 184.]

Publicists frequently assert that the law of nations has no concern with the constitution of a state. Phillimore says: "It is a sound general principle, and one to be laid down at the threshold of the science of which we are treating, that International Law has no concern with the form, character, or power of the constitution or government of a State, with the religion of its inhabitants, the extent of its domain, or the importance of its position and influence in the commonwealth of nations." [3d ed., I, 81.] This must be taken to mean that, so far as the law of nations is concerned, the different peoples are free to set up whatever constitution or government they choose. It cannot be taken to mean that the law of nations is blind to all variations in the constitutions and governments of states, for certain of those variations are the source of important capacities and incapacities with respect to international relations. . . .

External limitations upon a state's international capacity are the result of certain relationships which it has with other members of the society of nations. Such limitations are created by general treaties, by certain special treaties creating relationships which obtain general recognition, and by the positive law of nations as proved by common usage. They operate to restrict the legal capacity of the state as an international person, rendering it incapable of acquiring certain international rights or of entering into certain international transactions. External limitations have two important characteristics: (1) the state cannot divest itself of the incapacity by its own act; (2) the state is placed in a position of legal incapacity with respect to the entire community of nations. Wherever limitations of this kind apply only to a single state or to a particular group of states, the state or group affected is in a condition of legal inequality with respect to other members of the society of nations. Inequalities of condition or status have always played an important part in international relations. There are indications that their importance will increase as the international community becomes more closely integrated.[23]

[23] On the general question of the legal capacity of international persons—the so-called equality of states—see Baker, "The Doctrine of Legal Equality of States," B. Y. B. Int. L. (1923–24) 1; Dickinson, Equality of States; Goebel, Equality of States; McNair, "Equality in International Law," 26 Mich. L. Rev. 131.

SECTION 4. LIMITATIONS UPON THE LEGAL CAPACITY OF INTERNATIONAL PERSONS

The Constitution of the United States

Article 2. 1789.

Sect. I. 1. The executive power shall be vested in a President of the United States of America. . . .

Sect. II. 2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the Senate shall appoint, ambassadors, other public ministers, and consuls. . . . [24]

The Constitution of Mexico

Article 15. 1917.

British and Foreign State Papers, Volume 111, *pages* 778, 781.

Art. 15. No Treaty shall be authorised for the extradition of political offenders, or of offenders of the common class, who have been slaves in the country where the offence was committed. Nor shall any agreement or Treaty be entered into which abridges or modifies the guarantees and rights which this constitution grants to the individual and to the citizen.[25] [Branch's transl.]

[24] "Constitutions are at best only the skeletons of bodies politic. But like most skeletons they are of fundamental importance. They determine the height, the solidity, and something concerning the shape, general contour, and functional possibilities of the bodies they support." McBain and Rogers, New Constitutions of Europe, preface.

[25] See also Constitution of Egypt, 1923, art. 151, 118 Br. & For. S. P. 198, 213; Constitution of Honduras, 1924, arts. 10, 16, Pan Am. Union, L. & T. S. No. 2, pp. 4, 5; Constitution of Nicaragua, 1911, art. 16, 107 Br. & For. S. P. 1038, 1040; Constitution of Salvador, 1886, art. 11, Rodriguez, I, 260, 261.

The extradition of nationals is forbidden by Constitution of Danzig, 1922, art. 76, 118 Br. & For. S. P. 119, 131; Constitution of Germany, 1919, art. 112, McBain and Rogers, 176, 198; Constitution of Salvador, 1886, art. 11, Rodriguez, I, 260, 261; Constitution of the Serb, Croat, and Slovene State, 1921, art. 20, McBain and Rogers, 348, 353.

See further Constitution of Costa Rica, 1871, art. 15, and amendment of 1888, Rodriguez, I, 326, 328, 356; Constitution of the Dominican Republic, 1924, art. 100, Pan Am. Union, L. & T. S. No. 1, p. 27; Constitution of Ecuador, 1906, art. 6, 104 Br. & For. S. P. 918; Constitution of N caragua, 1911, art. 2, 107 Br. & For. S. P. 1038; Constitution of Panama, 1904, art. 136, Rodriguez, I, 392, 420; Constitution of Salvador, 1886, arts. 38, 49, Rodriguez, I, 260, 266, 268; Constitution of Venezuela, 1925, art. 100, par. 20.

The Constitution of Argentine

Articles 20 and 25. 1860.

The Argentine Civil Code, Publication of the Comparative Law Bureau of the American Bar Association, pages xxxvii, xxxviii.

20. Aliens enjoy in the territory of the Nation all the civil rights of citizens; they may engage in their industry, commerce, or profession; possess, purchase, and dispose of real property; navigate the rivers and coastal waters; freely practice their religious faith; make testaments and marry in accordance with the laws. They are not obliged to accept citizenship, or to pay forced extraordinary taxes. They obtain naturalization by residing two consecutive years in the Nation; but the authorities may reduce this period in favor of an applicant who claims and proves services to the Republic.[26]

25. The Federal Government shall encourage European immigration; and it shall not restrict, limit, or obstruct by taxation of any kind the entry into Argentine territory of aliens coming to it for the purpose of working the land, improving industries, or introducing and teaching arts and sciences.[27] [Joannini's transl.]

The Constitution of Mexico

Article 27. 1917.

British and Foreign State Papers, Volume 111, *pages* 778, 787.

Art. 27. . . . Legal capacity to acquire ownership of lands and waters of the nation shall be governed by the following provisions:—

(1) Only Mexicans by birth or naturalisation and Mexican companies have the right to acquire ownership in lands, waters and their appurtenances, or to obtain concessions to develop mines, waters or mineral fuels in the Republic of Mexico. The nation may grant the same right

[26] See also Constitution of Belgium, 1831, art. 128, McBain and Rogers, 501, 518; Constitution of Bolivia, 1880, art. 4, Rodriguez, II, 413; Constitution of Brazil, 1926, art. 72, Pan Am. Union, L. & T. S. No. 5, p. 34; Constitution of Costa Rica, 1871, art. 12, Rodriguez, I, 326, 328; Constitution of Cuba, 1901, art. 10, Rodriguez, II, 112, 114; Constitution of Czechoslovakia, 1920, art. 106, McBain and Rogers, 310, 330; Constitution of Ecuador, 1906, art. 28, 104 Br. & For. S. P. 918, 923; Constitution of Haiti, 1918, art. 4, 112 Br. & For. S. P. 1113; Constitution of Honduras, 1924, arts, 12–13, Pan Am. Union, L. & T. S. No. 2, p. 4; Constitution of Portugal, 1911, art. 3, 105 Br. & For. S. P. 766.

[27] See also Constitution of Paraguay, 1870, art. 6, Rodriguez, II, 381, 382. The Constitution of Bolivia, 1880, art. 4, Rodriguez, II, 413, provides in part as follows: "Every man has the right to enter the territory of the Republic, remain therein, travel through it, leave it, without any other restrictions than those established by international law." *Cf.* Constitution of Mexico, 1917, art. 33, 111 Br. & For. S. P. 778, 793.

to foreigners, provided they agree before the Department of Foreign Affairs to be considered Mexicans in respect to such property, and accordingly not to invoke the protection of their Governments in respect to the same, under penalty, in case of breach, of forfeiture to the nation of property so acquired. Within a zone of 100 kilom. from the frontiers, and of 50 kilom. from the sea coast, no foreigners shall under any conditions acquire direct ownership of lands and waters.[28] [BRANCH's transl.]

FIORE, IL DIRITTO INTERNAZIONALE CODIFICATO E LA SUA SANZIONE GIURIDICA

Fifth Edition, page 223, section 398. 1915.

398. The effective enjoyment of rights, which presuppose certain conditions of fact, may be refused to states which do not at the present time meet the factual requirements.

One can understand, for instance, that the right to hoist a flag can only belong to states which have seacoasts. Therefore, Switzerland was wrong in assuming the right to fly the federal maritime flag on the high seas.[29] [BORCHARD's transl.]

OGILVIE, INTERNATIONAL WATERWAYS

Preface, page ii. 1920.

An inland state having no navigable access to the sea may suffer during war economic restrictions which may jeopardize its supply of vital commodities. By reason of the exigencies of the World War, Switzerland, though having no mercantile marine, chartered merchant vessels from neutral and belligerent countries, obtaining some of them from the United States Shipping Board. In accordance with arrangements made with the German Government, these vessels were granted safe conducts on condition that they should bear distinguishing marks

[28] See BULLINGTON, "Land and Petroleum Laws of Mexico," 22 Am. Jour. Int. L. 50. See also Constitution of Peru, 1920, art. 39, Pan Am. Union, L. & T. S. No. 4, p. 7.

And see Constitution of Guatemala, 1879, art. 23, RODRIGUEZ, I, 236, 239; Constitution of Honduras, 1924, art. 15, Pan Am. Union, L. & T. S. No. 2, p. 5; Constitution of Nicaragua, 1911, art. 15, 107 Br. & For. S. P. 1038, 1040; Constitution of Venezuela, 1925, art. 50.

On constitutional provisions affecting the legal capacity of international persons, in general, see DICKINSON, Equality of States, ch. 6.

[29] See BLUNTSCHLI, §325; Calvo, 5th ed., I, §427; DICKINSON, Equality of States, 221; FAUCHILLE, I, Pt. II, 904; HUBER, Die rechtlichen Verhältnisse einer schweizerischen Meerschiffahrt unter Schweizerflagge; OPPENHEIM, 4th ed., I, §258; TWISS, 2d ed., I, 327; WESTLAKE, 2d ed., I, 169.

And see The Möwe [1915] P. 1, 13; The Fenix, 10 Am. Jour. Int. L. 909, 910, 912.

indicating the fact that they were chartered by Switzerland and that their cargoes were destined for that country. The United States agreed to permit the Shipping Board's vessels to go without convoy, provided the vessels bore such marks. Under these arrangements, the Swiss flag was flown from the foremast, and the flag of the country where the vessel was registered was displayed from the mainmast. The hull of the ship bore the Swiss cross and the word *Schweiz* was painted in large letters on the free-board. Flying two flags in this manner, it might be said, that one flag testified to the national character of the vessel and the other to the character of the cargo.

Declaration Recognising the Right to a Flag of States Having no Seacoast

Barcelona, April 20, 1921.

7 *League of Nations Treaty Series* 74.

The undersigned, duly authorised for the purpose, declare that the States which they represent recognise the flag flown by the vessels of any State having no sea-coast which are registered at some one specified place situated in its territory; such place shall serve as the port of registry of such vessels.[30]

Hyde, International Law

Volume I, pages 49–50, section 33. 1922.

The existence and observance of principles of an international system of law designed to govern the members of the society of nations, is due to the circumstance that there is a common civilization possessed by and familiar to each of them, and which enables each to regulate its conduct in accordance with the demands made upon all. Thus what are known as the States of international law, notwithstanding the sharp differences between some of them, resemble each other in the possession of what is described as European civilization. This is none the less true despite the completeness of the occasional failure of particular States under certain conditions to respond to the requirements of that civilization.

The situation is otherwise with respect to countries not possessed of and, therefore, unfamiliar with European civilization. This is true whether they are essentially uncivilized, or enjoy a civilization which,

[30] The Declaration was signed by thirty-one states. Up to September 1, 1928, twenty-seven states had ratified, or accepted as binding without ratification, or adhered. See L. of N. Doc., A. 6 (a), 1928, Annex, p. 13.

however tested, fails habitually to enable the possessors to meet the standards accepted by the States constituting the international society. Such failure commonly manifests itself in the inability to accord the requisite protection of foreign life and property, and in abuses of what are known as rights of jurisdiction.

With such countries the States of international law, nevertheless, find it expedient to hold diplomatic intercourse; and the capacity of the former to exercise rights of property and control over territory which they occupy is usually recognized. It is not, however, deemed to be incompatible with such conduct to withhold from such countries full rights of statehood. So long as they lack the capacity or disposition to accept the burdens of European civilization, at least in what pertains to the outside world, the States of international law demand and secure, as is elsewhere observed, the yielding of important rights of jurisdiction which are never relinquished by the territorial sovereign of a full-fledged and independent member of the family of nations.[31]

Treaty between China and the United States

Articles 11 and 27. Tientsin, June 18, 1858.

12 *United States Statutes at Large* 1023, 1025, 1029.

Art. 11. . . . Subjects of China guilty of any criminal act towards citizens of the United States shall be punished by the Chinese authorities according to the laws of China; and citizens of the United States, either on shore or in any merchant vessel, who may insult, trouble, or wound the persons or injure the property of Chinese, or commit any other improper act in China, shall be punished only by the consul or other public functionary thereto authorized, according to the laws of the United States. Arrests in order to trial may be made by either the Chinese or the United States authorities.

Art. 27. All questions in regard to rights, whether of property or person, arising between citizens of the United States in China, shall be subject to the jurisdiction and regulated by the authorities of their own government; and all controversies occurring in China between citizens of the United States and the subjects of any other government shall be regulated by the treaties existing between the United States and such governments, respectively, without interference on the part of China.

[31] See Cobbett, Cases, 3d ed., I, 45; Dickinson, Equality of States, 221, 223; Fiore, 4th ed., I, §§425–427; Lorimer, I, 216; Oppenheim, 4th ed., I, §28; Phillimore, 3d ed., I, 19; Westlake, 2d ed., I, 40. See also The Helena, 4 C. Rob. 3, *supra*, 82.

TREATY BETWEEN CHINA AND THE UNITED STATES

Article 4. Peking, November 17, 1880.

22 *United States Statutes at Large* 828, 829.

Art. 4. When controversies arise in the Chinese Empire between citizens of the United States and subjects of His Imperial Majesty, which need to be examined and decided by the public officers of the two nations, it is agreed between the Governments of the United States and China that such cases shall be tried by the proper official of the nationality of the defendant. The properly authorized official of the plaintiff's nationality shall be freely permitted to attend the trial and shall be treated with the courtesy due to his position. He shall be granted all proper facilities for watching the proceedings in the interests of justice. If he so desires, he shall have the right to present, to examine, and to cross-examine witnesses. If he is dissatisfied with the proceedings, he shall be permitted to protest against them in detail. The law administered will be the law of the nationality of the officer trying the case.

TREATY BETWEEN CHINA AND THE UNITED STATES

Article 15. Shanghai, October 3, 1903.

33 *United States Statutes at Large* 2208, 2215.

Art. 15. The Government of China having expressed a strong desire to reform its judicial system and to bring it into accord with that of Western nations, the United States agrees to give every assistance to such reform and will also be prepared to relinquish extra-territorial rights when satisfied that the state of the Chinese laws, the arrangements for their administration, and other considerations warrant it in so doing.[32]

[32] See also Treaty between China and Great Britain, Sept. 5, 1902, art. 12, 33 Martens, Nouv. Rec. Gén., 2 sér., 284, 293; Treaty between China and Japan, Oct. 8, 1903, art. 11, 31 *ibid.* 481, 486. And see Resolution Regarding Extraterritoriality in China, Washington, Dec. 10, 1921, 3 U. S. Treaties 3131; Report of Commission on Extraterritoriality in China, Peking, Sept. 16, 1926; KEETON, Development of Extraterritoriality in China.

Referring to the abolition of extraterritoriality in Turkey by the Treaty of Lausanne, WEISS, J., dissenting in the Lotus Case, remarked: "The new Turkey therefore finds herself freed from the hampering servitudes which for so long had placed her in a situation apart, in an inferior position amongst the nations; she now becomes their equal, having like them no other sovereign than international law." P. C. I. J. Publ., Series A, Judgment No. 9, p. 40.

CONVENTION BETWEEN PANAMA AND THE UNITED STATES

Article 1. Washington, November 18, 1903.

33 *United States* Statutes at Large 2234.

Art. 1. The United States guarantees and will maintain the independence of the Republic of Panama.[33]

PIÉDELIÈVRE, PRÉCIS DE DROIT INTERNATIONAL PUBLIC

Volume I, page 258, sections 286–287. 1894.

286. Treaties of guaranty are those by which a state obligates itself to give aid to another, whenever the other may be injured or threatened in the peaceable enjoyment of its rights. The idea involved in the notion of guaranty is therefore an idea of protection and assistance with a view to the acquisition or the preservation of certain rights, of assistance against actual or possible threats or injuries, of tutelage exercised over one power by another in order to safeguard its political or international interests.

287. It results that guaranty is applicable to all kinds of rights and obligations. Thus, the territorial possessions of a nation, its rights of sovereignty, the constitution of its internal government, the protection of a certain established order, such as the maintenance of a dynasty in power or of a condition of perpetual neutrality, the observance of the conditions and the execution of the clauses of a treaty, etc., may be the subjects of guaranty. It appears also that the guarantor, who is obligated to maintain the conditions or procure the observance of a treaty, to compel respect for an established form of government, to defend a prince against the eventuality of revolution, or to compel the application of established rules of succession to the throne of a certain dynasty, acquires the right to intervene in the internal affairs of third powers in order to secure to interested parties the objects of the guaranty. The latter renounce, therefore, to the former's advantage, a part of their independence and forbear to conserve the entirety of their juridical personality. Withal, as it has been very justly observed, such treaties of guaranty are the most fruitless and the most impolitic of all treaties.[34] [Editor's transl.]

[33] See HYDE, I, §20.

"As the Court has had occasion to state in previous judgments and opinions, restrictions on the exercise of sovereign rights accepted by treaty by the State concerned cannot be considered as an infringement of sovereignty." Permanent Court of International Justice, Jurisdiction of the European Commission of the Danube between Galatz and Braila, P. C. I. J. Publ., Series B, Advisory Opinion No. 14, p. 36.

[34] See DICKINSON, Equality of States, 221, 247; FAUCHILLE, I, Pt. III, 412; HOLTZENDORFF, III, 83; IDMAN, Le Traité de Garantie en Droit International; OPPENHEIM, 4th ed., I, §§574–576a; PRADIER-FODÉRÉ, II, 591; QUABBE, Die völkerrechtliche Garantie.

STATHAM v. STATHAM AND HIS HIGHNESS THE GAEKWAR OF BARODA

Great Britain. High Court of Justice; Probate, Divorce, and Admiralty Division. 1911.

Law Reports [1912] *Probate Division* 92.

These were two applications arising out of a husband's divorce petition.

[The statement of the case and the arguments of counsel are omitted. The facts are stated sufficiently in the opinion.]

BARGRAVE DEANE J. In this case Mr. George Wellington Statham has filed a petition praying the Court to dissolve his marriage on the ground of the adultery of his wife, Beatrix Alice Statham, with his Highness Maharaja Gaekwar Sir Saraji Rao III. of Baroda, who has been added as a co-respondent in the suit under s. 28 of the Divorce Act, 1857.

The first question which I have to determine is raised by summons on behalf of the co-respondent, in which the Court is asked to dismiss him from the suit on the ground that he is a reigning sovereign and by the rules of international law is not amenable to the jurisdiction of this Court.

The second question is the subject of a motion for leave to serve the co-respondent by substituted service, as it has been found impossible to personally serve the petition and citation upon him. This would follow almost as a matter of course if I were to find against the contention of his Highness raised on the summons.

There is no doubt that an independent reigning sovereign cannot by the rules of international law be made against his will a party to proceedings in our Courts. He may choose to sue, and if so a counter-claim may be raised against him as plaintiff, but he cannot be made a defendant.[35]

What then is the status of the Gaekwar of Baroda?

So far as I have been able to ascertain by my researches the princes of Baroda date their importance from the Mahratta Confederacy, which in the eighteenth century was a powerful body of confederated ruling chiefs in India. During the last thirty-two years of the eighteenth century the house of Baroda fell a prey to family feuds, and in 1800 the succession fell to a prince feeble in mind. Internal troubles arising, British troops were sent in defence of the hereditary ruler against all claimants, and in 1802 a treaty was signed by which the independence of the reigning prince of all except the British Crown was assured, but which, on the other hand, secured his dependence on the British Crown. Several weak but troublesome princes succeeded in succession to the throne of Baroda, and in 1874 the then reigning Gaekwar was by order of the British Government brought to trial on a charge of attempting to poison the British resident at his court. The trial was conducted before a mixed commission of eminent British officers and natives of the

[35] See ch. 6, *infra*, 526.

highest rank. A unanimous verdict was not obtained, and in the result, the then Viceroy of India, Lord Northbrook, deposed the Gaekwar and appointed another member of the royal house of Baroda to reign in his place.

In October, 1911, an action was brought in the King's Bench Division of the High Court in England by one Ernest Emmanuel against the present reigning Gaekwar, and Lush J., upon hearing counsel for both sides and having obtained a certificate from the India Office as to the status of the Gaekwar of Baroda, ordered that the writ in the action be set aside and all proceedings stayed on the ground that the defendant was an independent sovereign and not a subject of His Majesty the King. The certificate from the India Office is as follows:—

India Office Certificate.

"The Gaekwar of Baroda has been recognized by the Government of India as a ruling chief governing his own territories under the suzerainty of His Majesty. He is treated as falling within the class referred to in the Interpretation Act, 1889, section 18, sub-sec. 5, as that of native princes or chiefs under the suzerainty of His Majesty exercised through the Governor-General of India. The British Government does not regard or treat his Highness' territory as being part of British India or His Majesty's dominions, and it does not regard or treat him or his subjects as subjects of His Majesty.

"But, though his Highness is thus not independent, he exercises as ruler of his State various attributes of sovereignty, including internal sovereignty, which is not derived from British law, but is inherent in the ruling chief of Baroda, subject, however, to the suzerainty of His Majesty the King of England and to the exercise by the Government of India of such of the rights and powers of territorial sovereignty as have by treaty, usage, or otherwise passed to and are exercised by the suzerain, such as, for instance, the exercise of jurisdiction over Europeans and Americans in Baroda, of interference to settle disputes as to succession to the State or to put a stop to gross misrule in the State, or to regulate armaments and the strength of the military forces, &c."

What is the meaning of the word "suzerainty" and what are its essentials? Sir Courtenay Ilbert in his work on the Government of India gives a digest of statutory enactments relating to India, and in a supplemental part to that digest are contained definitions of expressions in the digest. He adopts the interpretations given in the Interpretation Act, 1889, and the Indian General Clauses Act, 1897, and in a note says the expression "suzerainty" is substituted by the Interpretation Act for the older expression "alliance" as indicating more accurately the relation between the rulers of these States and the British Crown as the paramount authority throughout India.

Thus "suzerainty" is a term applied to certain international relations between two sovereign States whereby one, whilst retaining a more or less limited sovereignty, acknowledges the supremacy of the other. Such a relation may be either in the nature of a fief, or conventional, *i.e.*, by some treaty of peace or alliance in contrast with the fief, which is a sovereignty granted by a lord paramount over some defined territory accompanied with an express grant of jurisdiction.[36]

Grotius (*De Jure Belli ac Pacis*) says unequal leagues are made not only between the conquerors and the conquered, but also between peoples of unequal power, even such as never were at war with one another. Grotius, Pufendorf, and Vattel agree that in unequal alliances the inferior power remains a sovereign State. Its subjects or citizens own allegiance only to their own sovereign. Over their disputes and internal dissensions the suzerain power as such has no jurisdiction. In short, the weaker power may exercise the rights of sovereignty so long as by so doing no detriment is caused to the interests or influence of the suzerain power. It follows that the inferior power must in all alliances with other States be controlled by its suzerain. Vattel says a weak State which in order to provide for its safety places itself under the protection of a more powerful one and engages to perform in return several offices equivalent to that protection, without, however, divesting itself of the right of government and sovereignty, does not cease to rank among the sovereigns who acknowledge no other law than the law of nations.

In my opinion this aptly states the true status of the present Gaekwar of Baroda and is consistent with the status of that sovereign prince as defined by the certificate from the India Office, and it follows that his Highness by international law is not capable of being made a co-respondent in a suit for dissolution of marriage in the High Court in England, and his name must be struck out as a co-respondent. I, however, give leave to the petitioner to proceed without making any co-respondent as to those paragraphs of the petition in which his Highness's name appears.[37]

The Charkieh

Great Britain. High Court of Admiralty. 1873.

Law Reports 4 *Admiralty and Ecclesiastical* 59.

[The statement of the case, the arguments of counsel, and part of the opinion are omitted. The facts are stated sufficiently in the opinion.]

[36] On suzerainty in the law of nations, see Dickinson, Equality of States, 236; Fauchille, I, Pt. I, 285; Hall, 8th ed., 32; Hyde, I, §§17–18; Oppenheim, 4th ed., I, §§90–91.

[37] See also Mighell v. Sultan of Johore [1894] 1 Q. B. 149; *infra*, 554; Duff Development Co. v. Government of Kelantan [1924] A. C. 797, *infra*, 639. And see King v. Earl of Crewe [1910] 2 K. B. 576. *Cf.* Cherokee Nation v. Georgia, 5 Pet. 1.

Sir Robert Phillimore. This is a cause instituted on behalf of the Netherlands Steamship Company, the owners of the steamship Batavier, and on behalf of the master, crew, and passengers thereof, against the screw steamship Charkieh and her freight, for damages arising out of a collision between the Batavier and the Charkieh in the river Thames, on the 19th of October, 1872.

The cause was instituted and the Charkieh was arrested by a warrant from this Court on the 21st of October.

No appearance was at that time entered on behalf of the owners of the Charkieh, but in the month of November an application was made on behalf of his Highness Ismail Pacha, Khedive of Egypt, to the Court of Queen's Bench for a prohibition to restrain this Court from proceeding further in the suit, and a rule nisi was granted, which rule was, after argument, on the 23rd of January, 1873, discharged. [Law Rep. 8 Q. B. 197.]

It appears from the report that the Court of Queen's Bench expressed no opinion upon the question which it was sought to raise on the application for a prohibition, deciding only that the question was one upon which this Court was specially qualified to adjudicate. Since this decision an appearance has been entered under protest for his Highness Ismail Pacha, the Khedive of Egypt, the owner of the Charkieh, and Admiral Latif Pacha, Minister of Marine of the government of Egypt. The pleadings on protest have been filed; they consist of a petition on behalf of his Highness the Khedive, an answer on behalf of the owners of the Batavier, a reply, and a conclusion. The petition concludes with a prayer to this Court—(His lordship here read the prayer of the petition).

The principal averments of fact and law in the petition are the following: That the Charkieh is the property of his Highness Ismail Pacha, the Khedive of Egypt, as reigning sovereign of the state of Egypt, and is a public vessel of the government and semi-sovereign state of Egypt. . . .

The answer, in substance, sets up that the Charkieh came to England on the footing of an ordinary merchant vessel, and was so treated without objection in all respects by the proper public authorities of England. That she was regularly advertised as a merchant vessel when about to leave Alexandria for England, and when again about to return, on the former occasion carrying cargo on the terms of ordinary bills of lading. It appears from the evidence that she was chartered to an English subject for the voyage to Alexandria.

The answer further submits that the Khedive "is not such a reigning sovereign as to entitle him or the government of Egypt to have accorded to the Charkieh by the comity of nations or otherwise the privileges or immunities of a public vessel of war of an independent sovereign or state, or the privilege of freedom from arrest and process in this suit." . . .

From these averments in the pleadings, and these facts in the evidence, the following questions arise:

1. Is the international status of the Khedive that of sovereign prince of Egypt?

2. Is he entitled by virtue of that status to claim the exemption of this ship from the jurisdiction of this Court?

3. If he be entitled to this privilege, has he waived or forfeited it?

I proceed to consider these questions in their order, and first, as to the international status of His Highness the Khedive. Very scanty evidence as to this status of the Khedive was produced before me at the hearing of the case. I was told by the counsel for his Highness that it was considered improper to offer evidence upon this subject, that it was my duty to take official cognisance of that status, and to obtain, by reference to the Foreign Office, any information which I might think necessary. Whether this was, or was not, the right course on the part of counsel to adopt, I do not now stop to inquire. I have endeavoured to inform myself, and have had recourse to the following sources of knowledge:

1. The general history of the government of Egypt.

2. The firmans which contain the public law of the Ottoman Empire on this subject.

3. The European treaties, which concern the relations between Egypt and the Porte.

4. The answer which the Foreign Office has furnished to an inquiry which I thought it my duty to make[38]. . . .

In 1806 A.D., an important epoch begins. In that year Mohammed Ali obtained from the Sultan a legal nomination to the Pachalic of Egypt, the actual authority of which he was already exercising. . . . During the interval between this period and 1831 A.D., he possessed an army of 60,000 men and a considerable navy, established a *de facto* empire from Senaar and Kadofan over all Syria to Adana, a part of Cilicia at the foot of Mount Taurus, and ruled over the island of Candia. The Porte, struggling with the rebellion of the Pacha of Janina, not subdued till 1822 A.D., and the uprising of the Greeks, whose liberties were established by the battle of Navarino in 1827 A.D., opposed a fitful, underhand, and feeble opposition to the continued practical aggression, however disguised in language, of its great subject.

Between the battle of Navarino (1827 A.D.) and the treaty, presently to be mentioned, of 1833 A.D., an important portion of Egyptian history intervenes, having a more immediate and direct bearing upon the question of public and international law which I am called upon to

[38] Sir Robert Phillimore's course was disapproved, and it was said that he should have treated the answer received from the Foreign Office as conclusive, in Mighell v. Sultan of Johore [1894] 1 Q. B. 149, 158, 160, 161, *infra*, 554, 556.

decide. Mohammed Ali, on being refused the Pachalic of Acre by the Porte, found various pretexts for the invasion of Syria, on the actual possession of which, it was manifest, the supremacy of the Porte or of the Khedive of Egypt would depend.

In 1831 A.D., the Egyptian army and Ibrahim Pacha passed the frontier. As soon as the Porte was apprised of this event, an order was immediately despatched to Mohammed Ali to recall his troops. To these and further orders he turned a deaf ear. An official declaration of war against him, preceded by a religious anathema or public declaration that he and his sons were rebels, and out of the pale of Mussulman law, did not stop his course.

In May, 1832, Acre was captured by his troops. Not long afterwards all Syria was conquered for him by Ibrahim, his general and son. The armies of the Porte were routed and destroyed, and the advance of the conqueror upon Constantinople was only prevented by the intervention of the great European Powers. Nevertheless, by a kind of convention usually called the treaty of Kutaieh [See Testa, *Recueil des Traités de la Porte Ottomane*, *t.* ii. 354], between the Sultan and Mohammed, the latter obtained a great addition of power and territory; for he retained possession of Syria and the passes of Mount Taurus or the district of Adana. He undertook indeed to pay tribute for Syria, as well as Egypt; but, with his army and navy untouched, and with these possessions, the Pacha of Egypt was allowed to remain, in fact, more powerful than his nominal master at Constantinople.

Here I will pause a moment to consider the law applicable to the facts as now stated.

What were the relations at this epoch existing between the Khedive and the Porte, and what was the nature and character of the authority of the former, so far as foreign states are connected with these considerations? Did they entitle the Khedive to the privilege of the sovereign of an independent state? These are questions which must be answered, like all others appertaining to international jurisprudence, by a reference to usage, authority, and the reason of the thing.

Many accredited writers and jurists have drawn a distinction, which seems not to have escaped the framer of the Khedive's petition on protest now before me—between a sovereignty absolute and pure, and that less complete and perfect dominion to which the name of half-sovereignty (*demi-souverain*) has been given. I am inclined to think that the sovereign of a state in the latter category may be entitled to require from foreign states the consideration and privileges which are unquestionably incident to the sovereign of a state who is in the former category. There are also certain acts of feudal homage, or, as jurists say, *servitutes juris gentium*, which do not disentitle the state obliged to them to an international existence as a separate state.

Some examples of half sovereignties are to be found in history. Some of the smaller states (*halb souverain*) of the German confederation, before it was virtually destroyed by Napoleon's confederation of the Rhine, and formally extinguished by the abdication of the Emperor Francis in 1806, also furnished examples of states *cum imminutione imperii*—to borrow the expression of Grotius [Grotius, *De Jure Belli et Pacis*, lib. ii. c. xv. s. vii. 1; Cambridge edition, 1853, vol. 2, p. 136]—but entitled to be treated as states by foreign powers. The old feudal relations of the Dukes of Burgundy, Normandy, and Brittany to France did not, I believe, prevent these princes from being considered as sovereigns at home and abroad, and from being entitled to be represented by ambassadors at foreign courts. . . .

It has been well said by a commentator on Martens' work:—

"*La souveraineté extérieure n'est autre chose que l'indépendance de l'État vis-à-vis des autres états.*" [Pinheiro Ferreira on Martens, *Précis du droit des gens*, edited by Vergé, l. i. c. 3, s. 23, t. i. p. 98, Paris, 1858.]

It may, moreover, be that, if such a status existed *de facto*, it would not be the province of the tribunals of a foreign state to look beyond the fact, or to inquire minutely or at all into the history of its establishment. International law has no concern with the form, character, or power of a state, if, through the medium of a government, it has such an independent existence as to render it capable of entertaining international relations with other states. An apt illustration of this position is furnished by the status accorded by European Powers in more modern times to what were once commonly called the Barbary States. . . .

If, at this period, I had been obliged to decide whether the Pacha of Egypt was entitled to the privilege of a sovereign in this country, my decision would have been influenced by a regard to the *de facto* sovereign rights apparently exercised at this period by his Highness; and perhaps the analogy of an European state having absolute dominion over its own subjects with feudal subordination to another state might have been cited with effect.

Though, even in this crisis of the history of Egypt, when the independence of that country was so nearly established, it must be observed that no attempt appears to have been made on behalf of the Pacha to exercise the principal international attribute of sovereignty, namely, the *jus legationis*, to be represented by an ambassador or diplomatic agent at the court of foreign sovereigns; nor is there any reason to believe that such an attempt, if made, would have been successful.

But in the interval between 1833 A.D. and 1841 A.D. the scene is greatly changed. The actors remain, but play very different parts.

Nor is it unimportant to observe, with reference to the question immediately before me, that the stream of Egyptian political history, however immiscible the characters of the individual Mohammedan and

Christian may be, has ever since this epoch been greatly affected by the currents of European diplomacy. I pass by earlier treaties and the treaty of Unkiar Skelessi in 1833 A.D. [Martens, *Nouveau Recueil de Traités, tom.* xi. p. 655; State Papers, vol. 20, p. 1176], which, placing Turkey under the protectorate of Russia, has been superseded by a later treaty. Mohammed Ali and Ibrahim, in 1834 A.D., pursued the scheme of uniting all the provinces belonging to the caliphate under their Government; but discontents arose among the natives of Syria, which were not appeased by the disarmament of the Druses and of the population generally. These discontents revived the hopes of the Sultan, and, in 1839 A.D., he sent another army into Syria, which was defeated at Nezib. But in 1840 A.D., Mohammed Ali was made aware that the European powers would not allow an Arab empire to be established on the ruins of the Ottoman state.

England sent an agent to warn the Pacha of his danger, and, in answer to a statement of his rights, the following language was used: "I have to instruct you," said Lord Palmerston to Colonel Hodges, the agent employed, "on the next occasion on which Mohammed Ali shall speak to you of his rights, to say to his highness, that you are instructed by your Government to remind him that he has no rights except such as the Sultan has conferred upon him; that the only legitimate authority which he possesses is the authority which has been delegated to him by the Sultan over a portion of the Sultan's dominions, and which has been entrusted to him for the sole purpose of being used in the interest and in obedience to the orders of the Sultan; that the Sultan is entitled to take away that which he has given; that the Sultan may probably do so if his own safety should require it; and that if in such case the Sultan should not have the means of self-defence, the Sultan has allies, who may possibly lend him those means" (Correspondence relating to the affairs of the Levant presented to Parliament in 1841. pt. 1. p. 592).

And on the 18th of July, 1840, Lord Palmerston wrote to Colonel Hodges as follows: "You will see that orders have been given to the British fleet to act at once, by cutting off the communication between Syria and Egypt, and by helping the Syrians. If Mehemet Ali should complain of this, and of its being done without notice, you will remind him civilly that we are the allies of the Sultan, and have a right to help the faithful subjects of the Sultan in maintaining their allegiance, and to assist the Sultan against those of his subjects who are in revolt against him, as Mehemet Ali is; and that Mehemet Ali, not being an independent sovereign with whom the Four Powers have any political relations, those Powers are not bound to give him any notice of their intended proceedings" (*Ibid.*, pt. 2, p. 5). . . .

These passages from the despatches of the English Secretary for Foreign Affairs were not adverted to in the argument of counsel. I

suppose, however, that, after such reference, it could not be contended that, if at this epoch the question now before me as to the claim of the Khedive to be treated by England as a sovereign prince had arisen, such a claim could have been maintained in this Court.

Have events subsequent to this epoch made this claim, then untenable, capable of being sustained? Surely not; for the principles of international policy enunciated in these despatches were fully carried into execution by the convention of the 15th of July, 1840 [Hertslet's Treaties, vol. 5, pp. 535, 544; Murhard, *Nouveau Recueil de Traités, tom.* i. p. 156], by which Austria, England, Prussia, and Russia concurred in the determination to protect the Porte by coercive measures, if necessary, against the Pacha. Whether the Pacha should be a sovereign prince or a subject, however powerful, of the Porte, seems to have depended on the result of this war. But the consequence of this European intervention was the rapid overthrow of the Pacha's power in Syria; after which the Sultan issued to the Pacha the firman of the 13th of February, 1841, . . .

The first firman of the 13th of February, 1841 (of which I have only the French translation) begins by reciting the act of submission (*l'acte de soumission*) by the Pacha, and the experience which he has acquired during the time he has occupied the position of "*Gouverneur de L' Égypte,*" and proceeds:—"*Je t'accorde le gouvernement de l'Égypte dans ses anciennes limites, avec le privilége additionnel de l'hérédité.*" Certain conditions are added as to the succession of his heir in the direct male line, on the failure of which the Porte is to confer the government on some other person" (Correspondence relating to the affairs of the Levant, pt. 3, p. 436). And then follows this important qualification (at p. 437): "*Bien que les Pachas d'Égypte ayent obtenu le privilége de l'hérédité, ils doivent cependant être considérés quant à la préséance comme étant sur un pied d'égalité avec les autres Vizirs, ils seront traités comme les autres Vizirs de ma Sublime Porte, et recevront les mêmes titres que l'on donne aux autres Vizirs quand on leur écrit.*"

All the treaties concluded, or to be concluded, between the Porte and friendly powers "*seront complétement mis à l'exécution dans la province de l'Égypte aussi;*" so also the fundamental laws contained in the *Hatti-Sheriff* of Gulhané (3rd of November, 1839, State Papers, vol. 31, p. 1239). All taxes are to be imposed and received in the name of the Sultan, and "*attendu que les Égyptiens aussi sont les sujets de ma Sublime Porte,*" certain regulations are to be made to prevent their being harassed by the manner of their imposition. The amount of annual tribute is to be fixed. The army is not to exceed 18,000 men, "*Mais vu que les troupes de terre et de mer de l'Égypte sont instituées pour le service de ma Sublime Porte, il sera permis, en temps de guerre, de les porter au nombre qui aura été jugé convenable par ma Sublime Porte.*"

The troops are to carry the same colours as those of the Porte. . . .

The result, then, of the historical inquiry as to the status of his Highness the Khedive, is as follows: That in the firmans, whose authority upon this point appears to be paramount, Egypt is invariably spoken of as one of the provinces of the Ottoman Empire. That the Egyptian army is regulated as part of the military force of the Ottoman Empire. That the taxes are imposed and levied in the name of the Porte. That the treaties of the Porte are binding upon Egypt, and that she has no separate *jus legationis*. That the flag for both the army and the navy is the flag of the Porte.

All these facts, according to the unanimous opinion of accredited writers, are inconsistent and incompatible with those conditions of sovereignty which are necessary to entitle a country to be ranked as one among the great community of states.

Against this array of negative proof is to be set the solitary circumstance that the office of Khedive is hereditary. It requires but little consideration to see that this peculiarity cannot affect the question. Egypt remains a province of an empire, and does not become an empire, because her viceroy is hereditary. The viceroy does not become a sovereign prince because his sovereign permits him to transmit the viceroyalty to his descendants in the direct male line. The hereditary character does not confer on the holder, in this case, the right of making war and peace, of sending an ambassador, or of maintaining a separate military or naval force, or of governing at all, except in the name and under the authority of his sovereign.

The hereditary character of the Viceroyalty may make the Viceroy the chief subject of the Porte, but he is still a subject prince, and not a sovereign prince or "reigning sovereign" even "of a semi-sovereign state," according to the terms of the petition on protest. . . .

Lastly, no treaty ever having been made with his Highness, no ambassador ever received from or sent to him, British consuls in Egypt receiving no exequatur from him, there being, in other words, no *de facto* recognition of his Highness as a sovereign by our government, has there been any recognition *de jure* of him in this capacity?

The Court of Chancery, when a plaintiff averred in his bill that a certain republic in Central America had been recognised as an independent government, put itself in communication with the Foreign Office, and after such communication, declared itself authorized to state that the republic in question had never been recognized by the government of this country, and on the ground that what was pleaded was "historically false," allowed a demurrer to the bill: Taylor v. Barclay. [2 Sim. 213.] I have communicated with the Foreign Office, and have received the following answer to my questions, *viz.*: "that the Khedive has not been and is not now recognised by Her Majesty as reigning

sovereign of the state of Egypt." "He is recognised by Her Majesty's government as the hereditary ruler of the province of Egypt under the supremacy of the Sultan of Turkey."

Upon all these facts I have arrived at the conclusion that, independently of any other consideration, his Highness the Khedive has failed to establish his claim to exempt his vessel from the process of this Court. . . .

[In an omitted part of the opinion the court proceeded to consider whether, assuming the Khedive to be entitled to immunities, he could successfully assert immunity in this case. It was concluded that the proceeding *in rem* against the ship would be no violation of immunity, and that immunity could not be conceded for a public owned ship employed in trade.[39]]

Upon all grounds therefore, namely,

First, that his highness the Khedive, however exalted his position and distinguished his rank, has failed to establish that he is entitled to the privileges of a sovereign prince, according to the criteria of sovereignty required by the reason of the thing, and by the usage and practice of nations as expounded by accredited writers upon international jurisprudence;

Secondly, that, on the assumption he is entitled to such privilege, it would not oust the jurisdiction of this Court in the particular proceeding which has been instituted against this ship;

And, thirdly, that, assuming the privilege to exist, it has been waived with reference to this ship by the conduct of the person who claims it;

I pronounce against the protest, and I think I must in justice to the suitor give him the costs of these proceedings.

Having regard to the importance of the case, if any leave of the Court be required in order to appeal from this decision, I will readily give the requisite permission.[40]

Neely v. Henkel

United States. Supreme Court. 1901.

180 *United States Reports* 109.

[Neely was employed in the Department of Posts in Cuba, in 1900, while Cuba was occupied by forces of the United States. While thus

[39] See ch. 6, §3, *infra*, 594.

[40] *Cf.* The Ionian Ships, 2 Spinks 212.

Egypt was occupied by British military forces after 1882, but the forms of Turkish suzerainty were preserved. On Dec. 18, 1914, Great Britain terminated Turkish suzerainty and declared Egypt a protectorate. On March 15, 1922, Great Britain announced the termination of the protectorate and the recognition of Egypt as an independent state, subject to certain "special relations" to the British Empire. 13 Martens, Nouv. Rec. Gén., 3 sér., 489; Hall, 8th ed., 32. The United States recognized the independence of Egypt on April 26, 1922.

employed he embezzled and converted funds and property belonging to the Cuban postal service and subsequently fled to the United States, where he was arrested and held for extradition pursuant to Revised Statutes §5270, as amended by Act of June 6, 1900. The amending act provided that "whenever any foreign country or territory, or any part thereof, is occupied by or under the control of the United States, any person who shall violate, or who has violated, the criminal laws in force therein, by the commission of any of the following offenses, namely: . . . embezzlement or criminal malversation of the public funds, committed by public officers, employees, or depositaries; . . . and who shall depart or flee, or who has departed or fled, from justice therein to the United States, . . . shall, when found therein, be liable to arrest and detention by the authorities of the United States, and on the written request or requisition of the military governor or other chief executive officer in control of such foreign country or territory shall be returned and surrendered as hereinafter provided." 31 Stat. L. 656. Neely applied for a writ of *habeas corpus* upon the ground, among others, that Cuba was not "foreign country or territory" within the meaning of the statute. The application was denied and Neely appealed.]

[The above statement of the case is substituted for the statement in the opinion. The names of counsel and part of the opinion are omitted.]

Mr. Justice Harlan delivered the opinion of the court. . . .

That at the date of the act of June 6, 1900, the Island of Cuba was "occupied by" and was "under the control of the United States" and that it is still so occupied and controlled, cannot be disputed. This court will take judicial notice that such were, at the date named and are now, the relations between this country and Cuba. So that the applicability of the above act to the present case—and this is the first question to be examined—depends upon the inquiry whether, within its meaning, Cuba is to be deemed a foreign country or territory.

We do not think this question at all difficult of solution if regard be had to the avowed objects intended to be accomplished by the war with Spain and by the military occupation of that Island. Let us see what were those objects as they are disclosed by official documents and by the public acts of the representatives of the United States.

On the 20th day of April, 1898, Congress passed a joint resolution, the preamble of which recited that the abhorrent conditions existing for more than three years in the Island of Cuba, so near our own borders, had shocked the moral sense of the people of the United States, had been a disgrace to civilization, culminating in the destruction of a United States battleship, with two hundred and sixty-six of its officers and crew, while on a friendly visit in the harbor of Havana, and could not longer be endured. It was, therefore, resolved: "1. That the people of the Island of Cuba are, and of right ought to be, free and independent.

2. That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government in the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters. 3. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect. 4. That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction or control over said Island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the Island to its people." 30 Stat. 738.

The adoption of this joint resolution was followed by the act of April 25, 1898, by which Congress declared: "1. That war be, and the same is, hereby declared to exist, and that war has existed since the 21st day of April, 1898, including said day, between the United States of America and the Kingdom of Spain. 2. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry this act into effect." 30 Stat. 364, c. 189.

The war lasted but a few months. The success of the American arms was so complete and overwhelming that a Protocol of Agreement between the United States and Spain embodying the terms of a basis for the establishment of peace between the two countries was signed at Washington on the 12th of August, 1898. By that agreement it was provided that "Spain will relinquish all claim of sovereignty over and title to Cuba" and that the respective countries would each appoint commissioners to meet at Paris and there proceed to the negotiation and conclusion of a treaty of peace. 30 Stat. 1742.

Commissioners possessing full authority from their respective Governments for that purpose having met in Paris, a Treaty of Peace was signed on December 10, 1898, and ratifications having been duly exchanged it was proclaimed April 11, 1899. 30 Stat. 1754.

That treaty contained among other provisions the following:

"Art. I. Spain relinquishes all claim of sovereignty over and title to Cuba. And as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property."

"Art. XVI. It is understood that any obligations assumed in this treaty by the United States with respect to Cuba are limited to the time

of its occupancy thereof; but it will upon the termination of such occupancy, advise any government established in the island to assume the same obligations." 30 Stat. 1754–1761.

On the 13th of December, 1898, an order was issued by the Secretary of War stating that, by direction of the President, a division to be known as the Division of Cuba consisting of the geographical departments and provinces of the Island of Cuba, with headquarters at Havana, was created and placed under the command of Major General John R. Brooke, United States Army, who was required, in addition to his command of the troops in the Division, to "exercise the authority of Military Governor of the Island." And on December 28, 1898, General Brooke, by a formal order, in accordance with the order of the President, assumed command of that Division, and announced that he would exercise the authority of Military Governor of the Island.

On the 1st day of January, 1899, at the palace of the Spanish Governor-General in Havana, the sovereignty of Spain was formally relinquished and General Brooke immediately entered upon the full exercise of his duties as Military Governor of Cuba.

Upon assuming the positions of Military Governor and Major General commanding the Division of Cuba, General Brooke issued to the People of Cuba the following proclamation:

"Coming among you as the representative of the President, in furtherance and in continuation of the humane purpose with which my country interfered to put an end to the distressing condition in this island, I deem it proper to say that the object of the present Government is to give protection to the people, security to persons and property, to restore confidence, to encourage the people to resume the pursuits of peace, to build up waste plantations, to resume commercial traffic, and to afford full protection in the exercise of all civil and religious rights. To this end, the protection of the United States Government will be directed, and every possible provision made to carry out these objects through the channels of civil administration, although under military control, in the interest and for the benefit of all the people of Cuba, and those possessed of rights and property in the island. The civil and criminal code which prevailed prior to the relinquishment of Spanish sovereignty will remain in force, with such modifications and changes as may from time to time be found necessary in the interest of good government. The people of Cuba, without regard to previous affiliations, are invited and urged to coöperate in these objects by the exercise of moderation, conciliation, and good-will one toward another, and a hearty accord in our humanitarian purposes will insure kind and beneficent government. The Military Governor of the Island will always be pleased to confer with those who may desire to consult him on matters of public interest."

On the 11th day of January, 1899, the Military Governor, "in pursuance of the authority vested in him by the President of the United States, and in order to secure a better organization of the civil service in the Island of Cuba," ordered that thereafter "the civil government shall be administered by four Departments, each under the charge of its appropriate Secretary," to be known, respectively, as the Departments of State and Government, of Finance, of Justice and Public Instruction, and of Agriculture, Commerce, Industries and Public Works, each under the charge of a Secretary. To these Secretaries "were transferred, by the officers in charge of them, the various bureaus of the Spanish civil government." Subsequently, by order of the Military Governor, a Supreme Court for the island was created, with jurisdiction throughout Cuban territory, composed of a President or Chief Justice, six Associate Justices, one Fiscal, two Assistant Fiscals, one Secretary or Chief Clerk, two Deputy Clerks, and other subordinate employés, with administrative functions, as well as those of a court of justice in civil and criminal matters. By order of a later date, issued by the Military Governor, the jurisdiction of the ordinary courts of criminal jurisdiction was defined.

Under date of July 21, 1899, by direction of the Military Governor, a code known as the Postal Code was promulgated and declared to be the law relating to postal affairs in Cuba. That Code abrogated all laws then existing in Cuba inconsistent with its provisions. It provided that the Director General of Posts of the Island should have the control and management of the Department of Posts and prescribed numerous criminal offences, affixing the punishments for each. It is not disputed that one of the offences charged against Neely is included in those defined in the Postal Code established by the Military Governor of Cuba, and that the other is embraced by the Penal Code of that Island which was in force when the war ensued with Spain, and which by order of the Military Governor remained in force, subject to such modifications as might be found necessary in the interest of good government.

On the 13th day of June, 1900, the present Military Governor of Cuba, General Leonard Wood, made his requisition upon the President for the extradition of Neely under the act of Congress.

The facts above detailed make it clear that within the meaning of the act of June 6, 1900, Cuba is foreign territory. It cannot be regarded, in any constitutional, legal or international sense, a part of the territory of the United States.

While by the act of April 25, 1898, declaring war between this country and Spain, the President was directed and empowered to use our entire land and naval forces, as well as the militia of the several States to such extent as was necessary, to carry such act into effect, that authorization was not for the purpose of making Cuba an integral part of the United

States but only for the purpose of compelling the relinquishment by Spain of its authority and government in that Island and the withdrawal of its forces from Cuba and Cuban waters. The legislative and executive branches of the Government, by the joint resolution of April 20, 1898, expressly disclaimed any purpose to exercise sovereignty, jurisdiction or control over Cuba "except for the pacification thereof," and asserted the determination of the United States, that object being accomplished, to leave the government and control of Cuba to its own people. All that has been done in relation to Cuba has had that end in view and, so far as the court is informed by the public history of the relations of this country with that Island, nothing has been done inconsistent with the declared object of the war with Spain.

Cuba is none the less foreign territory, within the meaning of the act of Congress, because it is under a Military Governor appointed by and representing the President in the work of assisting the inhabitants of that island to establish a government of their own, under which, as a free and independent people, they may control their own affairs without interference by other nations. The occupancy of the Island by troops of the United States was the necessary result of the war. That result could not have been avoided by the United States consistently with the principles of international law or with its obligations to the people of Cuba.

It is true that as between Spain and the United States—indeed, as between the United States and all foreign nations—Cuba, upon the cessation of hostilities with Spain and after the Treaty of Paris was to be treated as if it were conquered territory. But as between the United States and Cuba that Island is territory held in trust for the inhabitants of Cuba to whom it rightfully belongs and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action.

In his message to Congress of December 6, 1898, the President said that "as soon as we are in possession of Cuba and have pacified the Island, it will be necessary to give aid and direction to its people to form a government for themselves," and that "until there is complete tranquillity in the Island and a stable government inaugurated, military occupation will be continued." Nothing in the Treaty of Paris stands in the way of this declared object, and nothing existed, at the date of the passage of the act of June 6, 1900, indicating any change in the policy of our Government as defined in the joint resolution of April 20, 1898. In reference to the declaration in that resolution of the purposes of the United States in relation to Cuba, the President in his annual message of December 5, 1899, said that the pledge contained in it "is of the highest honorable obligation, and must be sacredly kept." Indeed, the Treaty of Paris contemplated only a temporary occupancy and control of Cuba by the United States. While it was taken for

granted by the treaty that upon the evacuation by Spain, the island would be occupied by the United States, the treaty provided that "so long as such occupation shall last" the United States should "assume and discharge the obligations that may, under international law, result from the fact of its occupation for the protection of life and property." It further provided that any obligations assumed by the United States, under the treaty, with respect to Cuba, were "limited to the time of its occupancy thereof," but that the United States, upon the termination of such occupancy, should "advise any government established in the Island to assume the same obligations."

It cannot be doubted that when the United States enforced the relinquishment by Spain of her sovereignty in Cuba and determined to occupy and control that island until there was complete tranquillity in all its borders and until the people of Cuba had created for themselves a stable government, it succeeded to the authority of the displaced government so far at least that it became its duty under international law and pending the pacification of the Island, to protect in all appropriate legal modes the lives, the liberty and the property of all those who submitted to the authority of the representatives of this country. That duty was recognized in the Treaty of Paris and the act of June 6, 1900, so far as it applied to cases arising in Cuba, was in aid or execution of that treaty and in discharge of the obligations imposed by its provisions upon the United States. The power of Congress to make all laws necessary and proper for carrying into execution as well the powers enumerated in section 8 of article I of the Constitution, as all others vested in the Government of the United States, or in any Department or the officers thereof, includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with a foreign power. What legislation by Congress could be more appropriate for the protection of life and property in Cuba, while occupied and controlled by the United States, than legislation securing the return to that island, to be tried by its constituted authorities, of those who having committed crimes there fled to this country to escape arrest, trial and punishment? No crime is mentioned in the extradition act of June 6, 1900, that does not have some relation to the safety of life and property. And the provisions of that act requiring the surrender of any public officer, employé or depositary fleeing to the United States after having committed in a foreign country or territory occupied by or under the control of the United States the crime of "embezzlement or criminal malversation of the public funds" have special application to Cuba in its present relations to this country.

We must not be understood, however, as saying that but for the obligation imposed by the Treaty of Paris upon the United States to

protect life and property in Cuba pending its occupancy and control of that island, Congress would have been without power to enact such a statute as that of June 6, 1900, so far as it embraced citizens of the United States or persons found in the United States who had committed crimes in the foreign territory so occupied and controlled by the United States for temporary purposes. That question is not open on this record for examination, and upon it we express no opinion. It is quite sufficient in this case to adjudge, as we now do, that it was competent for Congress, by legislation, to enforce or give efficacy to the provisions of the treaty made by the United States and Spain with respect to the Island of Cuba and its people. . . .

We are of opinion, for the reasons stated, that the act of June 6, 1900, is not in violation of the Constitution of the United States, and that this case comes within the provisions of that act. The court below having found that there was probable cause to believe the appellant guilty of the offences charged, the order for his extradition was proper, and no ground existed for his discharge on *habeas corpus*.

The judgment of the Circuit Court is, therefore,

Affirmed.[41]

TREATY BETWEEN CUBA AND THE UNITED STATES

Articles 1, 2, 3, 4, 5, 6, and 7. Havana, May 22, 1903.

33 *United States Statutes at Large* 2248, 2251, 2252.

Art. 1. The Government of Cuba shall never enter into any treaty or other compact with any foreign power or powers which will impair or tend to impair the independence of Cuba, nor in any manner authorize or permit any foreign power or powers to obtain by colonization or for military or naval purposes, or otherwise, lodgment in or control over any portion of said island.

Art. 2. The Government of Cuba shall not assume or contract any public debt to pay the interest upon which, and to make reasonable sinking-fund provision for the ultimate discharge of which, the ordinary revenues of the Island of Cuba, after defraying the current expenses of the Government, shall be inadequate.

[41] See also Pearcy v. Stranahan, 205 U. S. 257; United States v. Assia, 118 Fed. 915; Goodyear Tire & Rubber Co. v. Rubber Tire W. Co., 164 Fed. 869.

By an amendment to the army appropriation act of March 2, 1901, Congress authorized the President to "leave the government and control of the island of Cuba to its people" as soon as a government should be established under a constitution incorporating certain articles. 31 U. S. Stat. L. 895, 897. These articles were incorporated as an appendix in the Constitution of Cuba of 1901. RODRIGUEZ, II, 147. And they were subsequently embodied in the Treaty of Havana between Cuba and the United States, May 22, 1903, *infra*. See HYDE, I, §19.

Art. 3. The Government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with respect to Cuba imposed by the Treaty of Paris on the United States, now to be assumed and undertaken by the Government of Cuba.

Art. 4. All acts of the United States in Cuba during its military occupancy thereof are ratified and validated, and all lawful rights acquired thereunder shall be maintained and protected.

Art. 5. The Government of Cuba will execute, and, as far as necessary, extend the plans already devised, or other plans to be mutually agreed upon, for the sanitation of the cities of the island, to the end that a recurrence of epidemic and infectious diseases may be prevented, thereby assuring protection to the people and commerce of Cuba, as well as to the commerce of the Southern ports of the United States and the people residing therein.

Art. 6. The Island of Pines shall be omitted from the boundaries of Cuba specified in the Constitution, the title thereto being left to future adjustment by treaty.

Art. 7. To enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense, the Government of Cuba will sell or lease to the United States lands necessary for coaling or naval stations, at certain specified points, to be agreed upon with the President of the United States.[42]

Treaty between Haiti and the United States

Port-au-Prince, September 16, 1915.

39 *United States Statutes at Large* 1654.

Preamble. The United States and the Republic of Haiti desiring to confirm and strengthen the amity existing between them by the most cordial coöperation in measures for their common advantage;

And the Republic of Haiti desiring to remedy the present condition of its revenues and finances, to maintain the tranquillity of the Republic, to carry out plans for the economic development and prosperity of the Republic and its people;

And the United States being in full sympathy with all of these aims and objects and desiring to contribute in all proper ways to their accomplishment;

[42] On protection in the law of nations, see Despagnet, Essai sur les Protectorats; Dickinson, Equality of States, 221, 240; Englehardt, Les Protectorats; Fauchille, I, Pt. I, 259; Hall, 8th ed., 28; Heilborn, Das völkerrechtliche Protektorat; Oppenheim, 4th ed., I, §§92–94.

The United States and the Republic of Haiti have resolved to conclude a Convention with these objects in view. . . .

Art. 1. The Government of the United States will, by its good offices, aid the Haitian Government in the proper and efficient development of its agricultural, mineral and commercial resources and in the establishment of the finances of Haiti on a firm and solid basis.

Art. 2. The President of Haiti shall appoint, upon nomination by the President of the United States, a General Receiver and such aids and employees as may be necessary, who shall collect, receive and apply all customs duties on imports and exports accruing at the several custom houses and ports of entry of the Republic of Haiti.

The President of Haiti shall appoint, upon nomination by the President of the United States, a Financial Adviser, who shall be an officer attached to the Ministry of Finance, to give effect to whose proposals and labors the Minister will lend efficient aid. The Financial Adviser shall devise an adequate system of public accounting, aid in increasing the revenues and adjusting them to the expenses, inquire into the validity of the debts of the Republic, enlighten both Governments with reference to all eventual debts, recommend improved methods of collecting and applying the revenues, and make such other recommendations to the Minister of Finance as may be deemed necessary for the welfare and prosperity of Haiti.

Art. 3. The Government of the Republic of Haiti will provide by law or appropriate decrees for the payment of all customs duties to the General Receiver, and will extend to the Receivership, and to the Financial Adviser, all needful aid and full protection in the execution of the powers conferred and duties imposed herein; and the United States on its part will extend like aid and protection.

Art. 4. Upon the appointment of the Financial Adviser, the Government of the Republic of Haiti, in coöperation with the Financial Adviser, shall collate, classify, arrange and make full statement of all the debts of the Republic, the amounts, character, maturity and condition thereof, and the interest accruing and the sinking fund requisite to their final discharge.

Art. 5. All sums collected and received by the General Receiver shall be applied, first, to the payment of the salaries and allowances of the General Receiver, his assistants and employees and expenses of the Receivership, including the salary and expenses of the Financial Adviser, which salaries will be determined by previous agreement; second, to the interest and sinking fund of the public debt of the Republic of Haiti; and, third, to the maintenance of the constabulary referred to in Article X, and then the remainder to the Haitian Government for purposes of current expenses.

In making these applications the General Receiver will proceed to pay salaries and allowances monthly and expenses as they arise, and

on the first of each calendar month, will set aside in a separate fund the quantum of the collection and receipts of the previous month.

Art. 6. The expenses of the Receivership, including salaries and allowances of the General Receiver, his assistants and employees, and the salary and expenses of the Financial Adviser, shall not exceed five per centum of the collections and receipts from customs duties, unless by agreement by the two Governments.

Art. 7. The General Receiver shall make monthly reports of all collections, receipts and disbursements to the appropriate officer of the Republic of Haiti and to the Department of State of the United States, which reports shall be open to inspection and verification at all times by the appropriate authorities of each of the said Governments.

Art. 8. The Republic of Haiti shall not increase its public debt except by previous agreement with the President of the United States, and shall not contract any debt or assume any financial obligation unless the ordinary revenues of the Republic available for that purpose, after defraying the expenses of the Government, shall be adequate to pay the interest and provide a sinking fund for the final discharge of such debt.

Art. 9. The Republic of Haiti will not without a previous agreement with the President of the United States, modify the customs duties in a manner to reduce the revenues therefrom; and in order that the revenues of the Republic may be adequate to meet the public debt and the expenses of the Government, to preserve tranquillity and to promote material prosperity, the Republic of Haiti will coöperate with the Financial Adviser in his recommendations for improvement in the methods of collecting and disbursing the revenues and for new sources of needed income.

Art. 10. The Haitian Government obligates itself, for the preservation of domestic peace, the security of individual rights and full observance of the provisions of this treaty, to create without delay an efficient constabulary, urban and rural, composed of native Haitians. This constabulary shall be organized and officered by Americans, appointed by the President of Haiti, upon nomination by the President of the United States. The Haitian Government shall clothe these officers with the proper and necessary authority and uphold them in the performance of their functions. These officers will be replaced by Haitians as they, by examination, conducted under direction of a board to be selected by the senior American officer of this constabulary and in the presence of a representative of the Haitian Government, are found to be qualified to assume such duties. The constabulary herein provided for, shall, under the direction of the Haitian Government, have supervision and control of arms and ammunition, military supplies, and traffic therein, throughout the country. The high contracting parties

agree that the stipulations in this Article are necessary to prevent factional strife and disturbances.

Art. 11. The Government of Haiti agrees not to surrender any of the territory of the Republic of Haiti by sale, lease, or otherwise, or jurisdiction over such territory, to any foreign government or power, nor to enter into any treaty or contract with any foreign power or powers that will impair or tend to impair the independence of Haiti.

Art. 12. The Haitian Government agrees to execute with the United States a protocol for the settlement, by arbitration or otherwise, of all pending pecuniary claims of foreign corporations, companies, citizens or subjects against Haiti.

Art. 13. The Republic of Haiti, being desirous to further the development of its natural resources, agrees to undertake and execute such measures as in the opinion of the high contracting parties may be necessary for the sanitation and public improvement of the Republic, under the supervision and direction of an engineer or engineers, to be appointed by the President of Haiti upon nomination by the President of the United States, and authorized for that purpose by the Government of Haiti.

Art. 14. The high contracting parties shall have authority to take such steps as may be necessary to insure the complete attainment of any of the objects comprehended in this treaty; and, should the necessity occur, the United States will lend an efficient aid for the preservation of Haitian Independence and the maintenance of a government adequate for the protection of life, property and individual liberty.[43]

The Covenant of the League of Nations

Article 22. 1920.

Article 22. To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States

[43] "Une convention du 16 septembre 1915 entre les Etats-Unis et la République d'Haïti, . . . a soumis cette République á une sorte de quasi-protectorat américain; elle a apporté au profit des Etats-Unis d'importantes restrictions à la souveraineté intérieure et extérieure de l'Etat d'Haïti, aux points de vue des finances, de l'armée et de la marine, des relations diplomatiques, de la police, des télégraphes et téléphones, de l'hygiéne et des travaux publics." Fauchille, I, Pt. I, 273.

See also Convention between the Dominican Republic and the United States, Feb. 8, 1907, 35 U. S. Stat. L. 1880, replaced by a new convention, Dec. 27, 1924, 44 U. S. Stat. L. 2162; Convention between Nicaragua and the United States, Aug. 5, 1914, 39 U. S. Stat. L. 1661; and unratified loan conventions between the United States and Honduras and Nicaragua respectively, 5 Am. Jour. Int. L. Suppl. 274, 291. See Hyde, I, §§21–24.

See Imbert, Les Emprunts d'États Étrangers; Kaufmann, Das internationale Rechte der egyptischen Staatschuld; Kebedgy, "De la protection des créanciers d'un Etat étranger," 21 Jour. du Dr. Int. Privé 59, 504.

which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

There are territories, such as Southwest Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates.[44]

SECTION 5. INTERNATIONAL PERSONS DE FACTO

The Bluefields Incident

Nicaragua and the United States. 1899–1900.

Moore, Digest of International Law, Volume I, pages 50–51.

February 3, 1899, General Reyes, who had lately resigned the office of governor of the department of Zelaya (the Mosquito Reservation), proclaimed at Bluefields a revolution against the titular government of President Zelaya. He took and held undisputed possession of the custom-house and other public buildings and of all the agencies of government, and from February 3 to February 25 he and his delegates exercised at Bluefields all the functions of government, including the collection of duties. At the end of February the insurrection collapsed, and the Nicaraguan Government, after the reestablishment of its authority at Bluefields, demanded the payment to itself, by the merchants, of the amounts of duty which they had paid to the insurgent authorities during the period of their *de facto* control. Against this demand the American merchants remonstrated. The Government of the United States, on receiving the remonstrance, stated (1) that it would not support, as against the demand of Nicaragua, any Americans, if such there were, who had aided or abetted the insurrection, but (2) that Americans who had paid "under duress of person or property, or under intimidations amounting to coercion, are entitled, if second payments are demanded by the Nicaraguan Government, to make such payments under protest," and that if any Americans had made a second payment without protest, because they were required by Nicaragua so to do, they would be considered as having paid under protest. Prior to the receipt of this instruction, however, Mr. Merry, the minister of the United

[44] On the mandate system, see Cioriceanu, Les Mandats Internationaux; Fauchille, I. Pt. I, 297, I, Pt. II, 812; Gsell-Trümpi, Zur rechtlichen Natur der Völkerbundsmandate; Hall, 8th ed., 158; Lauterpacht, Private Law Sources and Analogies of International Law, 191; Millot, Les Mandats Internationaux; Oppenheim, 4th ed., I, §§ 94c–94f; Schneider, Das völkerrechtliche Mandat; Stoyanovsky, La Théorie Générale des Mandats Internationaux; Vallini, I Mandati Internazionali della Società delle Nazioni; Van Rees, Les Mandats Internationaux; Wright, "Sovereignty of the Mandates," 17 Am. Jour. Int. L. 691; Wright, "United States and the Mandates," 23 Mich. L. Rev. 717.

On international persons, in general, see Fauchille, I, Pt. I, 207; Hall, 8th ed., 17; Hyde, I, §§6–34; Oppenheim, 4th ed., I, §§63–111.

States, and the commander of the U. S. S. Detroit, then at Bluefields, cabled a suggestion that second payments be refused, as the revolutionary government certainly was *de facto*, and such action was necessary to the maintenance of American interests and influence; and on April 29, 1899, an agreement was concluded by Mr. Merry and Mr. Sanson, Nicaraguan minister for foreign affairs, under which it was arranged that the money demanded by Nicaragua should be deposited in the British consulate pending the decision of the controversy. Meanwhile the Nicaraguan authorities were to raise the embargo which they had previously placed on certain merchandise in order to compel the owners to comply with their demands. This arrangement was approved by the United States, and the British consul accepted the trust. The amount in dispute, which was claimed from five American firms, was $19,673.33, Nicaraguan currency.

Subsequently the Department of State received the sworn statements of the American merchants, which apparently showed (1) that they were not in any wise accomplices in the Reyes movement; (2) that during the period of February 3–23 the merchants did not pay current dues in cash, but gave bonds for them, and that the money actually paid was the amount due in bonds which then matured for duties levied in December, 1898, and January, 1899, the payments being made to the agent of the titular government, who held the bonds and who was continued in office by General Reyes; (3) that the bonds bore a penalty of 5 per cent a month for nonpayment, and that payment was demanded under threat of suspension of importations; and (4) that from February 3 to February 25 General Reyes was in full control and exercise of all governmental agencies, civil and military, in the district. Under these circumstances the United States expressed the opinion that to exact a second payment would be "an act of international injustice," and asked the assent of the Nicaraguan Government to the return of the money by the British consul to the depositors.

Subsequently the Nicaraguan Government sought to bring the matter before its judicial tribunals, and to require the merchants to establish before those tribunals their "excuse" for their "unwarranted payments." To this course the United States objected, on the ground that the question had become a diplomatic one. The two Governments failed to agree on the question whether the payments were made under compulsion to a *de facto* authority, but the money was at length returned to the American merchants with the assent of Nicaragua.[45]

[45] References to the original documents as published in Papers Relating to the Foreign Relations of the United States will be found in the footnotes to Moore's Digest, *loc. cit.*

See MacLeod v. United States, 229 U. S. 416. See also United States v. Rice, 4 Wh. 246, *infra*, 318. *Cf.* Fleming v. Page, 9 How. 603, *infra*, 320.

The Three Friends

United States. Supreme Court. 1897.

166 *United States Reports* 1.

The steamer Three Friends was seized November 7, 1896, by the collector of customs for the district of St. John's, Florida, as forfeited to the United States under section 5283 of the Revised Statutes, and, thereupon, November 12, was libelled on behalf of the United States in the District Court for the Southern District of Florida. . . .

[The District Court sustained exceptions to the libel, the United States appealed to the Circuit Court of Appeals, and later the case was taken to the Supreme Court on writ of *certiorari*. Part of the statement of the case, the arguments of counsel, and part of the opinion are omitted.]

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court. . . .

The libel alleged that the vessel was "furnished, fitted out and armed, with intent that she should be employed in the service of a certain people, to wit, certain people then engaged in armed resistance to the Government of the King of Spain, in the island of Cuba, to cruise and commit hostilities against the subjects, citizens and property of the King of Spain, in the island of Cuba, with whom the United States are and were at that date at peace."

The learned District Judge held that this was insufficient under section 5283, because it was not alleged "that said vessel had been fitted out with intent that she be employed in the service of a foreign prince or state, or of any colony, district or people recognized as such by the political power of the United States."

In Wiborg v. United States, 163 U. S. 632, which was an indictment under section 5286, we referred to the eleven sections from 5281 to 5291, inclusive, which constitute Title LXVII of the Revised Statutes, and said: "The statute was undoubtedly designed in general to secure neutrality in wars between two other nations, or between contending parties recognized as belligerents, but its operation is not necessarily dependent on the existence of such state of belligerency," and the consideration of the present case arising under section 5283 confirms us in the view thus expressed. . . .

These sections were brought forward from the act of April 20, 1818, 3 Stat. 447, c. 88, entitled "An act in addition to the 'Act for the punishment of certain crimes against the United States,' and to repeal the acts therein mentioned," which was derived from the act of June 5, 1794, 1 Stat. 381, c. 50, entitled "An act in addition to the 'Act for the punishment of certain crimes against the United States,'" and the act of

March 3, 1817, 3 Stat. 370, c. 58, entitled "An act more effectually to preserve the neutral relations of the United States."

The piracy act of March 3, 1819, 3 Stat. 510, c. 77, Rev. Stat. §§4293, 4294, 4295, 4296, 5368, supplemented the acts of 1817 and 1818.

The act of 1794, which has been generally recognized as the first instance of municipal legislation in support of the obligations of neutrality, and a remarkable advance in the development of International Law, was recommended to Congress by President Washington in his annual address on December 3, 1793; was drawn by Hamilton; and passed the Senate by the casting vote of Vice President Adams. Ann. 3d Cong. 11, 67. Its enactment grew out of the proceedings of the then French minister, which called forth President Washington's proclamation of neutrality in the spring of 1793. And though the law of nations had been declared by Chief Justice Jay, in his charge to the grand jury at Richmond, May 22, 1793 (Wharton's State Trials, 49, 56), and by Mr. Justice Wilson, Mr. Justice Iredell and Judge Peters, on the trial of Henfield in July of that year (*Id.* 66, 84), to be capable of being enforced in the courts of the United States criminally, as well as civilly, without further legislation, yet it was deemed advisable to pass the act in view of controversy over that position, and, moreover, in order to provide a comprehensive code in prevention of acts by individuals within our jurisdiction inconsistent with our own authority, as well as hostile to friendly powers.

Section 5283 of the Revised Statutes is as follows:

"Every person who, within the limits of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out or arming, of any vessel with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district or people, to cruise or commit hostilities against the subjects, citizens or property of any foreign prince or state, or of any colony, district or people, with whom the United States are at peace, or who issues or delivers a commission within the territory or jurisdiction of the United States, for any vessel, to the intent that she may be so employed, shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years. And every such vessel, her tackle, apparel and furniture, together with all materials, arms, ammunition and stores, which may have been procured for the building and equipment thereof, shall be forfeited; one half to the use of the informer, and the other half to the use of the United States."

By referring to section three of the act of June 5, 1794, section one of the act of 1817, and section three of the act of 1818, . . . it will be seen that the words "or of any colony, district or people" were inserted

in the original law by the act of 1817, carried forward by the act of 1818, and so into section 5283.

The immediate occasion of the passage of the act of March 3, 1817, appears to have been a communication, under date of December 20, 1816, from the Portuguese minister to Mr. Monroe, then Secretary of State, informing him of the fitting out of privateers at Baltimore to act against Portugal, in case it should turn out that that Government was at war with the "self-styled Government of Buenos Ayres," and soliciting "the proposition to Congress of such provisions of law as will prevent such attempts for the future." On December 26, 1816, President Madison sent a special message to Congress, in which he referred to the inefficacy of existing laws "to prevent violations of the obligations of the United States as a nation at peace towards belligerent parties and other unlawful acts on the high seas by armed vessels equipped within the waters of the United States," and, "with a view to maintain more effectually the respect due to the laws, to the character, and to the neutral and pacific relations of the United States," recommended further legislative provisions. This message was transmitted to the minister December 27, and he was promptly officially informed of the passage of the act in the succeeding month of March. Geneva Arbitration, Case of the United States, 138. In Mr. Dana's elaborate note to §439 of his edition of Wheaton, it is said that the words "colony, district or people" were inserted on the suggestion of the Spanish minister that the South American provinces in revolt and not recognized as independent might not be included in the word "state." Under the circumstances this act was entitled as "to preserve the neutral relations of the United States," while the title of the act of 1794 described it as "in addition" to the Crimes Act of April 30, 1790, 1 Stat. 112, c. 9, and the act of 1818 was entitled in the same way. But there is nothing in all this to indicate that the words "colony, district or people" had reference solely to communities whose belligerency had been recognized, and the history of the times, an interesting review of which has been furnished us by the industry of counsel, does not sustain the view that insurgent districts or bodies, unrecognized as belligerents, were not intended to be embraced. On the contrary, the reasonable conclusion is that the insertion of the words "district or people" should be attributed to the intention to include such bodies, as for instance, the so-called Oriental Republic of Artigas, and the Governments of Pétion and Christophe, whose attitude had been passed on by the courts of New York more than a year before in Gelston v. Hoyt, 13 Johns. 141, 561, which was then pending in this court on writ of error. There was no reason why they should not have been included, and it is to the extended enumeration as covering revolutionary bodies laying claim to rights of sovereignty, whether recognized or unrecognized, that Chief Justice Marshall manifestly referred in

saying, in The Gran Para, 7 Wheat. 471, 489, that the act of 1817 "adapts the previous laws to the actual situation of the world." At all events, Congress imposed no limitation on the words "colony, district or people," by requiring political recognition.

Of course a political community whose independence has been recognized is a "state" under the act; and, if a body embarked in a revolutionary political movement, whose independence has not been, but whose belligerency has been, recognized, is also embraced by that term, then the words "colony, district or people," instead of being limited to a political community which has been recognized as a belligerent, must necessarily be held applicable to a body of insurgents associated together in a common political enterprise and carrying on hostilities against the parent country, in the effort to achieve independence, although recognition of belligerency has not been accorded.

And as agreeably to the principles of international law and the reason of the thing, the recognition of belligerency, while not conferring all the rights of an independent state, concedes to the Government recognized the rights, and imposes upon it the obligations, of an independent state in matters relating to the war being waged, no adequate ground is perceived for holding that acts in aid of such a Government are not in aid of a state in the sense of the statute. . . .

[In an omitted part of the opinion the court considered Gelston v. Hoyt, 3 Wh. 246; The Estrella, 4 Wh. 298; The Nueva Anna and Liebre, 6 Wh. 193; and The Gran Para, 7 Wh. 471.]

Even if the word "state" as previously employed admitted of a less liberal signification, why should the meaning of the words "colony, district or people" be confined only to parties recognized as belligerent? Neither of these words is used as equivalent to the word "state," for they were added to enlarge the scope of a statute which already contained that word. The statute does not say foreign colony, district or people, nor was it necessary, for the reference is to that which is part of the dominion of a foreign prince or state, though acting in hostility to such prince or state. Nor are the words apt if confined to a belligerent. As argued by counsel for the Government, an insurgent colony under the act is the same before as after the recognition of belligerency, as shown by the instance of the colonies of Buenos Ayres and Paraguay, the belligerency of one having been recognized but not of the other, while the statute was plainly applicable to both. Nor is district an appropriate designation of a recognized power *de facto*, since such a power would represent not the territory actually held but the territory covered by the claim of sovereignty. And the word "people," when not used as the equivalent of state or nation, must apply to a body of persons less than a state or nation, and this meaning would be satisfied by considering it as applicable to any consolidated political body. . . .

[In an omitted part of the opinion the court considered United States v. Quincy, 6 Pet. 445; Nesbitt v. Lushington, 4 T. R. 783; and The Salvador, L. R. 3 P. C. 218.]

Any other conclusion rests on the unreasonable assumption that the act is to remain ineffectual unless the Government incurs the restraints and liabilities incident to an acknowledgment of belligerency. On the one hand, pecuniary demands, reprisals or even war, may be the consequence of failure in the performance of obligations towards a friendly power, while on the other, the recognition of belligerency involves the rights of blockade, visitation, search and seizure of contraband articles on the high seas and abandonment of claims for reparation on account of damages suffered by our citizens from the prevalence of warfare.

No intention to circumscribe the means of avoiding the one by imposing as a condition the acceptance of the contingencies of the other can be imputed.

Belligerency is recognized when a political struggle has attained a certain magnitude and affects the interests of the recognizing power; and in the instance of maritime operations, recognition may be compelled, or the vessels of the insurgents, if molesting third parties, may be pursued as pirates. The Ambrose Light, 25 Fed. Rep. 408; 3 Whart. Dig. Int. Law, §381; and authorities cited.[46]

But it belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed.

The distinction between recognition of belligerency and recognition of a condition of political revolt, between recognition of the existence of war in a material sense and of war in a legal sense, is sharply illustrated by the case before us. For here the political department has not recognized the existence of a *de facto* belligerent power engaged in hostility with Spain, but has recognized the existence of insurrectionary warfare prevailing before, at the time and since this forfeiture is alleged to have been incurred.

On June 12, 1895, a formal proclamation was issued by the President and countersigned by the Secretary of State, informing the people of the United States that the island of Cuba was "the seat of serious civil disturbances accompanied by armed resistance to the authority of the established government of Spain, a power with which the United States are and desire to remain on terms of peace and amity"; declaring that "the laws of the United States prohibit their citizens, as well as all others being within and subject to their jurisdiction, from taking part in such disturbances adversely to such established government, by accepting

[46] But see HYDE, I, §233; OPPENHEIM, 4th ed., I, §273; WIESSE, Le Droit International Appliqué aux Guerres Civiles, 117; 38 Harv. L. Rev. 334, 352; 22 Mich. L. Rev. 118, 120.

or exercising commissions for warlike service against it, by enlistment or procuring others to enlist for such service, by fitting out or arming or procuring to be fitted out and armed ships of war for such service, by augmenting the force of any ship of war engaged in such service and arriving in a port of the United States, and by setting on foot or providing or preparing the means for military enterprises to be carried on from the United States against the territory of such government"; and admonishing all such citizens and other persons to abstain from any violation of these laws.

In his annual message of December 2, 1895, the President said: "Cuba is again gravely disturbed. An insurrection, in some respects more active than the last preceding revolt, which continued from 1868 to 1878, now exists in a large part of the eastern interior of the island, menacing even some populations on the coast. Besides deranging the commercial exchanges of the island, of which our country takes the predominant share, this flagrant condition of hostilities, by arousing sentimental sympathy and inciting adventurous support among our people, has entailed earnest effort on the part of this Government to enforce obedience to our neutrality laws and to prevent the territory of the United States from being abused as a vantage ground from which to aid those in arms against Spanish sovereignty.

"Whatever may be the traditional sympathy of our countrymen as individuals with a people who seem to be struggling for larger autonomy and greater freedom, deepened as such sympathy naturally must be in behalf of our neighbors, yet the plain duty of their Government is to observe in good faith the recognized obligations of international relationship. The performance of this duty should not be made more difficult by a disregard on the part of our citizens of the obligations growing out of their allegiance to their country, which should restrain them from violating as individuals the neutrality which the nation of which they are members is bound to observe in its relations to friendly sovereign states. Though neither the warmth of our people's sympathy with the Cuban insurgents, nor our loss and material damage consequent upon the futile endeavors thus far made to restore peace and order, nor any shock our humane sensibilities may have received from the cruelties which appear to especially characterize this sanguinary and fiercely conducted war, have in the least shaken the determination of the Government to honestly fulfil every international obligation, yet it is to be earnestly hoped, on every ground, that the devastation of armed conflict may speedily be stayed and order and quiet restored to the distracted island, bringing in their train the activity and thrift of peaceful pursuits."

July 27, 1896, a further proclamation was promulgated, and in the annual message of December 7, 1896, the President called attention to

the fact that "the insurrection in Cuba still continues with all its perplexities," and gave an extended review of the situation.

We are thus judicially informed of the existence of an actual conflict of arms in resistance of the authority of a government with which the United States are on terms of peace and amity, although acknowledgment of the insurgents as belligerents by the political department has not taken place; and it cannot be doubted that, this being so, the act in question is applicable.

We see no justification for importing into section 5283 words which it does not contain and which would make its operation depend upon the recognition of belligerency; and while the libel might have been drawn with somewhat greater precision, we are of opinion that it should not have been dismissed. . . .

The decree must be reversed, and the cause remanded to the District Court with directions to resume custody of the vessel and proceed with the case in conformity with this opinion.

Ordered accordingly.[47]

[The dissenting opinion of Mr. Justice Harlan is omitted.]

THORINGTON v. SMITH

United States. Supreme Court. 1868.

8 *Wallace's Reports* 1.

Appeal from the District Court for the Middle District of Alabama, the case being this:

In November, 1864, Thorington being the owner of a piece of land adjoining the city of Montgomery, Alabama, sold it to Smith and Hartley, all parties being then resident of Montgomery. At the time of this sale the late rebellion was still in active operation and had been so for more than three years. Alabama, or this part of it, was at the time in the occupation of the military and civil authorities of the rebel States, and the Federal government exercised no authority there. There was no gold or silver coin in use, nor any notes of the United States, such as made the circulation of the loyal portion of the country. The only currency in any ordinary use, or in which current daily business could be at all carried on, were treasury notes of the Confederate States, notes in form and general aspect like bank bills, and by which the Confederate States of America promised to pay the bearer the sum named in them,

[47] See also The Salvador, L. R. 3 P. C. 218; The Ambrose Light, 25 Fed. 408; Wiborg v. United States, 163 U. S. 632; O'Neill v. Central Leather Co., 87 N. J. L. 552; U. S. Naval War College (1901) 108; *ibid.* (1902) 57; *ibid.* (1904) 26; *ibid.* (1907) 127; *ibid.* (1912) 9; WILSON, "Insurgency and International Maritime Law," 1 Am. Jour. Int. L. 46.

"two years after the ratification of a treaty of peace between the Confederate States and the United States of America." . . .

The price agreed to be paid by Smith and Hartley, for the land which they purchased was $45,000. Of this sum $35,000 were paid at the execution of the deed in Confederate States treasury notes; and for the residue a note was executed thus:

Montgomery, November 28th, 1864.

$10,000.

One day after date, we, or either of us, promise to pay Jack Thorington, or bearer, ten thousand dollars, for value received in real estate, sold and delivered by said Thorington to us this day, as per his deed to us of this date: this note, part of the same transaction, is hereby declared as a lien or mortgage on said real estate situate and adjoining the city of Montgomery.

W. D. Smith.
J. H. Hartley.

The rebellion being suppressed in 1865, the Confederate States treasury notes became, of course, worthless, and Thorington, in 1867, filed a bill in the court below against his purchasers, who were still in possession, for the enforcement of the vendor's lien, claiming the $10,000 in the only money now current, to wit, lawful money of the United States. . . .

The court below, admitting the evidence to prove that the note was in fact made for payment in Confederate States treasury notes, and sustaining, apparently, the view of the purchasers that the contract was illegal because to be paid in such notes, dismissed the bill.

The questions before this court upon the appeal, were these:

1. Can a contract for the payment of Confederate notes, made during the late rebellion, between parties residing within the so-called Confederate States, be enforced at all in the courts of the United States?

2. Can evidence be received to prove that a promise expressed to be for the payment of dollars was, in fact, made for the payment of any other than lawful dollars of the United States?

3. Did the evidence establish the fact that the note for ten thousand dollars was to be paid, by agreement of the parties, in Confederate notes? . . .

[Part of the statement of the case, the argument of counsel, and part of the opinion are omitted.]

The Chief Justice delivered the opinion of the court . . .

The first question is by no means free from difficulty. It cannot be questioned that the Confederate notes were issued in furtherance of an unlawful attempt to overthrow the government of the United States, by insurrectionary force. Nor is it a doubtful principle of law that no

contracts made in aid of such an attempt can be enforced through the courts of the country whose government is thus assailed. But, was the contract of the parties to this suit a contract of that character? Can it be fairly described as a contract in aid of the rebellion?

In examining this question the state of that part of the country in which it was made must be considered. It is familiar history, that early in 1861 the authorities of seven States, supported, as was alleged, by popular majorities, combined for the overthrow of the National Union, and for the establishment, within its boundaries, of a separate and independent confederation. A governmental organization, representing these States, was established at Montgomery in Alabama, first under a provisional constitution, and afterwards under a constitution intended to be permanent. In the course of a few months, four other States acceded to this confederation, and the seat of the central authority was transferred to Richmond, in Virginia. It was, by the central authority thus organized, and under its direction, that civil war was carried on upon a vast scale against the government of the United States for more than four years. Its power was recognized as supreme in nearly the whole of the territory of the States confederated in insurrection. It was the actual government of all the insurgent States, except those portions of them protected from its control by the presence of the armed forces of the National government.

What was the precise character of this government in contemplation of law?

It is difficult to define it with exactness. Any definition that may be given may not improbably be found to require limitation and qualification. But the general principles of law relating to *de facto* government will, we think, conduct us to a conclusion sufficiently accurate.

There are several degrees of what is called *de facto* government.

Such a government, in its highest degree, assumes a character very closely resembling that of a lawful government. This is when the usurping government expels the regular authorities from their customary seats and functions, and establishes itself in their place, and so becomes the actual government of a country. The distinguishing characteristic of such a government is, that adherents to it in war against the government *de jure* do not incur the penalties of treason; and under certain limitations, obligations assumed by it in behalf of the country, or otherwise, will, in general, be respected by the government *de jure* when restored. . . .

It is very certain that the Confederate government was never acknowledged by the United States as a *de facto* government in this sense. Nor was it acknowledged as such by other powers. No treaty was made by it with any civilized state. No obligations of a National character were created by it, binding after its dissolution, on the States which it repre-

sented, or on the National government. From a very early period of the civil war to its close, it was regarded as simply the military representative of the insurrection against the authority of the United States.

But there is another description of government, called also by publicists a government *de facto*, but which might, perhaps, be more aptly denominated a government of paramount force. Its distinguishing characteristics are (1), that its existence is maintained by active military power, within the territories, and against the rightful authority of an established and lawful government; and (2), that while it exists, it must necessarily be obeyed in civil matters by private citizens who, by acts of obedience, rendered in submission to such force, do not become responsible, as wrong-doers, for those acts, though not warranted by the laws of the rightful government. Actual governments of this sort are established over districts differing greatly in extent and conditions. They are usually administered directly by military authority, but they may be administered, also, by civil authority, supported more or less directly by military force.

One example of this sort of government is found in the case of Castine, in Maine, reduced to British possession during the war of 1812. From the 1st of September, 1814, to the ratification of the treaty of peace in 1815, according to the judgment of this court in United States v. Rice, 4 Wheaton, 253, "the British government exercised all civil and military authority over the place." "The authority of the United States over the territory was suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conqueror. By the surrender, the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognize and impose." It is not to be inferred from this that the obligations of the people of Castine as citizens of the United States were abrogated. They were suspended merely by the presence, and only during the presence, of the paramount force. A like example is found in the case of Tampico, occupied during the war with Mexico by the troops of the United States. It was determined by this court, in Fleming v. Page, 9 Howard, 614, that, although Tampico did not become a port of the United States in consequence of that occupation, still, having come, together with the whole State of Tamaulipas, of which it was part, into the exclusive possession of the National forces, it must be regarded and respected by other nations as the territory of the United States. These were cases of temporary possession of territory by lawful and regular governments at war with the country of which the territory so possessed was part.

The central government established for the insurgent States differed from the temporary governments at Castine and Tampico in the cir-

cumstance, that its authority did not originate in lawful acts of regular war, but it was not, on that account, less actual or less supreme. And we think that it must be classed among the governments of which these are examples. It is to be observed that the rights and obligations of a belligerent were conceded to it, in its military character, very soon after the war began, from motives of humanity and expediency by the United States. The whole territory controlled by it was thereafter held to be enemies' territory, and the inhabitants of that territory were held, in most respects, for enemies. To the extent, then, of actual supremacy, however unlawfully gained, in all matters of government within its military lines, the power of the insurgent government cannot be questioned. That supremacy did not justify acts of hostility to the United States. How far it should excuse them must be left to the lawful government upon the re-establishment of its authority. But it made obedience to its authority, in civil and local matters, not only a necessity but a duty. Without such obedience, civil order was impossible.

It was by this government exercising its power throughout an immense territory, that the Confederate notes were issued early in the war, and these notes in a short time became almost exclusively the currency of the insurgent States. As contracts in themselves, except in the contingency of successful revolution, these notes were nullities; for, except in that event, there could be no payer. They bore, indeed, this character upon their face, for they were made payable only "after the ratification of a treaty of peace between the Confederate States and the United States of America." While the war lasted, however, they had a certain contingent value, and were used as money in nearly all the business transactions of many millions of people. They must be regarded, therefore, as a currency, imposed on the community by irresistible force.

It seems to follow as a necessary consequence from this actual supremacy of the insurgent government, as a belligerent, within the territory where it circulated, and from the necessity of civil obedience on the part of all who remained in it, that this currency must be considered in courts of law in the same light as if it had been issued by a foreign government, temporarily occupying a part of the territory of the United States. Contracts stipulating for payments in this currency, cannot be regarded for that reason only, as made in aid of the foreign invasion in the one case, or of the domestic insurrection in the other. They have no necessary relations to the hostile government, whether invading or insurgent. They are transactions in the ordinary course of civil society, and, though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with actual intent to further invasion or insurrection. We cannot doubt that such contracts should be enforced in the courts of the United States, after the restoration of peace, to the

extent of their just obligation. The first question, therefore, must receive an affirmative answer.

The second question, Whether evidence can be received to prove that a promise, made in one of the insurgent States, and expressed to be for the payment of dollars, without qualifying words, was in fact made for the payment of any other than lawful dollars of the United States? is next to be considered.

It is quite clear that a contract to pay dollars, made between citizens of any State of the Union, while maintaining its constitutional relations with the National government, is a contract to pay lawful money of the United States, and cannot be modified or explained by parol evidence. But it is equally clear, if in any other country, coins or notes denominated dollars should be authorized of different value from the coins or notes which are current here under that name, that, in a suit upon a contract to pay dollars, made in that country, evidence would be admitted to prove what kind of dollars were intended, and, if it should turn out that foreign dollars were meant, to prove their equivalent value in lawful money of the United States. Such evidence does not modify or alter the contract. It simply explains an ambiguity, which, under the general rules of evidence, may be removed by parol evidence.

We have already seen that the people of the insurgent States, under the Confederate government were, in legal contemplation, substantially in the same condition as inhabitants of districts of a country occupied and controlled by an invading belligerent. The rules which would apply in the former case would apply in the latter; and, as in the former case, the people must be regarded as subjects of a foreign power, and contracts among them be interpreted and enforced with reference to the conditions imposed by the conqueror, so in the latter case, the inhabitants must be regarded as under the authority of the insurgent belligerent power actually established as the government of the country, and contracts made with them must be interpreted and enforced with reference to the condition of things created by the acts of the governing power.

. . . Our answer to the second question is, therefore, also in the affirmative. We are clearly of opinion that such evidence must be received in respect to such contracts, in order that justice may be done between the parties, and that the party entitled to be paid in these Confederate dollars can recover their actual value at the time and place of the contract, in lawful money of the United States.

We do not think it necessary to go into a detailed examination of the evidence in the record in order to vindicate our answer to the third question. It is enough to say that it has left no doubt in our minds that the note for ten thousand dollars, to enforce payment of which suit was brought in the Circuit Court, was to be paid, by agreement of the parties, in Confederate notes.

It follows that the decree of the Circuit Court must be reversed, and the cause remanded, for further hearing and decree, in conformity with this opinion.[48]

THE CITY OF BERNE IN SWITZERLAND v. THE BANK OF ENGLAND

Great Britain. High Court of Chancery. 1804.

9 *Vesey, Jr., Chancery Reports* 347.

Mr. Romilly, for the Plaintiff, on behalf of himself and the other members of the Common Council Chamber of the city of Berne, in Switzerland, and the Burghers and Citizens of that city, moved, that the Governor and Company of the Bank of England and South Sea Company may be restrained from permitting a transfer of, and the trustees from transferring, certain funds, standing in their names under a purchase by the old Government of Berne before the Revolution.

Mr. Piggott and Mr. Wooddeson, for the Bank of England, and Mr. Mansfield and Mr. Steele, for the Trustees, opposed the motion; on the ground, that the existing Government of Switzerland, not being acknowledged by the Government of this country, could not be noticed by the Court.

THE LORD CHANCELLOR (ELDON) would not make the Order; observing, that he was much struck with the objection; and it was extremely difficult to say, a judicial Court can take notice of a Government, never authorized by the Government of the Country, in which that Court sits; and, whether the Foreign Government is recognized, or not, is matter of public notoriety.[49]

[48] See Home Insurance Co.'s Case, 8 Ct. Cl. 449; United States v. Insurance Companies, 22 Wall. 99. See also Mauran v. Insurance Co., 6 Wall. 1; Delmas v. Insurance Co., 14 Wall. 661; Ford v. Surget, 97 U. S. 594; Ketchum v. Buckley, 99 U. S. 188; Baldy v. Hunter, 171 U. S. 388. *Cf.* Texas v. White, 7 Wall. 700; Hanauer v. Doane, 12 Wall. 342; Hanauer v. Woodruff, 15 Wall. 439; Horn v. Lockhart, 17 Wall. 570; Sprott v. United States, 20 Wall. 459; Williams v. Bruffy, 96 U. S. 176; Lamar v. Micou, 112 U. S. 452.

See also Lemkuhl v. Kock, Transvaal L. R. [1903] T. S. 451. *Cf.* Van Deventer v. Hancke and Mossop, Transvaal L. R. [1903] T. S. 401, *infra*, 311.

See HENRY, Les Gouvernements de Fait devant le Juge, 28; MOORE, Dig. Int. L., I, 52.

[49] "For demands of a private nature, as a foreign government may be sued, so it may sue, in the Courts of this country: see, *ante*, note 2 to The Nabob of the Carnatic v. The East India Company, 1 V. 371. But, then, such foreign governments must be recognized by our own; this was repeatedly declared by Lord Eldon, with respect to the new governments of South America, before their independence of Spain was completely established and formally acknowledged by the British cabinet." 9 Ves. 347 n.

See also Dolder v. Bank of England, 10 Ves. 352; Dolder v. Lord Huntingfield, 11 Ves. 283; The Penza, 277 Fed. 91; The Rogdai, 278 Fed. 294; The Rogday, 279 Fed. 130; Russian Government v. Cibrario, 191 N. Y. Supp. 543, 235 N. Y. 255; Preobaz-

MAX WULFSOHN ET AL., RESPONDENTS, v. RUSSIAN SOCIALIST FEDERATED SOVIET REPUBLIC, APPELLANT

United States. Court of Appeals of New York. 1923.

234 *New York Reports* 372.

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the second judicial department, entered July 21, 1922, which affirmed an order of Special Term denying a motion to vacate a warrant of attachment.

The following question was certified: "Can the defendant, which has not been recognized as a sovereign state by the United States government, be sued in the courts of this state as a foreign corporation?"

[The arguments of counsel are omitted.]

ANDREWS, J. The Russian Federated Soviet Republic is the existing *de facto* government of Russia. This is admitted by the plaintiff. Otherwise there is no proper party defendant before the court. It is claimed by the defendant. The Appellate Division states that it is a matter of common knowledge. It has not been recognized by the government of the United States. The plaintiffs owned a quantity of furs. They were stored in Russia and they were confiscated by the Russian government. Treating this act as a conversion the present action is brought. The litigation is not, therefore, with regard to title to property situated within the jurisdiction of our courts where the result depends upon the effect to be given to the action of some foreign government. Under such circumstances it might be that the theory of the comity of nations would have a place. (The Annette, L. R. Pro. Div. [1919] 105; The Nueva Anna, 6 Wheat. 193; Oetjen v. Central Leather Co., 246 U. S. 297; Luther v. Sagor & Co., 1 K. B. 1921, 456; S. C., 3 K. B. 1921, 532.) A different case is presented to us. The government itself is sued for an exercise of sovereignty within its own territories on the theory that such an act if committed by an individual here would be a tort under our system of municipal law. It is said that because of non-recognition by the United States such an action may be maintained. There is no relation between the premise and the conclusion.

The result we reach depends upon more basic considerations than recognition or non-recognition by the United States. Whether or not a government exists clothed with the power to enforce its authority within its own territory, obeyed by the people over whom it rules, capable of performing the duties and fulfilling the obligations of an independent power, able to enforce its claims by military force, is a fact not a theory.

henski v. Cibrario, 192 N. Y. Supp. 275; 31 Yale L. Jour. 534. *Cf.* Russian Government v. Lehigh Valley R. Co., 293 Fed. 133, 135; Lehigh Valley R. Co. v. State of Russia, 21 F. (2d) 396 *infra*, 905; 17 Am. Jour. Int. L. 742. And see also Archangel Saw Mills Co. v. Baring Brothers & Co. [1922] 1 Ch. 244.

For it recognition does not create the state although it may be desirable. So only are diplomatic relations permitted. Treaties made with the government which it succeeds may again come into effect. It is a testimony of friendly intentions. Also in the country granting the recognition that act is conclusive as to the existence of the government recognized. (Taylor v. Barclay, 2 Sim. 213; Republic of Peru v. Dreyfus Bros. & Co., L. R. 38 Ch. Div. 348; Republic of Peru v. Peruvian Guano Co., L. R. 36 Ch. Div. 489.) Again recognition may become important where the actual existence of a government created by rebellion or otherwise becomes a political question affecting our neutrality laws, the recognition of the decrees of prize courts and similar questions. But except in such instances the fact of the existence of such a government whenever it becomes material may probably be proved in other ways. (Yrisarri v. Clement, 3 Bing. 432; The Charkieh, L. R. 4 A. & E. 59; but see Mighell v. Sultan of Johore, [1894] 1 Q. B. 158; Luther v. Sagor, 1 K. B. 1921, 456, 474.) Here, however, we need no proof. The fact is conceded. We have an existing government sovereign within its own territories. There necessarily its jurisdiction is exclusive and absolute. It is susceptible of no limitation not imposed by itself. This is the result of its independence. It may be conceded that its actions should accord with natural justice and equity. If they do not, however, our courts are not competent to review them. They may not bring a foreign sovereign before our bar, not because of comity, but because he has not submitted himself to our laws. Without his consent he is not subject to them. Concededly that is so as to a foreign government that has received recognition. (The Schooner Exchange v. McFaddon, 7 Cranch, 116; Porto Rico v. Rosaly, 227 U. S. 270; Oetjen v. Central Leather Co., 246 U. S. 297; Underhill v. Hernandez, 168 U. S. 250; American Banana Co. v. United Fruit Co., 213 U. S. 347; Ricaud v. American Metal Co., 246 U. S. 304; Hassard v. United States of Mexico, 29 Misc. Rep. 511; affd., 173 N. Y. 645; Mason v. Intercolonial Railway, 197 Mass. 349; Wadsworth v. Queen of Spain, 17 Q. B. 171; Vavasseur v. Krupp, L. R. 9 Ch. Div. 351; Strousborg v. Costa Rica, 44 L. T. 199.)[50] But whether recognized or not the evil of such an attempt would be the same. "To cite a foreign potentate into a municipal court for any complaint against him in his public capacity is contrary to the law of nations and an insult which he is entitled to resent." (De Haber v. Queen of Portugal, 17 Q. B. 171.) In either case to do so would "vex the peace of nations." In either case the hands of the state department would be tied. Unwillingly it would find itself involved in disputes it might think unwise. Such is not the proper method of redress if a citizen of the United States is wronged. The question is a political one, not confided to the courts but to another department of government.

[50] See ch. 6, *infra*, 526.

Whenever an act done by a sovereign in his sovereign character is questioned it becomes a matter of negotiation, or of reprisals or of war.

If the complaint and the affidavits upon which the warrant of attachment was based in the case before us clearly indicate that the plaintiffs must ultimately fail the warrant should be vacated. It does so appear in this case.

The orders, therefore, appealed from should be reversed, with costs in all courts, and motions to vacate attachment granted, with costs, and the question certified to us should be answered in the negative.

Hiscock, Ch. J., Hogan, Cardozo, Pound and McLaughlin, JJ., concur; Crane, J., dissents.

Ordered accordingly.[51]

Thompson v. Powles

Great Britain. High Court of Chancery. 1828.

2 *Simons' Chancery Reports* 194.

[This was a bill in equity to recover money claimed to have been procured through fraud. The bill alleged that Barclay & Co. as agents advertised certain certificates of obligation of the Republic of Guatemala, that Powles & Co. purported to contract with Barclay & Co. for the purchase of the loan, that plaintiff was induced by the representations of Powles & Co. to buy some of the obligations, that in fact there was a secret agreement between Barclay & Co. and Powles & Co. for disposing of the loan and dividing the proceeds, that plaintiff paid five instalments which had been declared forfeited, and that the Republic of Guatemala had repudiated the entire transaction. The bill prayed that defendants be decreed to repay the amount of the instalments with interest. The defendants demurred.]

[The above statement is substituted for the statement of the case in the report. Part of the arguments of counsel and part of the opinion are omitted.]

Mr. Pepys, and Mr. Jacob, in support of the demurrer:— . . . The whole of this transaction arises out of a loan to a government which is not recognized by this country and which is still part of the dominions of the King of Spain. It appears, from a variety of cases, that such a transaction is illegal. Jones v. Kinder [1 Turn. & Russ. 297]; in which Lord Eldon, C., though he did not formally decide the point, strongly

[51] Reversing 192 N. Y. Supp. 282, 195 N. Y. Supp. 472. See also Nankivel v. Omsk All Russian Government, 197 N. Y. Supp. 467, 237 N. Y. 150; 19 Am. Jour. Int. L. 263, 265; 37 Harv. L. Rev. 338, 349; 22 Mich. L. Rev. 29, 126. *Cf.* The Annette [1919] P. 105, *supra*, 96; The Gul Djemal, 296 Fed. 563. *Cf.* also Oliver American Trading Co. v. Government of Mexico, 70 N. Y. L. J. 209, 264 U. S. 440, 5 F. (2d) 659.

intimated an opinion that such a transaction could not be recognized in the courts of this country. De Witz v. Hendricks [2 Bing. 314]. Yrisarri v. Clement [2 Carr & Payne 223, 3 Bing. 432]. The courts of this country take notice of those public acts which are recited in treaties. Now, in a treaty between Spain and Great Britain, the inhabitants of this colony are described as revolted subjects. In Bire v. Thompson [unreported, see Taylor v. Barclay, 2 Sim 213, 222], a motion for an injunction was made before Lord Eldon, C., and was refused, because the Lord Chancellor could not take notice of the Republic of Colombia. But it is not merely that the courts do not recognize these states, but contracts for supplying them with money are actually illegal. It must be looked at as a question of international law. In the American war, Great Britain declared war against France and other countries, on the ground of interference between her and her colonies. In Hennings v. Rothschild [4 Bing. 315, 335], Best, C. J. says: "whoever looks into the law may find it very doubtful, whether any person holding allegience to the king of this country, can, without the king's consent, borrow money or lend money to a foreign prince." . . .

Mr. Bickersteth, and Mr. Pemberton, in support of the bill:— . . . The next objection that is made in this case, is that the transaction between Barclay & Co. and the Guatemala government, is one which the courts of this country will not recognize. For the purposes of this case, it is immaterial whether there was or was not any such government as that of Guatemala. Here the transactions with that government are perfectly collateral to the case. This is not a bill to enforce a contract between the Guatemala government and the plaintiff: in point of fact there has never been any such contract. It is immaterial to the plaintiff's case whether there was any such state in existence or not. All that he says, is that the defendants represented to him that there was such a government, and, by false pretences, got possession of his property. He does not ask of the court to recognize that government. The recognition of it is not necessary for the purpose of a decree being made for the plaintiff. The only thing that he shows, is that the alleged existence of this government was the instrument which the defendants used to commit this fraud. . . . But, supposing the contract between Barclay & Co. and the Guatemala government was illegal, that does not effect a derivative contract between two individuals in this country. Can Powles & Co. be allowed to say that, because, as between themselves and the Guatemala government, the contract was illegal, the plaintiff shall not recover back the money that he has paid. He does not attempt to enforce that contract, and to have the securities delivered to him, but to be repaid his money. But, supposing the contract between Powles & Co. and the plaintiff to be illegal, no considerations of public policy ought to prevent his rescinding it and recovering his money. Yrissari

v. Clement, was a case of libel; and there the loan was made to a nation at war. . . .

THE VICE-CHANCELLOR:—It appears to me that there is considerable difficulty, on the face of the bill, in understanding what was the nature of the things to be purchased; for, though it might be collected, from some parts of the bill, that the certificates and obligations mean the same thing; yet some of the passages, certainly, put them in direct opposition to each other. When I read the bill, it seemed to me that the certificates were mentioned as distinct from the obligations: but I should be very sorry to determine the case on any point so extremely minute. . . .

Next with respect to the matter of fraud. This it is said consisted in the representation, stated to have been made, by Messrs. Powles, to the plaintiff, that they had just entered into a contract to take the Guatemala loan, and that they fully expected it would bear a premium, and, therefore, strongly advised the plaintiff to purchase of them a portion of that loan. The circumstance that Powles & Co. had become the contractors for the loan, might, of itself, have been an inducement to other persons to purchase the bonds; and I must infer, from the frame of the bill, that this representation did so operate on the mind of the plaintiff, as to induce him to become a purchaser of these bonds, though he would not have become a purchaser, provided the fact had been that Messers. Powles had not been the contractors for the loan.

The other matter of fraud which the plaintiff's counsel rely upon, is that Messrs. Barclay & Co. so dealt with these bonds as to absolve the government from their obligation to deliver the certificates. This is not, in my mind, a fraud: for I do not collect, from this bill, that the mode in which Messrs. Powles and Barclay dealt, taking it even as it is stated, would absolve the government from their obligation to deliver the certificates. All that would result, from the course of dealing which was pursued between Messrs. Barclay and Powles, would be this, that the government would have a right to call on Messrs. Barclay to pay the whole amount which they received, namely 73*l.* per cent. For Messrs. Barclay & Co. were the agents of the government to sell these obligations, and; therefore, they could not, fairly, give their government credit for 68*l.* per cent. only, when, in point of fact, the sale between themselves and Powles & Co. at 68*l.* per cent., was merely fictitious, and Powles & Co., by virtue of that fictitious sale, received 73*l.* per cent. from the real purchaser. I think, therefore, that the government are not absolved from the performance of their contract; but that they would only have a right to recover the 73*l.* per cent. I do not, therefore, consider that as a case of fraud. But it appears to me, on the first ground, if it had stood alone, that it would have been a fraud; and I think that the court would have relieved the plaintiff.

But there is this further consideration: that this is represented to have been a contract, by the plaintiff, to purchase the obligations of persons who were stated to be the government of the Federal Republic of Central America. I confess that, after all I have heard fall, from the mouth of Lord Eldon, on the subject of persons representing themselves to be governments of foreign countries, which this country had not acknowledged to be governments, and which the courts cannot acknowledge them to be, till the government of the country has recognized them to be so, it does appear to me that this is a contract entered into by the plaintiff for the purpose of purchasing that which, by the law of the land, he could not purchase. I think that the contract, being to purchase securities from these persons, who, as the plaintiff says, were the government of Guatemala, cannot be considered as being a contract which this court ought to sanction. The whole case being founded on that, I do not think that I could give relief to the party, who builds his case for relief entirely on a transaction originating in such a manner; and it appears to me that, on that ground, I must allow this demurrer.[52]

BORIS N. SOKOLOFF, RESPONDENT, v. THE NATIONAL CITY BANK OF NEW YORK, APPELLANT

United States. Court of Appeals of New York. 1924.

239 *New York Reports* 158.

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 4, 1924, which reversed an order of Special Term denying a motion to strike out the first and second separate defenses in the amended answer as insufficient in law and granted said motion.

The following questions were certified:

"1. Is the first separate defense contained in the second amended answer herein sufficient in law?

"2. Is the second separate defense contained in the second amended answer herein sufficient in law?"

[The arguments of counsel and part of the opinion are omitted.]

CARDOZO, J. The case is here upon the pleadings.

In June, 1917, the plaintiff paid to the defendant, the National City Bank in the city of New York, $30,225 upon its promise to open an

[52] See Jones v. Garcia del Rio, Turn. & Russ. 297; De Wütz v. Hendricks, 9 Moo. 586, 2 Bing. 314; Yrisarri v. Clement, 2 Carr. & Payne 223, 228; Taylor v. Barclay, 2 Sim. 213; Habershon v. Vardon, 4 De G. & Sm. 467; Emperor of Austria v. Day, 3 De G. F. & J. 217, 244, *infra*, 815, 817; Kennett v. Chambers, 14 How. 38, *infra*, 802; COBBETT, Cases, 3d ed., II, 366.

Cf. Yrisarri v. Clement, *supra* (see [1924] A. C. 797, 825) See also The Lomonosoff, 37 T. L. R. 151.

account in favor of the plaintiff in its Petrograd branch, and to repay him this sum in rubles at the rate of twenty-three and one-quarter cents per ruble, or a total of 130,000 rubles, at such times and in such amounts as he by his written orders might demand. The plaintiff, after stating this agreement, alleges that the account was opened; that the plaintiff from time to time drew against it, till the balance was reduced to $28,365 or 122,000 rubles; and that thereafter in November, 1917, and again in February, 1918, checks for the balance were presented and dishonored.

The questions certified to us for answer are directed to two defenses.

The first defense states that there was a revolution in Russia in November, 1917, which resulted in the formation of the Russian Socialist Federated Soviet Republic; that in the same month the said government decreed the nationalization of all private joint stock banks organized under the laws of Russia or operating therein; that it took possession of said banks by force of arms and decreed that they be merged in the State Bank of Russia; that all the assets and liabilities of the liquidated banks were taken over by the State Bank acting for the Soviet government; that by force of said decree the government assumed the liability, if any, then owing to the plaintiff; that the defendant's Russian assets consisted of money on deposit in other banks, Russian State obligations, securities held in custody for clients, and certain other assets, of the value of over 240,000,000 rubles; that the liabilities of the said branch to its depositors were over 240,000,000 rubles; that the government following the seizure, proceeded to the liquidation of the banks whose activities it had ended; and that by a subsequent decree all deposit accounts were confiscated and were credited to the account of a revolutionary tax. The recital of these happenings is followed by an averment that the plaintiff was fully aware of the probability of future political and governmental changes, and that it was intended by the parties that the agreement should be performed in Russia and that the performance thereof should be governed by the laws of Russia and by any orders or decrees of any government which might exercise authority therein. By reason of these facts, the plaintiff's deposit account is said to have been seized, his title thereto divested, and the defendant's liability discharged.

The second defense is the same as the first except that it pleads the facts as a partial defense rather than a complete one.

The government of the United States refuses recognition of the Soviet Republic as the government of Russia. Problems not easy to solve have followed in the wake of the refusal. We have had occasion to deal with some of them in cases recently before us. Wulfsohn v. Russian Socialist Federated Soviet Republic (234 N. Y. 372) decided that the government of Russia, though unrecognized, was immune from suit in its corporate capacity at the instance of a plaintiff who asserted its existence as a government and sought to hold it to account for govern-

mental acts within its territorial jurisdiction. Russian Socialist Federated Soviet Republic v. Cibrario (235 N. Y. 255) decided that the same government had no standing to sue as plaintiff in our courts till recognition was accorded. These judgments are not decisive of the case before us now. The Russian government is not here either as plaintiff or as defendant. A domestic corporation pleads the acts and mandates of that government to excuse a default and discharge an obligation.

Courts of high repute have held that confiscation by a government to which recognition has been refused has no other effect in law than seizure by bandits or by other lawless bodies (Russian Commercial & Industrial Bank v. Comptoir D'Escompte de Mulhouse, [1923] 2 K. B. 630, 638; S. C., H. of L., 40 T. L. R. 837; Banque Internationale v. Goukassow, [1923] 2 K. B. 680; Luther v. Sagor & Co., [1921] 1 K. B. 456; S. C., [1921] 3 K. B. 532; *cf.* White, Child & Berney, Ltd., v. Simmons, [1922] 127 L. T. 571). It would be hazardous, none the less, to say that a rule so comprehensive and so drastic is not subject to exceptions under pressure of some insistent claim of policy or justice. In our own country, Oetjen v. Central Leather Co. (246 U. S. 297) and Ricaud v. American Metal Co., Ltd. (246 U. S. 304) are cited sometimes as pronouncements of equal generality, but in truth the point involved was narrower (31 Yale L. J. 535). Property in Mexico, hides and bullion, had been seized under requisitions by Villa and Pereyra, generals of Carranza. The ruling was that title had been thus divested, since, following the seizure, the Carranza government had been recognized as the lawful government of Mexico. There was no occasion to determine whether, in default of recognition, a like effect would have been ascribed to a levy of contributions by a commander in the field (O'Neill & Oetjen v. Central Leather Co., 87 N. J. L. 552; Ford v. Surget, 97 U. S. 594, 605, 606). We think the case at hand is not so governed by authority but that it may be dealt with upon principle.

Juridically, a government that is unrecognized may be viewed as no government at all, if the power withholding recognition chooses thus to view it. In practice, however, since juridical conceptions are seldom, if ever, carried to the limit of their logic, the equivalence is not absolute, but is subject to self-imposed limitations of common sense and fairness, as we learned in litigations following our Civil War. In those litigations acts or decrees of the rebellious governments, which, of course, had not been recognized as governments *de facto*, were held to be nullities when they worked injustice to citizens of the Union, or were in conflict with its public policy (Williams v. Bruffy, 96 U. S. 176, 187). On the other hand, acts or decrees that were just in operation and consistent with public policy, were sustained not infrequently to the same extent as if the governments were lawful (U. S. v. Insurance Companies, 22 Wall. 99; Sprott v. U. S., 20 Wall. 459; Texas v. White, 7 Wall. 700, 733; Mauran

v. Ins. Co., 6 Wall. 1; Baldy v. Hunter, 171 U. S. 388; *cf.* Dickinson, Unrecognized Governments, 22 Mich. L. R. 29, 42). These analogies suggest the thought that, subject to like restrictions, effect may at times be due to the ordinances of foreign governments which, though formally unrecognized, have notoriously an existence as governments *de facto*. Consequences appropriate enough when recognition is withheld on the ground that rival factions are still contending for the mastery, may be in need of readjustment before they can be fitted to the practice, now a growing one, of withholding recognition whenever it is thought that a government, functioning unhampered, is unworthy of a place in the society of nations. Limitations upon the general rule may be appropriate for the protection of one who has been the victim of spoliation though they would be refused to the spoliator or to others claiming under him. We leave these questions open. At the utmost, they suggest the possibility that a body or group which has vindicated by the course of events its pretensions to sovereign power, but which has forfeited by its conduct the privileges or immunities of sovereignty, may gain for its acts and decrees a validity quasi-governmental, if violence to fundamental principles of justice or to our own public policy might otherwise be done.

We think the defendant, though we were to assume the existence of such exceptions to the need of recognition, has not brought itself within them. There is room for debate whether relief from liability would follow if the acts set up in its answer were those of a government *de jure*. Whether that is so or not, we find no such injustice or impolicy in enforcing liability as to necessitate an exception to the rule that acts or decrees, to be ranked as governmental, must proceed from some authority recognized as a government *de facto*. The defendant is not a bailee for the plaintiff, nor were any of its assets ear-marked to the plaintiff's use. If that were its position, there would be other tests of liability. Surrender to overwhelming force would excuse the loss or destruction of the subject of a bailment whether the force that overwhelmed was legitimate or lawless. That is not the case before us. The *res* belonging to the plaintiff was not a physical object committed to the defendant's keeping, but an intangible right, a chose in action, the right to receive rubles in the future under an executory contract. This contract the defendant has not performed, yet it refuses to return the dollars that were paid to it by the plaintiff upon its promise of performance. Two acts that must be kept distinct in thought are said to justify this refusal. One is the decree nationalizing the banks of Russia with the accompanying seizure of their assets. The other is the later decree confiscating the accounts of the depositors as a "revolutionary tax."

The defendant's liability was unaffected by the attempt to terminate its existence and the seizure of its assets. A government of Russia could not terminate its existence either by dissolution or by merger, for

it was a corporation formed under our laws, and its corporate life continued until the law of its creation declared that it should end. What a Russian government could do was to deprive it of the privilege of doing business upon Russian soil. But the ending of its Russian business was not the ending of its duty to make restitution for benefits received without requital. As to this, there would be no dispute if its assets had been left intact. The situation in a legal aspect is not changed by the fact that the property of the Russian branch has been scattered or despoiled. Plaintiff did not pay his money to the defendant, and become the owner of this chose in action, upon the security of the Russian assets. He paid his money to a corporation organized under our laws upon the security of all its assets, here as well as elsewhere. Everything in Russia might have been destroyed by fire or flood, by war or revolution, and still the defendant would have remained bound by its engagement. The plaintiff had no means of knowing whether the assets physically in Russia were large or small. He might fairly assume, if he gave thought to it at all, that the reserve in cash or bullion at the disposal of the Russian branch would be only a small proportion of the Russian liabilities. Even now, the defendant does not state that it kept any more rubles or securities in Russia after its agreement with the plaintiff than before. It states, indeed, that its Russian assets were over 240,000,000 rubles and that its Russian liabilities were over that amount, but it does not state that the excess was the same for each. If assets physically in Russia were less than liabilities, the defendant would be making a profit by the process of cancellation. The defense becomes the more untenable when we mark the description of the assets seized. They consisted in part of securities held for clients. As to these, the defendant occupied the position of a bailee, with the result that the loss may have been the clients' rather than its own. Other classes of assets were moneys in other banks and obligations of the Russian state. If the defense were to prevail, the loss sustained by the defendant through these unfortunate investments would be shifted from itself and cast on its depositors. The situation is not changed though it be shown that the new or nationalized bank in appropriating the assets assumed the liabilities. Upon that head, the answer is lacking in certainty and precision. If, however, the defendant be given the benefit of the most favorable construction, there is still no suggestion of a novation, releasing the defendant and substituting its successor. Very likely, the defendant, upon payment of the plaintiff's claim, would have been subrogated to his rights under the covenant of assumption, if such a covenant there was. Its obligation as the primary debtor in its relation to its own creditors continued unimpaired.

If merger and seizure of assets do not avail as a defense, the question remains whether the defendant gains anything by the subsequent decree which confiscated the accounts of depositors as a "revolutionary tax."

At the time of this decree, the Russian assets were already lost. The defendant did not surrender them or any part of them for the purpose of discharging a tax or other liability imposed on its depositors. The question is not here whether credit would have to be allowed if payment had been made for such a purpose out of assets that would otherwise have been retained by the depositary. The ruling of the Supreme Court in Williams v. Bruffy (96 U. S. 176) suggests the difficulties that even then would have to be surmounted. Certain we think it is that a decree of confiscation directed against depositors does not reduce the liabilities of a bank which has already yielded up its assets in virtue of a decree of confiscation directed against itself. In such a situation the later decree, if it is to be given any effect at all, must speak the voice of a power recognized by us as sovereign. Troublesome questions of situs and of jurisdiction would even then remain. The intangible chose in action, at least when it is the result of a deposit in a bank, has for some purposes a situs at the residence or place of business of the debtor, though the creditor be far away (Blackstone v. Miller, 188 U. S. 189; Security Bank v. California, 263 U. S. 282; Matter of Houdayer, 150 N. Y. 37; *cf.* Direction der Disconto-Gesellschaft v. U. S. Steel Corp., 300 Fed. Rep. 741, 746). The debtor in this instance, though domiciled in the United States, may have had what was equivalent to a residence in Russia while it was doing business at its Russian branch. There is doubt whether its residence in Russia can be said to have continued after its branch had been seized and its business had been closed (*cf.* R. C. & I. Bank v. Comptoir, etc., *supra;* Banque Internationale v. Goukassow, [1923] 2 K. B. 680; White, Child & Berney, Ltd., v. Simmons, [1922] 127 L. T. 571). The decision of this case does not require that such doubts should be resolved. If there is jurisdiction in these conditions to confiscate the incorporeal right, no power short of sovereignty in all its plenitude has a competence so high. . .

The order should be affirmed with costs, and the questions certified answered in the negative.

Hiscock, Ch. J., Pound, McLaughlin, Crane, Andrews and Lehman JJ., concur.

Order affirmed.

Russian Reinsurance Co. et al., Respondents, v. Francis R. Stoddard, Jr., as Superintendent of Insurance of the State of New York, et al., Appellants

United States. Court of Appeals of New York. 1925.

240 *New York Reports* 149.

Appeal from a judgment, entered January 15, 1925, upon an order of the Appellate Division of the Supreme Court in the third judicial

department, reversing a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term and directing judgment in favor of plaintiff.

[The arguments of counsel are omitted.]

LEHMAN, J. The Russian Reinsurance Company was incorporated in December, 1899, by the government of Russia under a special statute which constitutes its charter and by-laws. In or about 1906 the corporation received authority to transact business in the State of New York. In accordance with the provisions of section 27 of the Insurance Law (Cons. Laws, ch. 28), it appointed the Mercantile Trust Company of New York (subsequently merged into the defendant Bankers Trust Company) as trustee, and deposited with it under a trust agreement securities and money to be held as its capital in this State for the protection of policyholders and creditors in the United States. As such trustee the defendant Bankers Trust Company now holds these securities and moneys. This action has been brought to compel their return to the plaintiffs. The Bankers Trust Company claims no interest in this property except as trustee or depositary. It resists the plaintiffs' claim solely on the ground that the plaintiffs fail to establish ownership or right of possession to the exclusion of others who might demand the property hereafter. That at the present time the plaintiff corporation is no longer in existence or, if in existence, has no capacity to sue; or in the alternative that the men who claim to be its directors and as such have attempted to take corporate action to demand the return of the property and to authorize the bringing of this suit, no longer represent the corporation. It urges that in any event the courts of this State should not assume jurisdiction of the action because they cannot grant a judgment which would be binding upon other parties who are not before the court and who might hereafter be able to establish a valid claim to the cause of action or property formerly belonging to this plaintiff.

A corporation organized and existing under the laws of a foreign state which we have recognized and with which we live in comity may ordinarily seek the aid of our courts in the assertion of its rights, even against our own citizens. If the existence of the corporation, its capacity to sue, or the authority of its directors to represent it or to bring the action is challenged, we look to the charter and the law of its corporate domicile for the data upon which we may rest our determination of such questions. If it is claimed that the plaintiffs' rights or property have passed to another, we examine the laws of the particular jurisdiction which may regulate their transfer or devolution. In such cases the judgments of our courts not only are binding upon the parties before them, but since other jurisdictions would determine the same questions upon the same considerations and presumably reach the same conclusion as our courts, the danger that a defendant might be subjected to a

double recovery at the suit of another claimant may not be regarded as serious. At least in actions at law when other possible claimants could not be brought into court, the court has ordinarily not regarded such danger as a sufficient ground to refuse to take jurisdiction of an action to enforce rights against a resident of this State which a plaintiff can establish by competent evidence.

The situation may present a different aspect when, as in this case, the domicile of the corporate plaintiff is in a country which for years has been without any government recognized by the United States, and all proceedings by the stockholders and directors of the corporation, within the country of its domicile, are forbidden and prevented by the civil authorities which control that country, and these authorities have also passed a decree which purports to liquidate and nationalize the corporation and perhaps to confiscate its shares of stock and property.

Until these civil authorities have been recognized by our State Department we may not regard them as the lawful sovereign government of the State. (Rose v. Himeley, 4 Cranch, 241; Gelston v. Hoyt, 3 Wheat. 246; Kennett v. Chambers, 14 How. (U. S.) 38.) In order to avoid possible confusion which may ensue when a term which ordinarily expresses a well-recognized juridical concept is applied to a new and partially undefined state of facts, we shall not even call these authorities a government. (Sokoloff v. National City Bank, 239 N. Y. 158.) We assume for the moment that, without recognition, their decrees lack here all the force which the decrees of a recognized sovereign government would have. We may assume that ordinarily such decrees are insufficient to furnish justification for an act which would otherwise be unlawful; that they can be the basis of no right which may be asserted in the courts of this country and can excuse no wrong. Whether these assumptions correctly represent rules to be applied under particular circumstances is a question which might arise if a representative of the civil authorities now functioning in Russia, or a liquidator appointed by them, laid claim to the assets held in trust by the Bankers Trust Company, or if the Bankers Trust Company urged as a defense to the present action that it had paid over the property to some other party, relying on a decree of the so-called Soviet government. Until the question how far, if at all, the courts of this country may give effect to the decrees of an unrecognized governmental authority arises necessarily and directly, its further consideration may be postponed. In the present case the primary question presented is not whether the courts of this country will give effect to such decrees, but is rather whether within Russia, or elsewhere outside of the United States, they have actually attained such effect as to alter the rights and obligations of the parties in a manner we may not in justice disregard, regardless of whether or not they emanate from a lawfully-established authority.

Certain findings of the trial court which have been unanimously affirmed by the Appellate Division set forth the general condition of Russia since the fall of the government of the Czar in 1917. We are bound by these findings, and in any event they merely embody a concise narration of events which, in most part, are within the common knowledge of the people of this country. Among these findings are the following:

"6. In 1917 the Government of the Czar in Russia was overthrown and a Provisional Government, sometimes known as the Kerensky Government, was established in Russia, which was recognized in full by the Government of the United States of America on March 22, 1917.

"7. The Provisional or Kerensky Government of Russia was overthrown or fell early in November, 1917, and was followed by the Russian Socialist Federated Soviet Republic.

"8. The Russian Socialist Federated Soviet Republic is the *de facto* government in Russia, enforcing in Russia by force its decrees.

"9. The State of Russia is now governed by the Russian Socialist Federated Soviet Republic. Such government there exists, clothed with power to enforce its authority within its own territory, obeyed by the people over whom it rules, capable of performing the duties and fulfilling the obligations of an independent power and able to enforce its claims by military force.

"10. The ambassador of the Provisional (Kerensky) Government to this country continued to be recognized until June 30, 1922, when his duties were terminated.

"11. There are no diplomatic, consular or trade representatives of the United States Government in Russia at the present time.

"12. The United States Government has not accorded recognition to the Russian Socialist Federated Soviet Republic, and there is in the United States no recognized representative of that Regime.

"13. The following countries have extended full recognition to the Russian Socialist Federated Soviet Republic (Soviet Regime): Austria; Esthonia; Lithuania; Turkey; Afghanistan; Finland; Latvia; Poland; Persia; Germany; Great Britain; Italy; Greece; Norway and Sweden; and Denmark and Czechoslovakia have concluded trade agreements with the Soviet Regime.

"14. The United States has concluded no treaties with Russia as represented by the Russian Socialist Federated Soviet Republic."

The fall of one governmental establishment and the substitution of another governmental establishment which actually governs; which is able to enforce its claims by military force and is obeyed by the people over whom it rules, must profoundly affect all the acts and duties, all the relations of those who live within the territory over which the new establishment exercises rule. Its rule may be without lawful foundation; but lawful or unlawful, its existence is a fact and that fact cannot be

destroyed by juridical concepts. The State Department determines whether it will recognize its existence as lawful, and until the State Department has recognized the new establishment, the court may not pass upon its legitimacy or ascribe to its decrees all the effect which inheres in the laws or orders of a sovereign. The State Department determines only that question. It cannot determine how far the private rights and obligations of individuals are affected by acts of a body not sovereign or with which our government will have no dealings. That question does not concern our foreign relations. It is not a political question, but a judicial question. The courts in considering that question assume as a premise that until recognition these acts are not in full sense law. Their conclusion must depend upon whether these have nevertheless had such an actual effect that they may not be disregarded. In such case we deal with result rather than cause. We do not pass upon what such an unrecognized governmental authority may do, or upon the right or wrong of what it has done; we consider the effect upon others of that which has been done, primarily from the point of view of fact rather than of theory.

It appears from an examination of the findings which have been unanimously affirmed that "the Russian Socialist Federated Soviet Republic enacted and promulgated in Russia certain decrees of nationalization in respect of various businesses and industries including the business of insurance." We have held in James & Co. v. Second Russian Insurance Co. (239 N. Y. 248) that such decree of nationalization "has no effect in the United States, unless, it may be, to such extent as justice and public policy require that effect be given," and that neither justice nor public policy requires us to give to such decrees an effect which will result in the extinction of the corporate existence of an insurance company which has been doing business in this State under authority of the Superintendent. Though such decrees may not be regarded as having terminated the corporate existence of this plaintiff, it is evident that plaintiff has been actually prevented from conducting its corporate business in the country of its domicile, its property there has been sequestrated, its business nationalized, and it has been driven out, if it is possible that a corporation may be driven out from its domicile, and yet maintain its life. Since March, 1917, no meetings of its stockholders have been held. The terms for which the various directors were elected have expired and no election has been held since that time. Although the charter provides that the seat or place of residence of the board of directors is at St. Petersburg or Petrograd, seven of the eight persons who were acting as directors when the Soviet Republic was established have been compelled to leave Russia and have held meetings in Paris. Although the charter provides that the management of the company's business is intrusted to the board of administration, and the general

meeting of shareholders, no such general meeting has been or could be held. Although the charter provides that the board of administration may "manage and supervise all affairs of the Company, without exception, within limits established by a general meeting" and further that "the details relating to the management of the business by the Board will be determined by an instruction to be approved by a General Meeting of shareholders" and that "all matters relating to the affairs of the Company may be examined and decided upon at the General Meetings of shareholders," yet since the Soviet Republic was established the directors have been compelled to assume the sole management of the affairs of the corporation without direction or restriction emanating from a general meeting of shareholders. It has not even been possible to subject its acts to supervision or examination by the revisions committee created by the charter for that purpose.

Do these facts establish that the plaintiff has no right to revoke the deed of trust and to receive the property after such trust has been terminated, or that the directors have no longer authority to represent the plaintiff? Perhaps not, but they do throw doubt upon both propositions, and before we pass upon them we must determine whether assumption of jurisdiction by our courts to determine these questions would be in accordance with our public policy. There is evidence, even though contradicted, which is sufficient to sustain findings that under the plaintiff's charter and the Russian law the plaintiff corporation may hold its directors' meeting in Paris and that each director continues in office until his successor is elected. Greater difficulties are presented by the question of whether the directors of a corporation still have power to represent the corporation, when for a long period conditions have made it impossible for the corporation to function in its domicile or to hold meetings of shareholders who have the final right to determine all the details of the corporate affairs and to give directions to the board of directors. The directors are merely the agents of the corporation, and when circumstances have changed, to such extent the conditions under which that agency was to be exercised and have rendered inoperative the checks and limitations provided in the charter; have made impossible the revocation of the agency or the substitution of new agents, we may question whether that agency continues in full force and vigor after the lapse of years. No answer to this question may be found in precedents, for until recently the conditions which gave rise to the question had never arisen. Doubtless our decision in James & Co. v. Second Russian Insurance Co. (*supra*) that the existence of the corporation has not been terminated carries with it some implication that for certain purposes at least the authority of the directors continues. Perhaps a corporation with sufficient vitality to appear in court must have officers or agents who may act for it in the assertion or defense of its rights; yet even though

we should assume that the authority of the agent to defend the corporation from attack, to preserve its property and to ask the courts to redress wrongs committed against it continues, it does not follow that the general authority of the agent also continues in full force. At present we content ourselves with stating the question; we do not in any wise express opinion as to its proper solution. It is sufficient to point out that different courts might reach different conclusions, and these conclusions might be based upon various considerations and be dictated by circumstances which may exist in one case and not in others.

We have not in this connection stressed the effect of the decrees of the Soviet Republic, except in so far as they have been actually enforced in the territory of Russia. The findings which have been unanimously affirmed state that the Soviet Regime "claiming to be the government of Russia, purported to take governmental action, liquidating all insurance companies, confiscating their available property and nationalizing the business of insurance in Russia." Though our courts give to this "purported governmental action" no extraterritorial effect, yet the so-called Soviet Regime, according to the findings or common knowledge, has been recognized by many other countries, including Great Britain, France, Italy and Germany. These countries, having admitted the Soviet Republic to their comity, will determine for themselves how far this comity should lead them in opening the doors of their courts to the Soviet Republic for the purpose of enforcing its decrees; but a total disregard of its laws and decrees as if they were non-existent, a failure to recognize them as having the full force of law within Russia would be without precedent, and would constitute a negation of the full recognition these nations have extended to the Soviet Republic. The directors who attempt to act for the plaintiff corporation have held their meetings within France. In France the lawful government of the country of the plaintiff's domicile is the Soviet Republic, and its decrees are in full sense the laws of the country it rules. Under such laws the corporation is nationalized, it may not continue to do business, its directors are no longer its agents. The situation is not only without precedent but anomalous. In its domicile the corporation cannot function, the government of the place where its directors sit has recognized as sovereign the government of the country of the corporate domicile which has issued a decree which either terminates the existence of the corporation or at least has terminated the right of directors or shareholders to act for the corporation. Though we might say that for us such decree is not the law even of the country which the Soviet government rules, yet it is enforced as the law in that country and is recognized as the law of that country by other great nations. The right of the directors to represent the corporation, even the existence of that corporation, must be determined in accordance with the law of Russia. For us the law of Russia,

in its strict sense, may still be the law as it existed when the Czar ruled; for other nations the law of Russia is the law sanctioned by the Soviet Republic. Our view of what is the law of Russia rests upon a juridical conception not always in consonance with fact; in other nations recognition has brought juridical conceptions and facts into harmony. Do these juridical conceptions require us to hold that the law of Russia has remained unchanged since December, 1917; that the Soviet Republic does not exist and, therefore, cannot act; that the plaintiff corporation still lives and is domiciled in Russia and is under the management of its former directors; though we know that its property in Russia has been sequestrated, its directors driven into exile, its business monopolized by an agency which enforces its decrees as if it were a government and is recognized as a government by most of the countries of Europe? Shall we recognize the right of the corporate directors to revoke the deed of trust and to receive property deposited thereunder though their authority is no longer recognized in the country of the corporate domicile, or in the country where the directors reside; though they might probably urge the non-existence of the corporation as a defense to any action brought by policyholders, creditors or stockholders in any forum which gives effect to the decree of nationalization made by the Soviet Republic; and the corporation will be immune from suit here after it withdraws from this jurisdiction? If the logical application of juridical conceptions leads to this result, then we should consider its practical consequences to determine whether we have not been carried beyond the "self-imposed limits of common sense and fairness." We shall not attempt to collate the authorities in order to deduce from them a new general rule which will define these limits. The very nature of the problem shows that general definitions must hamper rather than promote its solution. The facts of each case, the result of each possible decision, determines whether that decision accords with common sense and justice. There can be no true precedent in the books, when the facts are unprecedented. It remains for us to determine whether the result of the present judgment is contrary to common sense and justice.

We give or deny the effect of law to decrees or acts of a foreign governmental establishment in accordance with our own public policy; we open or close our courts to foreign corporations according to our public policy, and in determining our public policy in these matters common sense and justice must be consideration of weight.

The plaintiff insurance company deposited property with the defendant trust company in order to comply with the conditions imposed by the Insurance Law as a prerequisite to doing business within the State. Under the deed of trust the defendant assumed obligations which a court of equity will ordinarily enforce. The defendant has not heretofore failed to comply with these obligations; it does not now repudiate its

obligation at the proper time to pay over the property in its hands to the person or corporation lawfully entitled to receive it. It admits the obligation, it questions whether the party to whom that obligation is due is the plaintiff herein. The plaintiff appeals to a court of equity to compel the defendant to comply with an obligation which the defendant admits; the court must determine whether equitable principles should lead it to recognize the plaintiff as the party who may at the present time compel the defendant to deliver the property to it. The plaintiff if it exists at all is an artificial entity, a creature of statute, an abstraction rather than an actuality. It is in fact without existence in Russia which has given it birth; it may be in law non-existent in the countries which have recognized the Soviet Republic. It exists here solely by force of the juridical conception which we have pointed out should not be carried beyond the limits of common sense and justice. In testing a result by standards of common sense and justice we may look beyond all fictions to the facts behind them. At the present time this exiled corporation, unable to function in Russia, unable to hold stockholders' meetings, can function if at all only through its directors, acting as its agents. A judgment in this action in favor of the plaintiff is in effect a judgment directing delivery of the moneys to these directors by the present custodians. Under the plaintiff's corporate charter the property in the defendant's custody is part of the capital stock and reserve funds of the company which may be deposited by the directors in a credit institution only with the consent of certain government officials who are no longer functioning if indeed alive. The company cannot do business in Russia because it is excluded therefrom; it cannot do business under the management of the directors who here claim to represent it in any country which gives full force and effect to the decrees of the Soviet Government; it cannot do business in this jurisdiction after it has withdrawn these moneys from the depositary and it makes no claim that it intends or in fact could make use of the property as working capital in doing business elsewhere. Though this property in form belongs to the corporation, in fact, if it has not been confiscated, the policyholders, creditors and shareholders are eventually entitled to it. Certainly it does not belong to the directors to do with as they will. The directors may not distribute these moneys in liquidation, for under the express provision of the charter, liquidation if ordered must be carried out by other officers. Moreover, it is somewhat difficult to see how or where under present conditions a distribution of the assets among policyholders, creditors or stockholders could be successfully carried out, except in Russia, from which the corporation is now excluded. The corporation and its directors are not seeking redress for a wrong committed, or to establish an obligation which has been repudiated. They show no danger of waste. They do not ask for the corporate property so that it

may be used in corporate business. They ask the court to remove property from a custodian selected by the plaintiff itself with the approval of the Superintendent of Insurance, and to place it in the hands of a board of directors whose term has long expired; and whose continued authority rests rather upon necessity than upon the will of the principal, and is limited by the logic of the same necessity upon which it rests. Section 63, subdivision 4, of the Insurance Law provides that in certain cases the Superintendent of Insurance shall take possession of the property and conserve the assets of a foreign corporation. The present situation of the plaintiff corporation may not bring it within the letter of that section; yet its situation is such that a court of equity might well hesitate to grant a judgment which will permit the removal of its property from the custody of a trustee approved by the Superintendent until proof is made that such removal will serve a corporate purpose which can be carried out by the only corporate officers now able to act.

We do not assume that these directors would not safely keep this property if delivered to them; we do not now decide that any public policy forbids us after the claims of domestic creditors are secured, to order the delivery of the property to the directors of the corporation merely because of these considerations. At least, however, they point to the conclusion that there is no impelling reason why the court should take jurisdiction; they become cogent arguments why the court should not take jurisdiction if it also appears that injustice might be done to this defendant if judgment is granted against it. It seeks protection against any possible claim that may hereafter be made against it. Such a claim after judgment in favor of this plaintiff could conceivably be made by the Soviet government claiming under its decrees of nationalization and confiscation, or by the corporate plaintiff claiming that its directors had no authority to represent it when they revoked the deed of trust and demanded the money from the defendant. It may be conceded that no public policy requires us to refuse to order the delivery of the property to the plaintiff in order to give the Soviet government a possible opportunity to assert a claim based upon confiscation in our courts or the courts of any other country, nor will we assume that the State Department will ever enter into such relations with the Soviet government as might compel our courts to enforce such a claim. It may be conceded that if we held that the present directors have authority to take action as they have done, we necessarily also hold that the corporation could never make valid claim for the fund thereafter. The deed of trust was executed here; the trust is to be executed here; the defendant resides here; the situs of the cause of action is here; and the possibility of any court of this State, or of any other jurisdiction of this country, allowing a second recovery upon the same cause of action, if we decide in favor of the plaintiff, is so remote that we might perhaps

disregard it. May we regard as similarly remote the possibility of such a second recovery in the courts of a foreign nation? We have pointed out that the existence of the corporate plaintiff, its right to sue, the authority of the directors and the devolution of title to its assets must all be determined by the Russian law. We have pointed out that what constitutes law in Russia depends upon who is recognized as sovereign and the source of law. We recognize one source of law; most of the nations of Europe look to another sovereign as its source. We may anticipate respect for our decisions in the courts of foreign jurisdiction; we cannot anticipate that these courts will follow our decisions when they are based upon somewhat doubtful inferences drawn from disputed facts and resting on a premise of who is the lawful sovereign of Russia which other jurisdictions are by their own public policy compelled to deny. Our decision upon this point would establish only the fact that this plaintiff, under our view of the Russian law, is properly in our courts; when another party claims ownership of the same cause of action or challenges the correctness of our decision that this plaintiff has been before our court, then the question of fact may be determined anew. We do not assume that the courts of any foreign country would take jurisdiction to determine such questions in any action brought against a trustee in the situation of this defendant, either before or after the question was submitted to us. Perhaps their public policy based upon comity with us might cause them to refuse such jurisdiction, yet under the circumstances we cannot regard as entirely remote the possibility that in a foreign country where the defendant trustee may be doing business another action might be maintained in which the decision of this court would serve as no adequate protection against a second recovery.

We grant admission to the courts of this State to foreign corporations because of comity. We have not admitted to our comity the Soviet Republic, and the plaintiff denies allegiance to it. The claims based upon comity with a government of the Czar which may exist as a juridical concept but is in fact not functioning and is without representative here is tenuous. It should not prevail where injustice follows to one of our own nationals.

Our inability to protect by our judgment this defendant against a second recovery upon the same cause of action presents a strong consideration against assuming jurisdiction of this action. (Mahr v. Norwich Union Fire Insurance Co., 127 N. Y. 452.) The corporation is deprived of no substantial right or benefit if our courts refuse to entertain jurisdiction of an action brought by it until the time comes when a government which we recognize rules the country of plaintiff's corporate domicile, or at least until the plaintiff corporation is able to re-establish its existence in that domicile, and the machinery provided

by its charter for the management of its affairs is again functioning. If it is urged that by so doing we may enable the Soviet government in case of recognition by the State Department to assert here an unjust claim based upon confiscation, the answer is that the responsibility rests upon that branch of our government to determine in the first instance whether and upon what terms the Soviet government should hereafter be recognized and the courts will then determine, subject to any rights granted by treaty, whether they will enforce any claim asserted by that government.

To the extent that until that time the courts should not take jurisdiction of this equitable cause of action, both justice and common sense require us to give effect to the conditions existing in Russia, though those conditions are created by a force which we are not ready to acknowledge as entitled to recognition as a state or government.

The judgment of the Appellate Division should be reversed and the judgment of Special Term affirmed, without costs.

CRANE, J. (dissenting). By the majority opinion of this court it is conceded that the Bankers Trust Company has no legal claim to the funds in question, and neither has the Soviet Russian government. The funds belong to the Russian Reinsurance Company. By a decree of the Soviet government, which we refuse to recognize, that company has been put out of business, and its property confiscated, in so far as Soviet laws and decrees can be executed. The stockholders who own this money have no means whatever of acting, except through the agents whom they have appointed, to wit, the directors. The company is still in existence; the directors are still entitled to act, and would act within the domain of Russia, but for the decrees of the Soviets. The so-called government has tried to put a stop to all these things. We refuse to recognize its acts. What then must be the logical conclusion? It is that the property here belonging to the Russian Reinsurance Company should be paid to the directors, or the plaintiff, Rasor, as their duly authorized representative. Our courts are justly sensitive about giving force and effect to the decrees of confiscation scattered broadcast by the Russian government. And yet by such decision as this, we are accomplishing I fear, by indirection, that which we say we would not do directly. If the Bankers Trust Company has no right to this money, and neither the Russian Reinsurance Company, nor its directors, nor its stockholders have any right to it which they can enforce here, what is to become of the money? Shall the Bankers Trust Company hold it until our country shall officially recognize Russia? If so, under the decisions which this court has made, Soviet Russia may then be entitled to the funds. I consider that our decision has the tendency to give force and effect to these unrecognized decrees of the present Russian officials. The fear, which is apparently the only basis for our present decision, that the

Bankers Trust Company may in some way be called upon to pay this money twice is in my judgment so very remote, so far from the realm of possibility, that I would rather see the money go now to the persons entitled to it.

Hiscock, Ch. J., Cardozo and Pound, JJ., concur with Lehman, J.; Crane, J., reads dissenting opinion; McLaughlin and Andrews, JJ., not sitting.

Judgment reversed, etc. [53]

Claims of Royal Bank of Canada and Central Costa Rica Petroleum Company

Costa Rica and Great Britain. Arbitration Before William H. Taft, Sole Arbitrator. 1923.

18 *American Journal of International Law* 147.

This is a proceeding under a treaty of arbitration between Great Britain and Costa Rica. . . .

[Part of the opinion is omitted.]

In January, 1917, the Government of Costa Rica, under President Alfredo Gonzalez, was overthrown by Frederico Tinoco, the Secretary of War. Gonzalez fled. Tinoco assumed power, called an election, and established a new constitution in June, 1917. His government continued until August, 1919, when Tinoco retired, and left the country. His government fell in September following. After a provisional government under one Barquero, the old constitution was restored and elections held under it. The restored government is a signatory to this treaty of arbitration.

[53] See James & Co. v. Second Russian Insurance Co., 239 N. Y. 248; Joint Stock Co. v. National City Bank, 240 N. Y. 368; First Russian Insurance Co. v. Beha, 240 N. Y. 601; Sliosberg v. New York Life Insurance Co., 244 N. Y. 482; James & Co. v. Rossia Insurance Co., 247 N. Y. 262; Connick, "Effect of Soviet Decrees in American Courts," 34 Yale L. Jour. 499.

See Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse [1923] 2 K. B. 630, [1925] A. C. 112, and Banque Internationale de Commerce de Petrograd v. Goukassow [1923] 2 K. B. 682, [1925] A. C. 150, arising in British courts after Great Britain had recognized the new Russian government.

Cf. Agency of Canadian Car and Foundry Co. v. American Can Co., 253 Fed. 152, 258 Fed. 363. *Cf.* also Archangel Saw Mills Co. v. Baring Brothers & Co. [1922] 1 Ch. 244.

See Kolundjija v. Hanna Ore Mining Co., 155 Minn. 176; Garvin v. Diamond Coal & Coke Co., 278 Pa. 469; Inland Steel Co. v. Jelenovic, 150 N. E. (Ind.) 391.

See Ex parte Matthews, 277 Fed. 857; Petition of Brooks, 5 F. (2d) 238; Pestereff v. Reed, 7 Alaska 644.

See Pelzer v. United Dredging Co., 193 N. Y. Supp. 675, 676, 22 Mich. L. Rev. 29; 38 Harv. L. Rev. 816; 51 Jour. du Dr Int. Privé 1112.

On the 22nd of August, 1922, the Constitutional Congress of the restored Costa Rican Government passed a law known as Law of Nullities No. 41. It invalidated all contracts between the executive power and private persons, made with or without approval of the legislative power between January 27, 1917 and September 2, 1919, covering the period of the Tinoco government. It also nullified the legislative decree No. 12 of the Tinoco government, dated June 28, 1919, authorizing the issue of the fifteen million colones currency notes. The colon is a Costa Rican gold coin or standard nominally equal to forty-six and one-half cents of an American dollar, but it is uncoined and the exchange value of the paper colon actually in circulation is much less. The Nullities Law also invalidated the legislative decree of the Tinoco government of July 8, 1919, authorizing the circulation of notes of the nomination of 1000 colones, and annulled all transactions with such colones bills between holders and the state, directly or indirectly, by means of negotiation or contract, if thereby the holders received value as if they were ordinary bills of current issue.

The claim of Great Britain is that the Royal Bank of Canada and the Central Costa Rica Petroleum Company are Britain corporations whose shares are owned by British subjects; that the Banco Internacional of Costa Rica and the Government of Costa Rica are both indebted to the Royal Bank in the sum of 998,000 colones, evidenced by 998 one thousand colones bills held by the Bank; that the Central Costa Rica Petroleum Company owns, by due assignment, a grant by the Tinoco government in 1918 of the right to explore for and exploit oil deposits in Costa Rica, and that both the indebtedness and the concession have been annulled without right by the Law of Nullities and should be excepted from its operation. She asks an award that she is entitled on behalf of her subjects to have the claim of the bank paid, and the concession recognized and given effect by the Costa Rican Government.

The Government of Costa Rica denies its liability for the acts or obligations of the Tinoco government and maintains that the Law of Nullities was a legitimate exercise of its legislative governing power. It further denies the validity of such claims on the merits, unaffected by the Law of Nullities.

It is convenient to consider first the general objections to both claims of Great Britain, urged by Costa Rica, and then if such general objections cannot prevail, to consider the merits of each claim and Costa Rica's special defenses to it.

Coming now to the general issues applicable to both claims, Great Britain contends, first, that the Tinoco government was the only government of Costa Rica *de facto* and *de jure* for two years and nine months; that during that time there is no other government disputing

its sovereignty, that it was in peaceful administration of the whole country, with the acquiescence of its people.

Second, that the succeeding government could not by legislative decree avoid responsibility for acts of that government affecting British subjects, or appropriate or confiscate rights and property by that government except in violation of international law; that the act of Nullities is as to British interests, therefore itself a nullity, and is to be disregarded, with the consequence that the contracts validly made with the Tinoco government must be performed by the present Costa Rican Government, and that the property which has been invaded or the rights nullified must be restored.

To these contentions the Costa Rican Government answers: First, that the Tinoco government was not a *de facto* or *de jure* government according to the rules of international law. This raises an issue of fact.

Second, that the contracts and obligations of the Tinoco government, set up by Great Britain on behalf of its subjects, are void, and do not create a legal obligation, because the government of Tinoco and its acts were in violation of the constitution of Costa Rica of 1871.

Third, that Great Britain is stopped by the fact that it did not recognize the Tinoco government during its incumbency, to claim on behalf of its subjects that Tinoco's was a government which could confer rights binding on its successor. . . .

Dr. John Bassett Moore, now a member of the Permanent Court of International Justice, in his Digest of International Law, Volume I, p. 249, announces the general principle which has had such universal acquiescence as to become well settled international law:

"Changes in the government or the internal policy of a state do not as a rule affect its position in international law. A monarchy may be transformed into a republic or a republic into a monarchy; absolute principles may be substituted for constitutional, or the reverse; but, though the government changes, the nation remains, with rights and obligations unimpaired. . . .

"The principle of the continuity of states has important results. The state is bound by engagements entered into by governments that have ceased to exist; the restored government is generally liable for the acts of the usurper. The governments of Louis XVIII and Louis Philippe so far as practicable indemnified the citizens of foreign states for losses caused by the government of Napoleon; and the King of the Two Cicilies made compensation to citizens of the United States for the wrongful acts of Murat."

Again Dr. Moore says:

"The origin and organization of government are questions generally of internal discussion and decision. Foreign powers deal with the existing *de facto* government, when sufficiently established to give

reasonable assurance of its permanence, and of the acquiescence of those who constitute the state in its ability to maintain itself, and discharge its internal duties and its external obligations."

The same principle is announced in Professor Borchard's new work on The Diplomatic Protection of Citizens Abroad:

"Considering the characteristics and attributes of the *de facto* government, a general government *de facto* having completely taken the place of the regularly constituted authorities in the state binds the nation. So far as its international obligations are concerned, it represents the state. It succeeds to the debts of the regular government it has displaced and transmits its own obligations to succeeding titular governments. Its loans and contracts bind the state and the state is responsible for the governmental acts of the *de facto* authorities. In general its treaties are valid obligations of the state. It may alienate the national territory and the judgments of its courts are admitted to be effective after its authority has ceased. An exception to these rules has occasionally been noted in the practice of some of the states of Latin America, which declare null and void the acts of a usurping *de facto* intermediary government, when the regular government it has displaced succeeds in restoring its control. Nevertheless, acts validly undertaken in the name of the state and having an international character cannot lightly be repudiated and foreign governments generally insist on their binding force. The legality or constitutional legitimacy of a *de facto* government is without importance internationally so far as the matter of representing the state is concerned. (Bluntschli, Sects. 44, 45, 120; Holtzendorff, II, Sect. 21; Pradier Fodere, Sect. 134, 139; Rivier II, 131, 440; Rougier, 481; France v. Chile, Franco Chilean Arbitration, Lausanne, p. 220.)"

The same views are expressed by Chancellor Kent (1 Comm. 14th ed., p. 25), by Mr. Wheaton (Wheaton's International Law, Philippson's 5th Eng. ed., p. 37), and by Mr. Hall (International Law, 6th ed., J. B. Attay, 1909, pp. 20, 21), and by Dr. Woolsey in his Introduction to the Study of International Law (ed. 1873, pp. 32, 52, 53, 171, 172).

First, what are the facts to be gathered from the documents and evidence submitted by the two parties as to the *de facto* character of the Tinoco government?

In January, 1917, Frederico A. Tinoco was Secretary of War under Alfredo Gonzalez, the then President of Costa Rica. On the ground that Gonzalez was seeking reelection as President in violation of a constitutional limitation, Tinoco used the army and navy to seize the government, assume the provisional headship of the Republic and become Commander-in-Chief of the army. Gonzalez took refuge in the American Legation, thence escaping to the United States. Tinoco constituted a provisional government at once and summoned the people to an election

for deputies to a constituent assembly on the first of May, 1917. At the same time he directed an election to take place for the Presidency and himself became a candidate. An election was held. Some 61,000 votes were cast for Tinoco and 259 for another candidate. Tinoco then was inaugurated as the President to administer his powers under the former constitution until the creation of a new one. A new constitution was adopted June 8, 1917, supplanting the constitution of 1871. For a full two years Tinoco and the legislative assembly under him peaceably administered the affairs of the Government of Costa Rica, and there was no disorder of a revolutionary character during that interval. No other government of any kind asserted power in the country. The courts sat, Congress legislated, and the government was duly administered. Its power was fully established and peaceably exercised. The people seemed to have accepted Tinoco's government with great good will when it came in, and to have welcomed the change. Even the committee of the existing government, which formulated and published a report on May 29, 1920, directing the indictment of President Tinoco for the crime of military revolution and declaring the acts of his régime as null and void and without legal value, used this language:

"Without having a constitution to establish the office of President and determine his functions, and even to indicate the period for which he was to be elected, the election was held by the sole will of the person who was violently exercising the executive power. And as was natural, the election fell to the same Mr. Tinoco, and, sad to relate, the country applauded! The act, therefore, of decreeing that said election should be held under such conditions is contrary to the most rudimentary principles of political law."

The quotation is only important to show the fact of the then acquiescence of the people in the result. Though Tinoco came in with popular approval, the result of his two years administration of the law was to rouse opposition to him. Conspiracies outside of the country were projected to organize a force to attack him. But this did not result in any substantial conflict or even a nominal provisional government on the soil until considerably more than two years after the inauguration of his government, and did not result in the establishment of any other real government until September of that year, he having renounced his Presidency in August preceding, on the score of his ill health, and withdrawn to Europe. The truth is that throughout the record as made by the case and counter case, there is no substantial evidence that Tinoco was not in actual and peaceable administration without resistance or conflict or contest by anyone until a few months before the time when he retired and resigned.

Speaking of the resumption of the present government, this passage occurs in the argument on behalf of Costa Rica:

"Powerful forces in Costa Rica were opposed to Tinoco from the outset, but his overthrow by ballot or unarmed opposition was impossible and it was equally impossible to organize armed opposition against him in Costa Rican territory."

It is true that action of the supporters of those seeking to restore the former government was somewhat delayed by the influence of the United States with Gonzalez and his friends against armed action, on the ground that military disturbances in Central America during the World War would be prejudicial to the interests of the Allied Powers. It is not important, however, what were the causes that enabled Tinoco to carry on his government effectively and peaceably. The question is, must his government be considered a link in the continuity of the Government of Costa Rica? I must hold that from the evidence that the Tinoco government was an actual sovereign government.

But it is urged that many leading Powers refused to recognize the Tinoco government, and that recognition by other nations is the chief and best evidence of the birth, existence and continuity of succession of a government. Undoubtedly recognition by other Powers is an important evidential factor in establishing proof of the existence of a government in the society of nations. What are the facts as to this? The Tinoco government was recognized by Bolivia on May 17, 1917; by Argentina on May 22, 1917; by Chile on May 22, 1917; by Haiti on May 22, 1917; by Guatemala on May 28, 1917; by Switzerland on June 1, 1917; by Germany on June 10, 1917; by Denmark on June 18, 1917; by Spain on June 18, 1917; by Mexico on July 1, 1917; by Holland on July 11, 1917; by the Vatican on June 9, 1917; by Colombia on August 9, 1917; by Austria on August 10, 1917; by Portugal on August 14, 1917; by El Salvador on September 12, 1917; by Roumania on November 15, 1917; by Brazil on November 28, 1917; by Peru on December 15, 1917; and by Ecuador on April 23, 1917.

What were the circumstances as to the other nations?

The United States, on February 9, 1917, two weeks after Tinoco had assumed power, took this action:

"The Government of the United States has viewed the recent overthrow of the established government in Costa Rica with the gravest concern and considers that illegal acts of this character tend to disturb the peace of Central America and to disrupt the unity of the American continent. In view of its policy in regard to the assumption of power through illegal methods, clearly enunciated by it on several occasions during the past four years, the Government of the United States desires to set forth in an emphatic and distinct manner its present position in regard to the actual situation in Costa Rica which is that it will not give recognition or support to any government which may be established unless it is clearly proven that it is elected by legal and constitutional means."

And again on February 24, 1917:

"In order that citizens of the United States may have definite information as to the position of this Government in regard to any financial aid which they may give to, or any business transaction which they may have with those persons who overthrew the constitutional Government of Costa Rica by an act of armed rebellion, the Government of the United States desires to advise them that it will not consider any claims which may in the future arise from such dealings, worthy of its diplomatic support."

The Department of State issued the following in April, 1918:

"The Department of State has received reports to the effect that those citizens of Costa Rica now exercising the functions of government in the Republic of Costa Rica have been led to believe by those persons who are acting as their agents, that the Government of the United States was considering granting recognition to them as constituting the Government of Costa Rica.

"In order to correct any such impression which is absolutely erroneous, the Government of the United States desires to state clearly and emphatically that it has not altered the attitude which it has assumed in regard to the granting of recognition to the above mentioned citizens of Costa Rica and which was conveyed to them in February, 1917, and further that this attitude will not be altered in the future."

Probably because of the leadership of the United States in respect to a matter of this kind, her then Allies in the war, Great Britain, France and Italy, declined to recognize the Tinoco government. Costa Rica was, therefore, not permitted to sign the Treaty of Peace at Versailles, although the Tinoco government had declared war against Germany.

The merits of the policy of the United States in this non-recognition it is not for the arbitrator to discuss, for the reason that in his consideration of this case, he is necessarily controlled by principles of international law, and however justified as a national policy non-recognition on such a ground may be, it certainly has not been acquiesced in by all the nations of the world, which is a condition precedent to considering it as a postulate of international law.

The non-recognition by other nations of a government claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such. But when recognition *vel non* of a government is by such nations determined by inquiry, not into its *de facto* sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned. What is true of the non-recognition of the United States in its bearing upon the existence of a *de facto* government under

Tinoco for thirty months is probably in a measure true of the non-recognition by her Allies in the European War. Such non-recognition for any reason, however, cannot outweigh the evidence disclosed by this record before me as to the *de facto* character of Tinoco's government, according to the standard set by international law.

Second. It is ably and earnestly argued on behalf of Costa Rica that the Tinoco government cannot be considered a *de facto* government, because it was not established and maintained in accord with the constitution of Costa Rica of 1871. To hold that a government which establishes itself and maintains a peaceful administration, with the acquiescence of the people for a substantial period of time, does not become a *de facto* government unless it conforms to a previous constitution would be to hold that within the rules of international law a revolution contrary to the fundamental law of the existing government cannot establish a new government. This cannot be, and is not, true. The change by revolution upsets the rule of the authorities in power under the then existing fundamental law, and sets aside the fundamental law in so far as the change of rule makes it necessary. To speak of a revolution creating a *de facto* government, which conforms to the limitations of the old constitution is to use a contradiction in terms. The same government continues internationally, but not the internal law of its being. The issue is not whether the new government assumes power or conducts its administration under constitutional limitations established by the people during the incumbency of the government it has overthrown. The question is, has it really established itself in such a way that all within its influence recognize its control, and that there is no opposing force assuming to be a government in its place? Is it discharging its functions as a government usually does, respected within its own jurisdiction?

Reference is further made, on behalf of Costa Rica, to the Treaty of Washington, December 20, 1907, entered into by the Republics of Central America, in which it was agreed that

"The governments of the contracting parties will not recognize any one who rises to power in any of the five republics in consequence of a *coup d'état* or by a revolution against a recognized government until the representatives of the people by free elections have reorganized the country in constitutional form."

Such a treaty could not affect the rights of subjects of a government not a signatory thereto, or amend or change the rules of international law in the matter of *de facto* governments. Their action under the treaty could not be of more weight in determining the existence of a *de facto* government under Tinoco than the policy of the United States, already considered. Moreover, it should be noted that all the signatories to the treaty but Nicaragua manifested their conviction that the treaty

requirement had been met in the case of the Tinoco government, by recognizing it after the adoption of the constitution of 1917 and the election of Tinoco.

Third. It is further objected by Costa Rica that Great Britain by her failure to recognize the Tinoco government is estopped now to urge claims of her subjects dependent upon the acts and contracts of the Tinoco government. The evidential weight of such non-recognition against the claim of its *de facto* character I have already considered and admitted. The contention here goes further and precludes a government which did not recognize a *de facto* government from appearing in an international tribunal in behalf of its nationals to claim any rights based on the acts of such government.

To sustain this view a great number of decisions in English and American courts are cited to the point that a municipal court cannot, in litigation before it, recognize or assume the *de facto* character of a foreign government which the executive department of foreign affairs of the government of which the court is a branch has not recognized. This is clearly true. It is for the executive to decide questions of foreign policy and not courts. It would be most unseemly to have a conflict of opinion in respect to foreign relations of a nation between its department charged with the conduct of its foreign affairs and its judicial branch. But such cases have no bearing on the point before us. Here the executive of Great Britain takes the position that the Tinoco government which it did not recognize, was nevertheless a *de facto* government that could create rights in British subjects which it now seeks to protect. Of course, as already emphasized, its failure to recognize the *de facto* government can be used against it as evidence to disprove the character it now attributes to that government, but this does not bar it from changing its position. Should a case arise in one of its own courts after it has changed its position, doubtless that court would feel it incumbent upon it to note the change in its further rulings.

Precedents in American arbitrations are cited to show that an estoppel like the one urged does arise. They are Schultz's case (Moore, International Arbitrations, Vol. 3, 2973), Janson's case (*ibidem*, 2902), and Jarvis's case (Ralston, Venezuela Arbitrations, 150). In the opinions of these cases delivered by American commissioners, there are expressions sustaining the view that the bar of an estoppel exists, but an examination shows that no authorities are cited and no arguments are made in support of the view. Moreover, the array of facts in the cases was conclusive against the existence of a *de facto* government, and the expressions were unnecessary to the conclusion. In Schultz's case the claim of an American citizen was against the Juarez government for loss of goods by fire between the lines of battle waged by Miramon's forces against Juarez's government. The claim against Juarez's government was plainly not

sustainable, first because it occurred in the train of war and, second, because the Miramon forces never had in fact constituted a *de facto* government. The Janson case before the same tribunal was for the value of an American bark seized by Miramon's soldiers to escape out of the country from the victorious army of Juarez. The commissioner devotes many pages to a résumé of evidence to show that neither Miramon nor Maximilian, with whom he acted, had ever had a *de facto* government; that Juarez was always in control of the greater part of Mexico and always resisting. The truth is that the language of the decisions should be more properly construed to emphasize the great and overwhelming weight to be given to the recognition of Juarez by the United States and its non-recognition of Miramon as evidence against the *de facto* character of the government of the latter, than to uphold the theory of a bar by estoppel.

In Jarvis's case the facts were that Paez, a Venezuelan citizen, was an insurgent against the existing government of Venezuela in 1849, and enlisted in his conspiracy Jarvis, the American claimant, who furnished him a ship and arms and ammunition. This was a crime against the United States on Jarvis's part, because the United States was on terms of amity with Venezuela. The expedition failed. In 1861, thirteen years later, however, when Paez was in Venezuela, a sudden outbreak placed him in power. In 1863, just as he was about to retire with the collapse of his government, he issued bonds to Jarvis to repay him for his outlay in the unsuccessful insurrection of 1849, twelve years before. The commissioner held that there was no lawful consideration for the bonds. Certainly this was a righteous conclusion. It was a personal obligation of Paez, if it was an obligation at all. It was not a debt of Venezuela. It was invalid and unlawful because of its vicious origin, both by the laws of the United States and the laws of Venezuela. The commissioner also by way of additional but unnecessary support to his conclusion said the United States was estopped to urge the claim.

These are, so far as I am advised, the only authorities to be found either in decided cases or in text writers applying the principles of estoppel to bar a nation seeking to protect its nationals in their rights against the successor of a *de facto* government.

I do not understand the arguments on which an equitable estoppel in such case can rest. The failure to recognize the *de facto* government did not lead the succeeding government to change its position in any way upon the faith of it. Non-recognition may have aided the succeeding government to come into power; but subsequent presentation of claims based on the *de facto* existence of the previous government and its dealings does not work an injury to the succeeding government in the nature of a fraud or breach of faith. An equitable estoppel to prove the truth must rest on previous conduct of the person to be estopped,

which has led the person claiming the estoppel into a position in which the truth will injure him. There is no such case here.

There are other estoppels recognized in municipal law than those which rest on equitable considerations. They are based on public policy. It may be urged that it would be in the interest of the stability of governments and the orderly adjustment of international relations, and so a proper rule of international law, that a government in recognizing or refusing to recognize a government claiming admission to the society of nations should thereafter be held to an attitude consistent with its deliberate conclusion on this issue. Arguments for and against such a rule occur to me; but it suffices to say that I have not been cited to text writers of authority or to decisions of significance indicating a general acquiescence of nations in such a rule. Without this, it cannot be applied here as a principle of international law.

It is urged that the subjects of Great Britain knew of the policy of their home government in refusing to recognize the Tinoco régime and cannot now rely on protection by Great Britain. This is a question solely between the home government and its subjects. That government may take the course which the United States has done and refuse to use any diplomatic offices to promote such claims and thus to leave its nationals to depend upon the sense of justice of the existing Costa Rican Government, as they were warned in advance would be its policy, or it may change its conclusion as to the *de facto* existence of the Tinoco government and offer its subjects the protection of its diplomatic intervention. It is entirely a question between the claimants and their own government. It should be noted that Great Britain issued no such warning to its subjects as did the United States to its citizens in this matter. . . .

[In an omitted part of the opinion the Arbitrator considered and rejected the contention of Costa Rica that the claimants were "either by contract or the law of Costa Rica bound to pursue their remedies before the courts of Costa Rica and not to seek diplomatic interference on the part of their home government."]

A consideration of the issues before us, therefore, recurs to the merits of the two claims. The decision of them must be governed by the answer to the question whether the claims would have been good against the Tinoco government as a government, unaffected by the Law of Nullities, and unaffected by the Costa Rican Constitution of 1871. . . .

[In an omitted part of the opinion the Arbitrator considered the merits of the claims and concluded that, excepting a mortgage for $100,000 to which the Royal Bank was entitled on principles of equitable subrogation, neither claimant was entitled to recover.]

My award, therefore, is that the Law of Nullities in its operation upon the validity of the 998 one thousand colones bills and the claim in

behalf of the Royal Bank, will work no injury of which Great Britain can complain, if Costa Rica assigns all her interest in the mortgage for $100,000 upon Jose Joaquin Tinoco's estate executed by his widow, together with all interest paid thereon to the Royal Bank, and that, upon Costa Rica's executing this assignment and delivering the mortgage, the Royal Bank should deliver to the Government of Costa Rica the 998 one thousand colones bills held by it.

My award further is that the Law of Nullities in decreeing the invalidity of the Amory concession worked no injury to the Central Costa Rica Petroleum Company, Ltd., the assignee of the concession, and the British Controlled Oil Fields, Ltd., its sole stockholder, of which Great Britain can complain, because the concession was in fact invalid under the Constitution of 1917.

Article one of the treaty, under which this arbitration proceeds, provides that "the arbitrator shall determine what one party may owe the other for the expenses of the claim, and decide with regard to the payment of the expenses of the arbitration." Under the award, which is partly in favor of one and partly in favor of the other, I think it fair to require that each party pay its own expenses in maintaining its claims.

So far as the payment of the expenses of the arbitration is concerned, I know of none for me to fix. Personally, it gives me pleasure to contribute my service in the consideration, discussion and decision of the questions presented. I am glad to have the opportunity of manifesting my intense interest in the promotion of the judicial settlement of international disputes, and accept as full reward for any service I may have rendered, the honor of being chosen to decide these important issues between the high contracting parties.[54]

[54] See also Hopkins Case, Mex. U. S. Gen. Cl. Com'n., 42; Peerless Motor Car Co. Case, *ibid.*, 303.

On international persons *de facto*, in general, see DICKINSON, "Unrecognized Government or State in English and American Law," 22 Mich. L. Rev. 29, 118; DICKINSON, "Recent Recognition Cases," 19 Am. Jour. Int. L. 263; FRAENKEL, Digest of Cases Relating to Recognition of Governments; HENRY, Les Gouvernements de Fait devant le Juge; HERVEY, Legal Effects of Recognition in International Law; LE NORMAND, La Reconnaissance Internationale; SPIROPOULOS, Die de facto-Regierung im Völkerrecht; 19 Am. Jour. Int. L. 753.

CHAPTER III

NATIONALITY IN THE LAW OF NATIONS

SECTION 1. NATIONALITY BY BIRTH

FLOURNOY, DUAL NATIONALITY AND ELECTION

Yale Law Journal, Volume XXX, pages 545, 546. 1921.

Of the two principles of nationality *jus sanguinis* is probably the older. It seems that in ancient times the nation was viewed as a collection of tribes, more or less related, the tribes being made up of clans, and the clans of families. Although nations usually came to occupy well defined territories upon attaining civilization, they continued for a long time to be regarded as a collection of tribes, clans, and families, rather than as a single people subject to territorial jurisdiction. Under such conditions it was natural that nationality should have little if anything to do with place of birth. Roman citizenship seems to have been originally of this nature.

On the other hand *jus soli* seems to have originated with the feudal system, under which all persons, with certain limited exceptions, born within the fief of an over-lord were held to owe fealty to him and allegiance to the sovereign.

FRANCE, CIVIL CODE

Book I, Title I, Chapter I, Articles 9 and 10. 1803.

9. Every individual born in France of a foreigner, may, during the year which shall succeed the period of his majority, claim the quality of Frenchman; provided, that if he shall reside in France he declares his intention to fix his domicile in that country, and that in case he shall reside in a foreign country, he give security to become domiciled in France and establish himself there within a year, to be computed from the date of that undertaking.

10. Every child born of a Frenchman in a foreign country is French. Every child born in a foreign country of a Frenchman who shall have lost the quality of Frenchman, may at any time recover this quality by complying with the formalities prescribed in the ninth article.[1]

[1] "The principle of *jus sanguinis* adopted in the Code has remained a permanent feature of French law, but it has been found necessary to supplement it by admitting the *jus soli* to a constantly increasing operation, and the history of legislation in the

France, Law of Nationality

Articles 1, 2, 3, and 4. 1927.

27 *Duvergier, Collection Complète des Lois, Decrèts d'Interet Général, Etc., N. S.*, 451.

1. The following persons are French:

(1) Every legitimate child born of a Frenchman in France or abroad;

(2) Every legitimate child born in France of a father who was himself born there;

(3) Every legitimate child born in France of a French mother;

(4) Every natural child whose parentage is proved, during minority, by acknowledgment or by judgment, when the parent with respect to which proof has first been made is French.

If parentage is established with respect to both father and mother by the same act or the same judgment, the child follows the French nationality of the father.

The legitimation of a minor child gives the child, if it does not already have it, the French nationality of the father;

(5) Every natural child born in France, when either the father or mother, whose nationality the child should follow according to the provisions of §4, first paragraph, was born in France;

(6) Every natural child born in France, when the parent whose nationality the child should not follow, according to the provisions of the section and paragraph cited above, is French;

(7) Every person born in France of unknown parents or of parents whose nationality is unknown.

2. The following persons are French, saving the right to renounce that quality during the year following their majority as determined by French law:

(1) Every legitimate child born in France of an alien mother who was herself born there;

(2) Every natural child born in France of alien parents, when the parent whose nationality the child should not follow, according to the provisions of art. 1, was born in France.

To be permitted to renounce the quality of Frenchman, the party concerned should prove, by a certificate in proper form from his government, annexed to his declaration, that he has retained the nationality of his parents; in the appropriate case, moreover, he should produce a

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nineteenth century is that of a progressive reinstatement of the latter principle." McGovney, "French Nationality Laws Imposing Nationality at Birth," 5 Am. Jour. Int. L. 325, 334. "The experience of France proves that it is practically impossible for any country in which there is a large alien population to have its law of nationality based solely upon the rule of descent." Flournoy, "Dual Nationality and Election," 30 Yale L. Jour. 545, 556. See Pillet, I, 177.

certificate showing that he has satisfied the military law of his country, saving the exceptions provided in treaties.

The right of renunciation ceases:

(a) If, during the child's minority, the surviving father or mother of the legitimate child, or the surviving parent of the natural child or the parent whose nationality the child follows, have been naturalized or reintegrated;

(b) If a declaration has been signed, according to the forms provided by art. 5, with a view to the renunciation of the right, either by a minor over sixteen years of age, qualified according to the stipulations of art. 3, paragraph 2, or in the minor's name before that age;

(c) If the minor has participated voluntarily in recruiting operations according to the provisions of the military laws.

These provisions are not applicable to the children born in France of diplomatic agents or consuls of career of foreign nationality, who, if they are domiciled in France, shall have the right, from the age of sixteen until the completion of the twenty-second year, to claim the quality of Frenchman under the conditions established by art. 3.

3. Every person born in France of a foreigner domiciled in France, who shall declare his intention to claim the quality of Frenchman before the completion of his twenty-first year, may become French.

If the declarant is more than sixteen years of age, he must be authorized by the parent invested with parental power, or, in the appropriate case, by his guardian acting in accord with the advice of the family council. If he is less than sixteen years of age, the declaration may be signed in his name by his legal representative directed as above mentioned.

The registration of the declaration, signed in conformity with art. 5 hereafter, may be refused because of disqualification. In this case it is decided by decree rendered in conformity with the opinion of the Council of State. The declarant being duly called has the right to produce documents and informal written evidence. The decision must be rendered not more than six months after the declaration, or, if the regularity of the declaration has been contested, not more than six months after the date upon which the judgment which has recognized its regularity has become definitive.

Voluntary participation in recruiting operations, under the conditions established by the military laws for the sons born of foreigners in France, and subject to the qualification provided in paragraph 2, takes the place of the declaration referred to in paragraph 1. Inscription on the recruiting lists may be refused by the prefect because of disqualification, in conformity with instruction issued by the Council of State.

The provisions of the present article are not applicable to a person against whom there has been made an order of expulsion of which execution has not been suspended.

4. Every person born in France of a foreigner becomes French at the age of twenty-one if he is domiciled in France, unless, in the year which follows his majority, he has refused the quality of Frenchman in conformity with the stipulations of art. 2.

This provision is inapplicable:

(a) To the children born in France of diplomatic agents or consuls of career of foreign nationality who would have the right to claim the quality of Frenchman under the conditions established by art. 3;

(b) To the person against whom there has been made an order of expulsion of which execution has not been suspended.[2] [Editor's transl.]

[2] Of the remaining articles of the French Law of 1927, art. 5 governs procedure with respect to declarations electing or renouncing nationality, arts. 6 and 7 govern naturalization, art. 8 regulates the effect of marriage upon nationality, arts. 9 and 10 govern the loss of nationality by naturalization abroad, election, renunciation, or judgment, and art. 11 deals with the reintegration of those who have lost nationality. See VALERY, La Nationalité Française, Commentaire de la Loi du 10 Aout 1927.

Of the nationality laws of all countries it appears that seventeen are based solely on *jus sanguinis*, two equally upon *jus soli* and *jus sanguinis*, twenty-five principally upon *jus sanguinis* but partly upon *jus soli*, and twenty-six principally upon *jus soli* but partly upon *jus sanguinis*. 23 Am. Jour. Int. L. Suppl., Special Number, 29, 80.

In many countries the law of nationality has been incorporated in part at least in the constitution. See Constitution of Bolivia, 1880, arts. 31–32, RODRIGUEZ, II, 413, 420; Constitution of Brazil, 1926, art. 69, Pan Am. Union, L. & T. S. No. 5, p. 21; Constitution of Bulgaria, 1911, art. 54, 107 Br. & For. S. P. 615, 619; Constitution of Chile, 1925, arts. 5–6, Pan Am. Union, L. & T. S. No. 3, p. 3; Constitution of Colombia, 1886, art. 8, RODRIGUEZ, II, 318, 320; Constitution of Costa Rica, 1871, arts. 4–6, RODRIGUEZ, I, 326; Constitution of Cuba, 1901, arts. 4–7, RODRIGUEZ, II, 112, 113; Constitution of Dominican Republic, 1924, art. 8, Pan Am. Union, L. & T. S. No. 1, p. 6; Constitution of Ecuador, 1906, arts. 9–12, 104 Br. & For. S. P. 918, 919; Constitution of Finland, 1919, art. 4, MCBAIN and ROGERS, 468; Constitution of Guatemala, 1879, arts. 4–7, RODRIGUEZ, I, 236; Constitution of Honduras, 1924, arts. 6–9, Pan Am. Union, L. & T. S. No. 2, p. 3; Constitution of Lithuania, 1922, arts. 8–9, 120 Br. & For. S. P. 791; Constitution of Mexico, 1917, art. 30, 111 Br. & For. S. P. 778, 792; Constitution of Nicaragua, 1911, arts. 7–10, 107 Br. & For. S. P. 1038, 1039; Constitution of Panama, 1904, arts. 6–7, RODRIGUEZ, I, 392, 393; Constitution of Paraguay, 1870, arts. 35–36, RODRIGUEZ, II, 381, 388; Constitution of Peru, 1920, arts. 59–60, Pan Am. Union, L. & T. S. No. 4, p. 10; Constitution of Poland, 1921, arts. 87–88, MCBAIN and ROGERS, 405, 418; Constitution of Salvador, 1886, arts. 41–44, RODRIGUEZ, I, 260, 267; Constitution of Spain, 1876, art. 1, DODD, II, 199; Constitution of Turkey, 1924, art. 88, 120 Br. & For. S. P. 943, 951; Constitution of Uruguay, 1829, arts. 6–8, RODRIGUEZ, II, 158, 159; Constitution of Venezuela, 1925, arts. 27–30, G. B. Misc. No. 2 (1927) 90.

With the nationality law of France, reproduced above, *cf.* Germany, Imperial and State Citizenship Law, 1913, 8 Am. Jour. Int. L. Suppl. 217; Great Britain, Nationality and Status of Aliens Acts, 1914 to 1922, 4 & 5 Geo. V. c. 17, 8 & 9 Geo. V. c. 38, 12 & 13 Geo. V. c. 44, *infra*, 210; Italy, Law of Nationality, 1912, 106 Br. & For. S. P. 1071, with recent modifications and additions, G. B. Misc. No. 2 (1927) 33; Poland, Law of Nationality, 1920, 114 Br. & For. S. P. 914. For recent nationality legislation of other countries, see Great Britain, Foreign Office, "Nationality and Naturalisation Laws of

United States v. Wong Kim Ark

United States. Supreme Court. 1898.

169 *United States Reports* 649.

[The statement of the case, the names of counsel, and part of the opinion are omitted. The facts are stated sufficiently in the opinion.]

Mr. Justice Gray, after stating the case, delivered the opinion of the court.

The facts of this case, as agreed by the parties, are as follows: Wong Kim Ark was born in 1873 in the city of San Francisco, in the State of California and United States of America, and was and is a laborer. His father and mother were persons of Chinese descent, and subjects of the Emperor of China; they were at the time of his birth domiciled residents of the United States, having previously established and still enjoying a permanent domicil and residence therein at San Francisco; they continued to reside and remain in the United States until 1890, when they departed for China; and during all the time of their residence in the United States they were engaged in business, and were never employed in any diplomatic or official capacity under the Emperor of China. Wong Kim Ark, ever since his birth, has had but one residence, to wit, in California, within the United States, and has there resided, claiming to be a citizen of the United States, and has never lost or changed that residence, or gained or acquired another residence; and neither he, nor his parents acting for him, ever renounced his allegiance to the United States, or did or committed any act or thing to exclude him therefrom. In 1890 (when he must have been about seventeen years of age) he departed for China on a temporary visit and with the intention of returning to the United States, and did return thereto by sea in the same year, and was permitted by the collector of customs to enter the United States, upon the sole ground that he was a native-born citizen of the United States. After such return, he remained in the United States, claiming to be a citizen thereof, until 1894, when he (being about twenty-

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Certain Foreign Countries," Misc. No. 7 (1922) Cmd. 1771, Misc. No. 2 (1927) Cmd. 2852, and Misc. No. 7 (1928) Cmd. 3221, "Nationality Law of Latvia," Misc. No. 8 (1927) Cmd. 2970; Magnus, Tabellen zum internationalen Recht, vol. 2.

On nationality laws, in general, see Cahn, Reichs- und Staatsangehörigkeitsgesetz; Cockburn, Nationality; Cogordan, La Nationalité au Point de Vue des Rapports Internationaux; Keller—Trautmann, Kommentar zum Reichs- und Staatsangehörigkeitsgesetz; de Lapradelle, De la Nationalité d'Origine; Lehr, La Nationalité dans les Principaux Etats du Globe; Schwartz, Das Recht der Staatsangehörigkeit in Deutschland und im Ausland seit 1914; Sieber, Das Staatsbürgerrecht im internationalen Verkehr; Zeballos, La Nationalité au Point de Vue de la Législation Comparée et du Droit Privé Humain.

one years of age, but whether a little above or a little under that age does not appear) again departed for China on a temporary visit and with the intention of returning to the United States; and he did return thereto by sea in August, 1895, and applied to the collector of customs for permission to land; and was denied such permission, upon the sole ground that he was not a citizen of the United States.

It is conceded that, if he is a citizen of the United States, the acts of Congress, known as the Chinese Exclusion Acts, prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States, do not and cannot apply to him.

The question presented by the record is whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

I. In construing any act of legislation, whether a statute enacted by the legislature, or a constitution established by the people as the supreme law of the land, regard is to be had, not only to all parts of the act itself, and of any former act of the same law-making power, of which the act in question is an amendment; but also to the condition, and to the history, of the law as previously existing, and in the light of which the new act must be read and interpreted.

The Constitution of the United States, as originally adopted, uses the words "citizen of the United States," and "natural-born citizen of the United States." By the original Constitution, every representative in Congress is required to have been "seven years a citizen of the United States," and every Senator to have been "nine years a citizen of the United States;" and "no person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President." The Fourteenth Article of Amendment, besides declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," also declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." And the Fifteenth Article of Amendment declares that "the right of citizens of the United States to vote shall not

be denied or abridged by the United States, or by any State, on account of race, color or previous condition of servitude."

The Constitution nowhere defines the meaning of these words, either by way of inclusion or of exclusion, except in so far as this is done by the affirmative declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. Minor v. Happersett, 21 Wall. 162; Ex parte Wilson, 114 U. S. 417, 422; Boyd v. United States, 116 U. S. 616, 624, 625; Smith v. Alabama, 124 U. S. 465. The language of the Constitution, as has been well said, could not be understood without reference to the common law. 1 Kent Com. 336; Bradley, J., in Moore v. United States, 91 U. S. 270, 274. . . .

[In an omitted part of the opinion the court referred to Minor v. Happersett, *supra*, and Smith v. Alabama, *supra*.]

II. The fundamental principle of the common law with regard to English nationality was birth within the allegiance, also called "ligealty," "obedience," "faith" or "power," of the King. The principle embraced all persons born within the King's allegiance and subject to his protection. Such allegiance and protection were mutual—as expressed in the maxim, *protectio trahit subjectionem, et subjectio protectionem*—and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity, so long as they were within the kingdom. Children, born in England, of such aliens, were therefore natural-born subjects. But the children, born within the realm, of foreign ambassadors,[3] or the children of alien enemies, born during and within their hostile occupation of part of the King's dominions, were not natural-born subjects, because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction of the King.

This fundamental principle, with these qualifications or explanations of it, was clearly, though quaintly, stated in the leading case, known as Calvin's Case, or the Case of the Post-nati, decided in 1608, after a hearing in the Exchequer Chamber before the Lord Chancellor and all the Judges of England, and reported by Lord Coke and by Lord Ellesmere. Calvin's Case, 7 Rep. 1, 4b–6a, 18a, 18b; Ellesmere on

[3] In several countries the law expressly excepts the children born within the state of foreign diplomatic representatives. *E.g.*, Argentine, Law of 1869, art. 1, par. 1, 63 Br. & For. S. P. 413; Guatemala, Constitution of 1879, art. 5, par. 1, Rodriguez, I, 236. In several countries the exception includes children born within the state of all foreign officials. *E.g.*, Brazil, Constitution of 1926, art. 69, par. 1, Pan Am. Union, L. & T. S. No. 5, p. 21; Chile, Constitution of 1925, art. 5, par. 1, Pan Am. Union, L. & T. S. No. 3, p. 3; France, Law of 1927, art. 2, 27 Duvergier N. S. 451, 452, *supra*, 187, 188; Portugal, Civil Code of 1867, art. 18, par. 2.

Post-nati, 62–64; S. C., 2 Howell's State Trials, 559, 607, 613–617, 639, 640, 659, 679.[4]

The English authorities ever since are to the like effect. Co. Lit. 8a, 128b; Lord Hale, in Hargrave's Law Tracts, 210, and in 1 Hale P. C. 61, 62; 1 Bl. Com. 366, 369, 370, 374; 4 Bl. Com. 74, 92; Lord Kenyon, in Doe v. Jones, 4 T. R. 300, 308; Cockburn on Nationality, 7; Dicey, Conflict of Laws, pp. 173–177, 741. . . .

[In an omitted part of the opinion the court referred to Udny v. Udny, L. R. 1 H. L. Sc. 441; Cockburn, Nationality, 7; and Dicey, Conflict of Laws, 173–7, 741.]

It thus clearly appears that by the law of England for the last three centuries, beginning before the settlement of this country, and continuing to the present day, aliens, while residing in the dominions possessed by the Crown of England, were within the allegiance, the obedience, the faith or loyalty, the protection, the power, the jurisdiction, of the English Sovereign; and therefore every child born in England of alien parents was a natural-born subject, unless the child of an ambassador or other diplomatic agent of a foreign State, or of an alien enemy in hostile occupation of the place where the child was born.

III. The same rule was in force in all the English Colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the Constitution as originally established. . . .

[In an omitted part of the opinion the court referred to The Charming Betsy, 2 Cr. 64; Inglis v. Sailor's Snug Harbor, 3 Pet. 99; Shanks v. Dupont, 3 Pet. 242; Statute 11 & 12 Will. III. c. 6; McCreery v. Somerville, 9 Wh. 354; Levy v. McCartee, 6 Pet. 102; Dred Scott v. Sandford, 19 How. 393; United States v. Rhodes, 1 Abbott 28; Gardner v. Ward, 2 Mass. 244 n.; Rilham v. Ward, 2 Mass. 236; Isaacson v. Durant, 17 Q. B. D. 54; State v. Manuel, 4 Dev. & Bat. 20.]

That all children, born within the dominion of the United States, of foreign parents holding no diplomatic office, became citizens at the time of their birth, does not appear to have been contested or doubted until more than fifty years after the adoption of the Constitution, when the matter was elaborately argued in the Court of Chancery of New York, and decided upon full consideration by Vice Chancellor Sandford in favor of their citizenship. Lynch v. Clarke, (1844) 1 Sandf. Ch. 583.

The same doctrine was repeatedly affirmed in the executive departments, as, for instance, by Mr. Marcy, Secretary of State, in 1854, 2 Whart. Int. Dig. (2d ed.) p. 394; by Attorney General Black in 1859,

[4] Calvin's Case, Coke, Part VII, 1, is the leading English case on nationality by birth. Lynch v. Clarke, 1 Sandf. Ch. 583, is probably the most noteworthy American case antedating United States v. Wong Kim Ark.

9 Opinions, 373; and by Attorney General Bates in 1862, 10 Opinions, 328, 382, 394, 396.

Chancellor Kent, in his Commentaries, speaking of the "general division of the inhabitants of every country, under the comprehensive title of aliens and natives," says: "Natives are all persons born within the jurisdiction and allegiance of the United States. This is the rule of the common law, without any regard or reference to the political condition or allegiance of their parents, with the exception of the children of ambassadors, who are in theory born within the allegiance of the foreign power they represent." "To create allegiance by birth, the party must be born, not only within the territory, but within the ligeance of the government. If a portion of the country be taken and held by conquest in war, the conqueror acquires the rights of the conquered as to its dominion and government, and children born in the armies of a State, while abroad and occupying a foreign country, are deemed to be born in the allegiance of the sovereign to whom the army belongs. It is equally the doctrine of the English common law, that during such hostile occupation of a territory, and the parents be adhering to the enemy as subjects *de facto*, their children, born under such a temporary dominion, are not born under the ligeance of the conquered." 2 Kent Com. (6th ed.) 39, 42. And he elsewhere says: "And if, at common law, all human beings born within the ligeance of the King, and under the King's obedience, were natural-born subjects, and not aliens, I do not perceive why this doctrine does not apply to these United States, in all cases in which there is no express constitutional or statute declaration to the contrary." "Subject and citizen are, in a degree, convertible terms as applied to natives; and though the term citizen seems to be appropriate to republican freemen, yet we are, equally with the inhabitants of all other countries, subjects, for we are equally bound by allegiance and subjection to the government and law of the land." 2 Kent Com. 258, note. . . .

[In an omitted part of the opinion the court quoted from Binney on the Alienigenae of the United States (1853)]

IV. It was contended by one of the learned counsel for the United States that the rule of the Roman law, by which the citizenship of the child followed that of the parent, was the true rule of international law, as now recognized in most civilized countries, and had superseded the rule of the common law, depending on birth within the realm, originally founded on feudal considerations.

But at the time of the adoption of the Constitution of the United States in 1789, and long before, it would seem to have been the rule in Europe generally, as it certainly was in France, that, as said by Pothier, "citizens, true and native-born citizens, are those who are born within the extent of the dominion of France," and "mere birth within the realm

gives the rights of a native-born citizen, independently of the origin of the father or mother, and of their domicil;" and children born in a foreign country, of a French father who had not established his domicil there nor given up the intention of returning, were also deemed Frenchmen, as Laurent says, by "a favor, a sort of fiction," and Calvo, "by a sort of fiction of exterritoriality, considered as born in France, and therefore invested with French nationality." Pothier, *Traité des Personnes*, pt. 1, tit. 2, sect. 1, nos. 43, 45; Walsh-Serrant v. Walsh-Serrant, (1802) 3 *Journal du Palais*, 384; S. C., 8 Merlin, *Jurisprudence*, (5th ed.) Domicile, §13; Préfet du Nord v. Lebeau, (1862) *Journal du Palais*, 1863, 312 and note; 1 Laurent *Droit Civil*, no. 321; 2 Calvo *Droit International*, (5th ed.) §542; Cockburn on Nationality, 13, 14; Hall's International Law, (4th ed.) §68. The general principle of citizenship by birth within French territory prevailed until after the French Revolution, and was affirmed in successive constitutions, from the one adopted by the Constituent Assembly in 1791 to that of the French Republic in 1799. *Constitutions et Chartes*, (ed. 1830) pp. 100, 136, 148, 186. The Code Napoleon of 1807 [1803] changed the law of France, and adopted, instead of the rule of country of birth, *jus soli*, the rule of descent or blood, *jus sanguinis*, as the leading principle; but an eminent commentator has observed that the framers of that code "appear not to have wholly freed themselves from the ancient rule of France, or rather, indeed, ancient rule of Europe—*de la vieille règle française, ou plutôt même de la vieille règle européenne*—according to which nationality had always been, in former times, determined by the place of birth." 1 Demolombe *Cours de Code Napoleon*, (4th ed.) no. 146.

The later modifications of the rule in Europe rest upon the constitutions, laws or ordinances of the various countries, and have no important bearing upon the interpretation and effect of the Constitution of the United States. The English Naturalization Act of 33 Vict. (1870) c. 14, and the Commissioners' Report of 1869 out of which it grew, both bear date since the adoption of the Fourteenth Amendment of the Constitution; and, as observed by Mr. Dicey, that act has not affected the principle by which any person who, whatever the nationality of his parents, is born within the British dominions, acquires British nationality at birth, and is a natural-born British subject. Dicey Conflict of Laws, 741. At the time of the passage of that act, although the tendency on the continent of Europe was to make parentage, rather than birthplace, the criterion of nationality, and citizenship was denied to the native-born children of foreign parents in Germany, Switzerland, Sweden and Norway, yet it appears still to have been conferred upon such children in Holland, Denmark and Portugal, and, when claimed under certain specified conditions, in France, Belgium, Spain, Italy, Greece and Russia. Cockburn on Nationality, 14–21.

There is, therefore, little ground for the theory that, at the time of the adoption of the Fourteenth Amendment of the Constitution of the United States, there was any settled and definite rule of international law, generally recognized by civilized nations, inconsistent with the ancient rule of citizenship by birth within the dominion.

Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship.[5]

Both in England and in the United States, indeed, statutes have been passed, at various times, enacting that certain issue born abroad of English subjects, or of American citizens, respectively, should inherit, to some extent at least, the rights of their parents. But those statutes applied only to cases coming within their purport; and they have never been considered, in either country, as affecting the citizenship of persons born within its dominion. . . .

[In an omitted part of the opinion the court examined Statute Edw. III. stat. 2 (1350) and relevant authorities, concluding that the Statute was not merely declaratory of the common law, and reviewed acts of Congress conferring citizenship on the children of American citizens born abroad.]

V. In the fore front, both of the Fourteenth Amendment of the Constitution, and of the Civil Rights Act of 1866, the fundamental principle of citizenship by birth within the dominion was reaffirmed in the most explicit and comprehensive terms. . . .

[In an omitted part of the opinion the court quoted the first section of the Civil Rights Act of 1866, 14 U. S. Stat. L. 27.]

The first section of the Fourteenth Amendment of the Constitution begins with the words, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." As appears upon the face of the amendment, as well as from the history of the times, this was not intended to impose any new restrictions upon citizenship, or to prevent any persons from becoming citizens by the fact of birth within the United States, who would thereby have become citizens according to the law existing before its adoption. It is declaratory in form, and enabling and extending in effect. Its main purpose doubtless was, as has been often recognized by this court, to establish the citizenship of free negroes, which had been denied in the opinion delivered by Chief Justice Taney in Dred Scott v. Sandford, (1857) 19 How. 393; and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States. The Slaughterhouse Cases, (1873) 16 Wall. 36, 73; Strauder

[5] See Permanent Court of International Justice, Nationality Decrees in Tunis and Morocco, P. C. I. J. Publ., Series B, Advisory Opinion No. 4, *infra*, 294.

v. West Virginia, (1879) 100 U. S. 303, 306; Ex parte Virginia, (1879) 100 U. S. 339, 345; Neal v. Delaware, (1880) 103 U. S. 370, 386; Elk v. Wilkins, (1884) 112 U. S. 94, 101. But the opening words, "All persons born," are general, not to say universal, restricted only by place and jurisdiction, and not by color or race—as was clearly recognized in all the opinions delivered in The Slaughterhouse Cases, above cited. . . .

[In an omitted part of the opinion the court reviewed The Slaughter-House Cases, 16 Wall. 36, and Elk v. Wilkins, 112 U. S. 94.]

The real object of the Fourteenth Amendment of the Constitution, in qualifying the words, "All persons born in the United States," by the addition, "and subject to the jurisdiction thereof," would appear to have been to exclude, by the fewest and fittest words, (besides children of members of the Indian tribes, standing in a peculiar relation to the National Government, unknown to the common law,) the two classes of cases—children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State—both of which, as has already been shown, by the law of England, and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country. Calvin's Case, 7 Rep. 1, 18b; Cockburn on Nationality, 7; Dicey, Conflict of Laws, 177; Inglis v. Sailors' Snug Harbor, 3 Pet. 99, 155; 2 Kent Com. 39, 42.

The principles upon which each of those exceptions rests were long ago distinctly stated by this court. . . .

[In an omitted part of the opinion the court reviewed United States v. Rice, 4 Wh. 246, and The Exchange, 7 Cr. 116; and referred to the several naturalization and citizenship acts of the United States and to the Civil Rights Act of 1866.]

This sentence of the Fourteenth Amendment is declaratory of existing rights, and affirmative of existing law, as to each of the qualifications therein expressed—"born in the United States," "naturalized in the United States," and "subject to the jurisdiction thereof"—in short, as to everything relating to the acquisition of citizenship by facts occurring within the limits of the United States. But it has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the Constitution to establish an uniform rule of naturalization. . . .

[In an omitted part of the opinion the court reviewed opinions of the executive departments since the adoption of the Fourteenth Amendment and also the case of Benny v. O'Brien, 58 N. J. L. 36.]

The foregoing considerations and authorities irresistibly lead us to these conclusions: The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the

allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The Amendment, in clear words and in manifest intent, includes the children born, within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. His allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remains within our territory, is yet, in the words of Lord Coke, in Calvin's Case, 7 Rep. 6a, "strong enough to make a natural subject, for if he hath issue here, that issue is a natural-born subject:" and his child, as said by Mr. Binney in his essay before quoted, "if born in the country, is as much a citizen as the natural-born child of a citizen, and by operation of the same principle." It can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides—seeing that, as said by Mr. Webster, when Secretary of State, in his Report to the President on Thrasher's Case in 1851, and since repeated by this court, "independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance or of renouncing any former allegiance, it is well known that, by the public law, an alien, or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason, or other crimes, as a native-born subject might be, unless his case is varied by some treaty stipulations." Ex. Doc. H. R. No. 10, 1st sess. 32d Congress, p. 4; 6 Webster's Works, 526; United States v. Carlisle, 16 Wall. 147, 155; Calvin's Case, 7 Rep. 6a; Ellesmere on Postnati, 63; 1 Hale P. C. 62; 4 Bl. Com. 74, 92.

To hold that the Fourteenth Amendment of the Constitution excludes from citizenship the children, born in the United States, of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German or other European parentage, who have always been considered and treated as citizens of the United States.

VI. Whatever considerations, in the absence of a controlling provision of the Constitution, might influence the legislative or the executive branch of the Government to decline to admit persons of the Chinese race to the status of citizens of the United States, there are none that

can constrain or permit the judiciary to refuse to give full effect to the peremptory and explicit language of the Fourteenth Amendment, which declares and ordains that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States."

Chinese persons, born out of the United States, remaining subjects of the Emperor of China, and not having become citizens of the United States, are entitled to the protection of and owe allegiance to the United States, so long as they are permitted by the United States to reside here; and are "subject to the jurisdiction thereof," in the same sense as all other aliens residing in the United States. Yick Wo v. Hopkins, (1886) 118 U. S. 356; Law Ow Bew v. United States, (1892) 144 U. S. 47, 61, 62; Fong Yue Ting v. United States, (1893) 149 U. S. 698, 724; Lem Moon Sing v. United States, (1895) 158 U. S. 538, 547; Wong Wing v. United States, (1896) 163 U. S. 228, 238. . . .

[In an omitted part of the opinion the court reviewed Yick Wo v. Hopkins, 118 U. S. 356; Quock Ting v. United States, 140 U. S. 417; Congressional debates on the Civil Rights Bill and the Fourteenth Amendment; Fong Yue Ting v. United States, 149 U. S. 698; and Lem Moon Sing v. United States, 158 U. S. 538. The court referred also to State v. Ah Chew, 16 Nev. 50, and to a series of opinions delivered by lower federal courts in the Ninth Circuit.]

It is true that Chinese persons born in China cannot be naturalized, like other aliens, by proceedings under the naturalization laws. But this is for want of any statute or treaty authorizing or permitting such naturalization, as will appear by tracing the history of the statutes, treaties and decisions upon that subject—always bearing in mind that statutes enacted by Congress, as well as treaties made by the President and Senate, must yield to the paramount and supreme law of the Constitution. . . .

[In an omitted part of the opinion the court referred to Chirac v. Chirac, 2 Wh. 259, and to the successive acts passed by Congress with respect to naturalization.]

The Fourteenth Amendment of the Constitution, in the declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," contemplates two sources of citizenship, and two only: birth and naturalization. Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law. But citizenship by birth is established by the mere fact of birth under the circumstances defined in the Constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization. A person born out of the jurisdiction of the United States can only become

a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory; or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts. . . .

The fact, therefore, that acts of Congress or treaties have not permitted Chinese persons born out of this country to become citizens by naturalization, cannot exclude Chinese persons born in this country from the operation of the broad and clear words of the Constitution, "All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States."

VII. Upon the facts agreed in this case, the American citizenship which Wong Kim Ark acquired by birth within the United States has not been lost or taken away by anything happening since his birth. No doubt he might himself, after coming of age, renounce this citizenship, and become a citizen of the country of his parents, or of any other country; for by our law, as solemnly declared by Congress, "the right of expatriation is a natural and inherent right of all people," and "any declaration, instruction, opinion, order or direction of any officer of the United States, which denies, restricts, impairs or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic." Rev. Stat. §1999, reënacting act of July 27, 1868, c. 249, §1; 15 Stat. 223, 224. Whether any act of himself, or of his parents, during his minority, could have the same effect, is at least doubtful. But it would be out of place to pursue that inquiry; inasmuch as it is expressly agreed that his residence has always been in the United States, and not elsewhere; that each of his temporary visits to China, the one for some months when he was about seventeen years old, and the other for something like a year about the time of his coming of age, was made with the intention of returning, and was followed by his actual return, to the United States; and "that said Wong Kim Ark has not, either by himself or his parents acting for him, ever renounced his allegiance to the United States, and that he has never done or committed any act or thing to exclude him therefrom."

The evident intention, and the necessary effect, of the submission of this case to the decision of the court upon the facts agreed by the parties, were to present for determination the single question, stated at the beginning of this opinion, namely, whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor

of China, becomes at the time of his birth a citizen of the United States. For the reasons above stated, this court is of opinion that the question must be answered in the affirmative.

Order affirmed.[6]

Mr. Chief Justice Fuller, with whom concurred Mr. Justice Harlan, dissenting. . . .

[The dissenting opinion is omitted.]

Mr. Justice McKenna, not having been a member of the court when this case was argued, took no part in the decision.

William C. McKay v. James A. Campbell

United States. District Court, District of Oregon. 1871

2 *Sawyer's Reports* 118.

Before Deady, District Judge.

[The case is stated in the opinion. The names of counsel and part of the opinion are omitted.]

Deady, J. This action is brought to recover a penalty of $500, given by section 2 of an act of congress entitled "An act to enforce the rights of citizens of the United States to vote in the several States of the Union, and for other purposes," approved May 13, 1870 (16 Stat., 140). . . .

On February 4, 1871, the parties filed the following statement of facts in the case. . . .

"Alexander McKay, the plaintiff's paternal grandfather, was born in Scotland, and emigrated to Canada, where he married Margaret Bruce, a woman having one fourth Indian blood. The issue of this marriage was Thos. McKay, the plaintiff's father, who was born in Canada. About the latter part of the year 1810, Alexander McKay joined the expedition of John Jacob Astor, as a partner of the American fur company, and sailed from New York in the ship Tonquin, for the mouth of the Columbia river, taking with him his wife and son Thomas, the latter being then about thirteen years of age. They arrived at the mouth of the Columbia in 1811, and soon afterwards Alexander McKay perished by the destruction of the Tonquin. Thomas McKay afterwards entered into the service of the Northwest fur company, a corporation organized under the laws of Great Britain, having its principal office in Montreal. The trading post of Astor at Astoria was tranferrred to this Northwest fur company on the eleventh day of October, 1813,

[6] See Lam Mow v. Nagle, 24 F. (2d) 316 (child born on United States merchant vessel on high seas of Chinese parents domiciled in and at time of child's birth returning to United States). *Cf.* Great Britain, Nationality and Status of Aliens Act, 1914, §1 (1) (c), 4 & 5 Geo. V. c. 17.

and afterwards called Fort George. In 1821, by an act of parliament, the Northwest and Hudson Bay company were united under the name of the Honorable Hudson Bay company, and as such held possession and control of Fort George as a trading post from that time until the treaty between the United States and Great Britain in 1846.

"Thomas McKay married a Chinook Indian woman, and the plaintiff was the issue of that marriage, born at Fort George (now Astoria), in 1823, while his father, Thomas McKay, was in the service of the Hudson Bay company, and is seven sixteenths white and nine sixteenths Indian blood. Thomas McKay continued in the service of that company until about the year 1835; and his son, the plaintiff, was also in its service subsequent to the treaty between the United States and Great Britain, in 1846. The plaintiff has always lived in Oregon except from 1838 to 1843, while in the State of New York to obtain an education.

"Neither the plaintiff nor his father, nor his grandfather McKay, were ever naturalized under the laws of the United States. The plaintiff resided in Wasco county, Oregon, and in East Dalles precinct in said county, for five years prior to the election on June 6th, 1870. On that day, at a general election, the plaintiff offered to vote at the place of holding elections in East Dalles precinct, where the defendants James A. Campbell, T. M. Ward and George Corum were the judges of election. His right to vote was challenged by one of the judges, when the plaintiff offered to take the oath required by law, as to his qualifications to vote. The judges, or one of them, stated to plaintiff as a reason for not allowing him to vote, that he was not a citizen of the United States, but was a half-breed Indian, and refused to administer the oath to him as to his qualifications, and did not permit him to vote at that election."

Upon this state of facts, counsel maintains that the plaintiff was born in the allegiance of the United States, because he was born in its territory, and is, therefore, a citizen thereof, and was entitled to vote at such election. If the premises are admitted, the conclusion follows. The rule of the common law upon this subject is plain and well settled, both in England and America. Except in the case of children of ambassadors, who are in theory born upon the soil of the sovereign whom the parent represents, a child born in the allegiance of the king, is born his subject, without reference to the political status or condition of its parents. Birth and allegiance go together. (1 Black Com. 366; 2 Kent's Com. 39, 42; Ingles v. the Sailor's Snug Harbor, 3 Pet. 120; U. S. v. Rhodes, 1 Abb. U. S. Rep. 40; Lynch v. Clarke, and authorities there cited; 1 Sandf. Ch. 630.)

Counsel for defendant, while admitting the major premise of plaintiff's proposition, that any person born in the allegiance of the United States, is born a citizen thereof, disputes the minor one, that the plaintiff was so born, and insists that he was born in the allegiance of the crown of

Great Britain; because the British subjects in Oregon at the date of the plaintiff's birth, must be presumed to have occupied or dwelt in the country in pursuance of the treaty of joint occupation of June 15, 1846 [October 20, 1818?], and therefore as British subjects. Defendant's proposition concerning the allegiance in which plaintiff was born, is based upon article 3 of the convention of October 20, 1818, between the United States and Great Britain, which reads as follows:

"Art. 3. It is agreed that any country that may be claimed by either party on the northwest coast of America, westward of the Stony mountains, shall, together with its harbors, bays and creeks, and the navigation of all rivers within the same, be free and open, for the term of ten years from the date of the signature of the present convention, to the vessels, citizens and subjects of the two powers, it being well understood that this agreement is not to be construed to the prejudice of any claim which either of the two high contracting parties may have to any part of the said country, nor shall it be taken to affect the claims of any other power or State to any part of the said country; the only object of the high contracting parties in that respect being to prevent disputes and differences amongst themselves." (8 Stat. 249).

By the convention of August 6, 1827, between the same parties, it was provided as follows:

"Art. 1. All the provisions of the third article of the convention concluded between the United States of America and his majesty the king of the United Kingdoms of Great Britain and Ireland on the twentieth of October, 1818, shall be, and they are, hereby further indefinitely extended and continued in force, in the same manner as if all the provisions of the said article were herein specifically recited." (8 Stat. 360.)

By article 2 of this convention it is also agreed that either party to it may abrogate said article 3, on twelve months notice to the other after October 20, 1828.

On April 27, 1846, congress passed a "joint resolution concerning the Oregon territory" (9 Stat. 109), by which the president was authorized "at his discretion, to give the government of Great Britain the notice required" for the abrogation of said article 3. In the preamble of this resolution it is recited:—"And whereas it has now become desirable that the respective claims of the United States and Great Britain should be definitely settled, and that said territory may, no longer than need be, remain subject to the evil consequences of the divided allegiance of its American and British population, and of the confusion and conflict of national jurisdictions, dangerous to the cherished peace and good understanding of the two countries."

This led to the convention of June 15, 1846, "in regard to limits westward of the Rocky mountains" (9 Stat. 869), by which the forty-ninth parallel of north latitude was made the boundary between the

two countries. In the preamble to this convention it is admitted and declared by the parties thereto,—"that the state of doubt and uncertainty which has hitherto prevailed respecting the sovereignty and government of the territory on the northwest coast of America, lying westward of the Rocky or Stony mountains, should be finally terminated by an amicable compromise of the right mutually asserted by the two parties over the said territory."

The place of plaintiff's birth—Fort George—now is, and I suppose in contemplation of law from the American standpoint, was, at the date thereof, within the territory or realm of the United States. But as a matter of fact, the title to the country was then regarded as doubtful, unsettled and obscure; and this is apparent from the admissions above quoted from the respective preambles to the resolution and convention of April 27 and June 15, 1846. . . .

Under this state of things as to the title and occupancy of the country, and while his alien father is in the service of a British corporation, then exercising in the territory, by authority of the British Parliament, large municipal power, the plaintiff is born within the lines of a post then occupied by said corporation as a place of business and defense.

This being so, in my judgment, he was not born in the allegiance of the United States, but in that of the British crown.

The plaintiff being the child of an unnaturalized alien, and unnaturalized himself, cannot claim to be an American citizen, except upon the single ground, that he was born upon the soil, and subject to the jurisdiction of the United States. Nothing that has happened since his birth can add to or take away from the strength of his claim. The treaty of 1846, which definitely acknowledged the country south of the forty-ninth parallel to belong to the United States, contains no provision naturalizing the British subjects living south of that line, who may elect to become American citizens by remaining there, or otherwise. The case turns upon the single point—was the plaintiff born subject to the jurisdiction of the United States—under its allegiance?

Suppose the government of the United States had undertaken to exercise jurisdiction over the plaintiff before the treaty of 1846, when for the first time it actually obtained exclusive jurisdiction over the country? Suppose it had attempted by means of laws applicable to American citizens under like circumstances, to draft or tax him? How natural and forcible would have been the objection: "I am the child of a British father—a natural born British subject. True, I was born in Oregon, but by a treaty stipulation the country was then, and is now, for the time being, British soil as to a British subject. I was, therefore, born subject to the jurisdiction and in the allegiance of the king of Great Britain, and am as truly a British subject as though I had been born on the banks of the Thames."

When, in 1818, the two governments entered into the treaty of "joint occupation," as it has been aptly called, they thereby agreed that this then unsettled and unknown country, might be occupied by the people of both nations—that it should "be free and open" "to the vessels, citizens, and subjects of the two powers"—without either of them losing their nationality, changing their allegiance, or passing beyond the jurisdiction and protection of their separate governments. As to the British subject and his children born here, the country was for the time being British soil, while to the American citizen and his offspring it was in the same sense American soil.

Neither government was entitled to exercise any authority over the citizens or subjects of the other, or to assert the power and rights of a sovereign over them, or their effects, within this particular territory. If, prior to 1846, the plaintiff had died intestate and without heirs, leaving a large amount of personal property in the territory, there is no doubt but that the British crown would have claimed the escheat without a word of objection from the government of the United States.

When it is said that by the common law a person born of alien parents, and in the allegiance of the United States, is born a citizen thereof, it is necessarily understood that he is not only born on soil over which the United States has or claims jurisdiction, but that such jurisdiction for the time being is both actual and exclusive, so that such person is in fact born within the power, protection and obedience of the United States.

Generally speaking, the various places in the world are claimed, or admitted for the time being, to be under the exclusive jurisdiction of some particular sovereign or government, so that a person born at any one of them is without doubt born in the allegiance of such particular sovereign or government.

But that is not this case—which in this respect is a singular one. Its parallel has not been found in the books. The country of the plaintiff's birth was, at the time thereof, jointly occupied by the citizens and subjects of two governments in pursuance of a treaty to that effect. Under the circumstances, neither government can be considered as exercising general exclusive jurisdiction over the country and its inhabitants. It seems to me, that the only practical and just solution of the problem, is to consider the country for the time being, only to have been in the exclusive jurisdiction of each government as to its own citizens or subjects; and this is the view which congress appears to have taken of the matter in 1846, when, in the preamble to the resolution of April 27, it deprecated "the evil consequences of the divided allegiance of its American and British population," and "the confusion and conflict of national jurisdiction" growing out of the continued joint occupation of the country.

A parallel case may hereafter arise out of the present joint occupation of the island of San Juan, at the head of the straits of Fuca. It is well known that the title to this island is in dispute between the United States and Great Britain, and that in the meantime, in pursuance of an informal convention or understanding between the two governments, the island is occupied by the forces of each.[7]

Now, if hereafter the island is given up to the exclusive jurisdiction of the United States, and in the meantime a child of a British subject is born there within the portion occupied by the British forces, could it be considered as born in the allegiance of the United States? Certainly not. The child, although born on soil which is subsequently acknowledged to be the territory of the United States, was not at the time of its birth under the power or protection of the United States, and without these, the mere place of birth cannot impose allegiance or confer citizenship.

Chancellor Kent says (2 Com. 42), "To create allegiance by birth, the party must be born, not only within the territory, but within the allegiance of the government. If a portion of the country be taken and held by conquest in war, the conqueror requires (acquires) the rights of the conquered as to its dominion and government, and children born in the armies of a State while abroad, and occupying a foreign country, are deemed to be born in the allegiance of the sovereign to whom the army belongs. It is equally the doctrine of the English common law, that during such hostile occupation of a territory, if the parents be adhering to the enemy as subjects *de facto*, their children born under such temporary dominion, are not born under the allegiance of the conquered."

For this latter clause, the author refers to Calvin's case, and (note c) quotes Lord Coke as saying in that case: "An alien is a person out of the ligeance of the king. It is not *extra regnum*, nor *extra legem*, but *extra ligeantiam*. To make a subject born, the parents must be under the actual obedience of the king, and the place of birth be within the king's obedience, as well as within his dominion."

Now, in 1823, the plaintiff's "place of birth"—Fort George—was no more within the obedience of the United States than is the "Tower of London" to-day.

In Inglis v. The Sailor's Snug Harbor, 3 Peters, 126, the Supreme Court, on a certificate of a difference of opinion from the Circuit Court for the Southern District of New York, held that, as a general rule all persons born in the State of New York prior to July 4, 1776, were born British subjects, but might thereafter elect to remain so or not, and that all persons born therein after such date, were born citizens of such State, but that Inglis, who was born of a British subject in the city of

[7] See Watts v. United States, 1 Wash. Terr. 288, *infra*, 1021.

New York, after that date, and while the city was in the actual occupation of the British army, "was born a British subject under the protection of the British government, and not under that of the State of New York, and of course owing no allegiance to the State of New York."

The necessary conclusion from the rule announced in this case, is also, that a person to be born in the allegiance of a particular government, must not only be born within its territory, but under its obedience—exclusive jurisdiction and power. Of course it matters not whether the exclusive jurisdiction of the United States was excluded from the place of birth of this plaintiff by force of arms or by treaty with Great Britain. The result is the same in each case.

Articles 14 and 15 of the constitution, commonly called the fourteenth and fifteenth amendments, have been cited by counsel for plaintiff as bearing upon this question of the plaintiff's citizenship and consequent right to vote.

The latter simply provides that "the right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude."

But as to who are "citizens of the United States" this article is silent—it being understood that that matter had been regulated or defined by article 14, section 1, which enacts: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside."

Eliminate the words having reference to naturalized citizens, and the clause reads: "All persons born in the United States, and subject to the jurisdiction thereof, are citizens," etc.

This is nothing more than declaratory of the rule of the common law as above stated. To be a citizen of the United States by reason of his birth, a person must not only be born within its territorial limits, but he must also be born subject to its jurisdiction—that is, in its power and obedience. . . .

By the constitution of Oregon (art. II, sec. 2) no person is entitled to vote at any election therein, unless, among other things, he is a citizen of the United States, or has declared his intention to become such, "conformably to the laws of the United States upon the subject of naturalization." This description of persons is broader than that contained in article XV of the constitution of the United States, which does not include persons who have merely declared their intentions to become citizens. The act of congress under which this action is brought is enacted in pursuance of article XV, and only applies to citizens of the United States (16 Stat. 140.) On June 6, 1870, the plaintiff was not a citizen of the United States. This being so, he is not within the purview of the act and cannot maintain this action. If the defendant's refusal to permit the plaintiff to take the preliminary oath as to his qualifications,

so as to give him a *prima facie* right to vote, was wrongful, as I think it was under the State law, the case is not within the act of congress. That only gives a remedy for such refusal in case of citizens of the United States.

A word in conclusion: I am aware that the ruling in this case, would exclude from the privilege of voting quite a number of persons of mixed blood—persons whose fathers were British subjects, and mothers, Indian women—who have heretofore often, if not uniformly been allowed to vote in this State. They have done so by common consent, and under the authority of a vague public opinion that these persons by remaining south of the forty-ninth parallel after the treaty of 1846, could, and thereby did, elect to become American citizens. But "public opinion is not any authority on a point of law;" and it appears in this instance as in others, "that common consent is sometimes a common error." The remedy, if any is deemed necessary, is with the legislature, and not the courts.

There must be judgment for the defendant in bar of the action, and for his costs and disbursements.

COCKBURN, NATIONALITY

Pages 7–9. 1869.

It appears from the Parliamentary Rolls of the reign of Edward III., that as early as the 17th of that king (1343), doubts having arisen whether even the king's sons born without the realm could inherit, the Archbishop of Canterbury brought the question before the Lords. The Lords replied unanimously that there was no doubt that the king's sons could inherit, wherever born, but that with regard to children of other persons there were great difficulties in deciding the question. The matter was again brought before the Lords and Commons jointly, who concurred in the opinion previously given by the Lords, and recommended that a law should be passed on the subject; but, as Parliament was about to be prorogued, "*et ceste besoigne demand grant avisement et bone deliberation coment ele se purra mieltz faire, et plus surement,*" the further consideration of it was deferred.

Owing to the plague, legislation on this and other subjects was not resumed till the year 1350, when the Act 25 Edward III. stat. 2 was passed, entitled "A statute for those that be born beyond sea." By this statute it is provided "that all children inheritors which from henceforth shall be born without the legiance of the king, whose fathers and mothers at the time of the birth be and shall be at the faith and legiance of the King of England, shall have and enjoy the same benefits and advantages, to have and bear the inheritance within the same

legiance, as other inheritors aforesaid in time to come; so always the mothers of such children do pass the sea by the license and wills of their husbands."

It has been said that this statute was only declaratory of the Common law. But this view is hardly consistent with its language, which is prospective, and refers only to children which "from henceforth shall be born;" and it has been pertinently observed that if the statute had only been declaratory of the Common law, the subsequent legislation on this subject would have been wholly unnecessary.[8]

UNITED STATES, AN ACT TO SECURE THE RIGHT OF CITIZENSHIP TO CHILDREN OF CITIZENS OF THE UNITED STATES BORN OUT OF THE LIMITS THEREOF

Section 1. 1855.

10 *United States Statutes at Large* 604.

Be it enacted . . . That persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States: Provided, however, That the rights of citizenship shall not descend to persons whose fathers never resided in the United States.[9]

[8] On the subsequent British legislation, see De Geer v. Stone, 22 Ch. D. 243; United States v. Wong Kim Ark, 169 U. S. 649, 668–672, *supra*, 190, 196; PIGGOTT, Nationality, I, 47.

[9] See Act of 1790, c. 3, §1, 1 U. S. Stat. L. 103, 104; Act of 1795, c. 20, §3, 1 *ibid.* 414, 415; Act of 1802, c. 28, §4, 2 *ibid.* 153, 155; U. S. Rev. Stat., §1993; United States v. Wong Kim Ark, 169 U. S. 649, 672–674, *supra*, 190, 196; State v. Jackson, 79 Vt. 504, 515; "Alienigenae of the United States," 2 Am. L. Reg. 193.

See Weedin v. Chin Bow, 274 U. S. 657 (child born abroad of father who was citizen of United States but never resided in United States until after child's birth); Ng Suey Hi v. Weedin, 21 F. (2d) 801 (child born abroad of foreign polygamous marriage, valid where contracted, of father who was citizen of United States); Mason ex rel. Chin Suey v. Tillinghast, 26 F. (2d) 588 (*ditto:* effect of subsequent legitimation?).

"For many years it was held that persons born of American fathers in countries where the United States exercises extraterritorial jurisdiction were born citizens of the United States, whether or not their fathers had ever resided in this country. This construction of the law was recently abandoned by the Department." (Citing General Instruction to Diplomatic and Consular Offices of the United States, No. 340, July 27, 1914.) FLOURNOY, "New British Imperial Law of Nationality," 9 Am. Jour. Int. L. 870, 881.

The Act of 1907, §6, with respect to the expatriation of citizens and their protection abroad, provides: "That all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section nineteen hundred

GREAT BRITAIN, NATIONALITY AND STATUS OF ALIENS ACTS, 1914 to 1922

Part I, section 1, as amended. 1914–1922.

4 & 5 *Geo. V. c.* 17; 12 & 13 *Geo. V. c.* 44.

1.—(1) The following persons shall be deemed to be natural-born British subjects, namely:—

(a) Any person born within His Majesty's dominions and allegiance; and

(b) Any person born out of His Majesty's dominions whose father was, at the time of that person's birth, a British subject, and who fulfils any of the following conditions, that is to say, if either—

(i) his father was born within His Majesty's allegiance; or

(ii) his father was a person to whom a certificate of naturalization had been granted; or

(iii) his father had become a British subject by reason of any annexation of territory; or

(iv) his father was at the time of that person's birth in the service of the Crown; or

(v) his birth was registered at a British consulate within one year or in special circumstances, with the consent of the Secretary of State, two years after its occurrence, or, in the case of a person born on or after the first day of January, nineteen hundred and fifteen, who would have been a British subject if born before that date, within twelve months after the first day of August, nineteen hundred and twenty-two; and

(c) Any person born on board a British ship whether in foreign territorial waters or not:

Provided that the child of a British subject, whether that child was born before or after the passing of this Act, shall be deemed to have been born within His Majesty's allegiance if born in a place where by treaty, capitulation, grant, usage, sufferance, or other lawful means, His Majesty exercises jurisdiction over British subjects.

Provided also that any person whose British nationality is conditional upon registration at a British consulate shall cease to be a British subject unless within one year after he attains the age of twenty-one, or within such extended period as may be authorized in special cases by regulations made under this Act—

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and ninety-three of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority." 34 U. S. Stat. L. 1228, 1229.

(i) he asserts his British nationality by a declaration of retention of British nationality, registered in such manner as may be prescribed by regulations made under this Act; and

(ii) if he is a subject or citizen of a foreign country under the law of which he can, at the time of asserting his British nationality, divest himself of the nationality of that foreign country by making a declaration of alienage or otherwise, he divests himself of such nationality accordingly.

(2) A person born on board a foreign ship shall not be deemed to be a British subject by reason only that the ship was in British territorial waters at the time of his birth.

(3) Nothing in this section shall, except as otherwise expressly provided, affect the status of any person born before the commencement of this act.[10]

The Case of Mathison

Great Britain and Venezuela. Mixed Claims Commission. 1903.

Venezuelan Arbitrations of 1903, *Senate Document* (*58th Congress, 2d Session*) *No.* 316, *page* 429.

[The contention of the British Agent, the opinion of the Venezuelan Commissioner, and part of the opinion of Plumley, Umpire, are omitted.]

Plumley, Umpire:

The claimant was born in Venezuela on September 14, 1858. He now resides and has always resided in Venezuela. His father was of British parents and was born in Trinidad. No question is made that by the law of Great Britain one born in another country of a British father domiciled in such foreign country is a British subject. It is admitted that if he is also a Venezuelan by the laws of Venezuela, then the law of the domicile prevails and the claimant has no place before this Mixed Commission.[11]

His claim is for *l*4,766 for damages and injuries received by him through troops of the Venezuelan Government. No question is made that his claim is a just one, providing he brings himself within the jurisdiction of the Commission.

The honorable Commissioners fail to agree, and therefore this case comes to the umpire to be determined by him.

The constitution of Venezuela of 1864, title 1, section 2, subject, Venezuelans, is as follows:

[10] See Dicey, 4th ed., 156; Flournoy, "New British Imperial Law of Nationality," 9 Am. Jour. Int. L. 870; Kiefe, La Nationalité des Personnes dans l'Empire Britannique; Keith, Responsible Government in the Dominions, 2d ed., II, 1041.

[11] See Hurst, "Nationality of Claims," B. Y. B. Int. L. (1926) 163.

"Art 6. They are Venezuelans: First. All those born or that may be born in the territory of Venezuela, whatever may be the nationality of their parents."

No question is made that the constitution then established by the Republic is textually the same now, and has remained thus ever since 1864.

No question is made by the learned agent for the British Government that, under the constitution of 1864, one born thereafter in circumstances similar to those of the birth of the claimant Mathison would be a Venezuelan citizen, but it is asserted that the constitution existing at the time of the claimant Mathison's birth did not impose Venezuelan citizenship upon the claimant. The interpretation to be given to the constitution of 1857 is decisive of the question in issue, as it is agreed that this is the constitution in force at the time of the claimant Mathison's birth. . . .

The umpire understands that the honorable Commissioner for Venezuela claims in regard to the constitution of 1864 simply this, that it is exigetical, not additional, and that beginning with 1830 the constitution of Venezuela has had in this regard the same meaning and purport as the constitution of 1864.

It is insisted by the learned agent for Great Britain that to have the effect to deprive him of the nationality of his parents the law of a country where a man happens to be born must be stated in express and clear terms, and that general words can not be held sufficient to produce such result; and he claims further that the language of the constitution of Venezuela as it was prior to 1864 comes within the force and effect of his objection.

The strength and value of this contention will depend in a great measure upon what is deemed the natural relation of the state to those born within its domain, and conversely the natural relation to the state of one so born. If the state owes to such the protection due to its citizens, and in return has a right to demand from such due allegiance, if this is the natural relation between the two, changed only by artificial rules, legislative enactment, or kingly decrees, the language used in any law having reference to such relations will be interpreted to favor the natural status, unless it clearly appears to express a different purpose. On the other hand, if such is not the rule of nature, then an effort by enactment to make it a rule of the state will require very clear and unambiguous language to express such intention, and if ambiguities exist or the expression is weak the interpretation will be against the law which seeks to establish a principle in derogation of a great natural law.

Phillimore, volume 1, chapter 18 (star page), section 328, says:

"First. As to the right of territorial jurisdiction over persons: They are either (1) subjects or (2) foreigners commorant in the land. . . .

Under the term subjects may be included both native and naturalized citizens. . . . The native citizens of a State are those born within its dominions, even including, according to the law of England, the children of alien friends."

In a note to Phillimore, Volume IV, page 17, it is said that in Shedden v. Patrick, 1 Macqueen's House of Lords' Cases 611, Lord Chancellor Cranworth observes that in England, independently of statute law and with certain exceptions, every one born abroad is an alien. England holds that the happening of birth within its dominions from parents who are not enemies affixes and imposes an indelible citizenship in that country. See the case of Frost MacDonald in State Trials, 887. Here the respondent left Great Britain in his infancy, but he was born there. He was taken in arms holding a French commission, the latter being the country of his domicile; he was held guilty of treason by the courts of Great Britain. . . .

Such was the rule of the common law. All changes are the result of statutory legislation.

Blackstone contended, volume 1 (Cooley's), page 369:

"That the natural-born subject of one prince can not by any act of his own . . . put off or discharge his natural allegiance to the former."

And that this is the principle of universal law, citing to sustain this 1 Hale's P. C., 68.

The universality of this principle to the extent of holding the inability of expatriation is, of course, very much questioned, and is only quoted here to show the force which attaches to the incident of birth in establishing one's citizenship. In all these there are certain well-defined exceptions which, not being necessary to this discussion, are assumed to be in the minds of everyone, and therefore that no especial reference to them is necessary.

Story's Conflict of Law, second edition, Chapter III, section 48, gives as the general rule:

"Persons who are born in a country are generally deemed to be citizens and subjects of that country." . . .

Allegiance on the one hand and protection on the other ordinarily settle this without difficulty when applied to native-born or naturalized citizens, or mere commorant aliens. Serious questions arise only when the law must be applied to those who are domiciled from choice in a state of which they are not native and in which they have not sought or have not been permitted citizenship.

The necessities and blessings of commerce and the comity now existing between nations have enlarged these conditions and have permitted privileges to each quite beyond those pertaining to such relations in a not remote period. When the proportionate amount of these unattached persons to the great body of native citizens is relatively very small, the

danger and the harm to the state is little, if any; but any considerable number, relatively, of persons who partake of the benefits of a country and yet deny to it allegiance and defense, while claiming from it peculiar protection, become a serious menace and harm to the state of which they are a part. It is not egotism for a country to assume that a man who becomes *de facto* a citizen by his established domicile, who there erects his rooftree, there selects and locates his wife, and there rears his children, has deliberately chosen that such country shall be for his children their native land, to whom they, if not he, shall owe allegiance. If citizenship is thereby imposed, it is not by the state, but by the parent.

This law of nature, of nativity, furnishes the most ready basis of citizenship, and a law which recognizes it and which denies continuous alienship to successive generations is as general as it is wise and as wise as it is general.

It follows, then, that in the judgment of the umpire a law defining citizenship to mean those who are born in its dominions is so far in accord with the universal trend of law upon such matters, so consistent with a due regard for the higher welfare of the inhabitants of the state, so sympathetic with natural law, that he would find nothing doubtful nor uncertain if it be expressed in general terms.[12] Most certainly he finds no doubt or ambiguity in the expressions:

"Art 9. Venezuelans are such by birth and by naturalization."

"Art. 10. Venezuelans by birth are: The free men born in the territory of Venezuela." (Venezuelan constitution, 1830.) . . .

Nor does the umpire find ambiguity in this:

"Art. 7. The quality of a Venezuelan proceeds from nature or may be acquired by naturalization.

Venezuelans by nature are: All men born in the territory of Venezuela." (Venezuelan constitution, 1857.) . . .

These are identical in scope and largely in language with the fourteenth amendment of the Constitution of the United States, *viz:*

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

It is well understood and clearly expressed by the learned agent for Great Britain that the expressions used in the different constitutions in Venezuela hereinbefore quoted are to be accepted as they have been interpreted by that country through the proper channels. Being wholly a matter of its own domestic concern it is not questioned that the inter-

[12] "However much we may think of the rule of *jus soli* as a reasonable rule for determining nationality in general, it is hard for us to conceive of American merchants or bankers residing in Greece or China, for example, and raising children who are Greek or Chinese." FLOURNOY, "International Problems in Respect to Nationality by Birth," 20 Am. Soc. Int. L. Proc. 59, 64.

pretation which it has placed upon this language is authoritative and must be accepted by all other nations. Upon such matters if the laws of other nations conflict with the laws of Venezuela the laws of such other nation must yield, as they have no extraterritorial effect beyond the amount which the comity of Venezuela may allow. . . .

As an aid in understanding the spirit, scope, and purpose of the constitution of Venezuela of 1830, 1857, 1858, and 1864, the opinion of its statesmen is also of value. In the case before the American-Venezuelan Claims Commission under the convention of 1866 Commissioner Andrade, whose opinions give evidence of superior mental strength and ability, says (Moore's Int. Arb., vol. 3, 2457):

"By virtue of that right Venezuela declared in her constitutions of 1830, 1857, 1858, and 1864 a Venezuelan citizen by birth every free person born in the territory of Venezuela, such, for instance, as Narcissa de Hammer and Amelia de Brissot,"

referring here to the widows who appeared as claimants before the Commissioners in virtue of their derived citizenship through their husbands, who were United States citizens in their lifetime, while the claimants were Venezuelan born, reared, and domiciled.

The honorable Commissioner for Venezuela further asserts that his present contention is in accord with all past interpretation of this point by Venezuela. This last proposition is nowhere and in nowise challenged by the learned British agent, and hence is accepted by the umpire as an admitted fact. Such being the interpretation by Venezuela of its own constitution in this regard it must prevail. . . .

To hold in conformity with the contention of the honorable Commissioner for Venezuela that one born in the country of alien friends is a citizen of the country of his birth is to hold in accord with the position of England and the position of the United States of America and is in accord with the wise policy for a state which is growing or anticipates growth by immigration. It can not wisely have a large, foreign, cancerous growth of unaffiliated and unattached population alien to the country, its institutions, and its flag, but in due regard to its own safety it must fix a time when the domicile of the parent's choice shall create a citizen out of the son of his loins born within that domicile. It is the test of nature; it is the test of Venezuela. If citizenship is thereby imposed it is through the father's voluntary, intelligent selection. There must be an end to the citizenship of the national of a country when he is resident and domiciled in some other country. If the father can retain his foreign nationality and impart that to his own son on the soil of the country of his domicile, then may not the son of the son, and so on *ad infinitum?*

The umpire holds that the constitution of 1864 is but explanatory of the meaning of the constitutions preceding upon these questions of

nationality, and, that since 1830, a free man born in Venezuela is a citizen of Venezuela; and that therefore Edward A. Mathison is a Venezuelan and not a British subject, and this tribunal has no jurisdiction over his claim.

It is therefore dismissed without any prejudice to any right which the claimant may have in any other tribunal for the recovery of his claim.

The Case of Canevaro

Italy and Peru. Tribunal of the Permanent Court of Arbitration at The Hague. 1912.

Scott, The Hague Court Reports, 284.

[The claim of the Italian Government against Peru on behalf of Napoléon, Carlos and Rafael Canevaro originated as follows: It appears that on December 12, 1880, N. de Pierola, at the time dictator of Peru, issued a decree by virtue of which there were created, under date of December 23, 1880, pay checks (*bons de paiement, libramientos*) to the order of the firm of José Canevaro & Sons for the sum of 77,000 pounds sterling, payable at different periods; that these pay checks were not paid as they fell due; that in 1885, the father having died in 1883, the firm was reorganized with José Francisco, César and Rafael Canevaro, Peruvian citizens, as copartners, forming a Peruvian corporation; that in 1885 the Peruvian Government paid 35,000 pounds sterling on account, leaving due and outstanding to the firm the sum of 43,140 pounds sterling; that the firm remained in existence until it was dissolved in 1900 by the death of José Francisco Canevaro; and that the pay checks (*bons de paiement*) finally passed into possession of Napoléon and Carlos Canevaro, Italian subjects, and Rafael Canevaro, whose claim to Italian nationality was contested by Peru.

Differences arose between the claimants and Peru as to whether the pay checks should be paid in coin, or in one per cent bonds in accordance with the provisions of the Peruvian domestic debt law of June 12, 1889, as to the amount which the claimants had a right to demand, and as to the nationality of Rafael Canevaro. Peru contended that the debt was contracted by Peru with a Peruvian corporation and that therefore its settlement was entirely a domestic matter, but, finally, on April 25, 1910, as the result of diplomatic negotiations with Italy, a *compromis* was signed, submitting the questions in dispute to a tribunal of the Permanent Court of Arbitration at The Hague composed of the following members: Louis Renault of France, Guido Fusinato of Italy and Manuel Alvarez Calderón of Peru. The sessions began April 20, 1912, and ended April 22, 1912, the decision being rendered May 3, 1912.]

[The above statement of the case is taken from the syllabus in Scott, The Hague Court Reports, *loc. cit.* Part of the award is omitted.]

Award of the Tribunal:

Whereas, by a *compromis* dated April 25, 1910, the Italian and Peruvian Governments agreed to submit the following questions to arbitration:

Should the Peruvian Government pay in cash, or in accordance with the provisions of the Peruvian law of June 12, 1889, on the domestic debt, the bills of exchange (*cambiali*, *libramientos*) now in the possession of the brothers Napoléon, Carlos, and Rafael Canevaro, which were drawn by the Peruvian Government to the order of the firm of José Canevaro & Sons for the sum of 43,140 pounds sterling, plus the legal interest on the said amount?

Have the Canevaro brothers a right to demand the total amount claimed?

Has Count Rafael Canevaro a right to be considered as an Italian claimant? . . .

Whereas, in order to simplify the following statement it is deemed best to pass first upon the third question contained in the *compromis*, that is, the question of the status of Rafael Canevaro;

Whereas, according to Peruvian legislation (Article 34 of the Constitution), Rafael Canevaro is a Peruvian by birth because born on Peruvian territory,

And, whereas, on the other hand, according to Italian legislation (Article 4 of the Civil Code) he is of Italian nationality because born of an Italian father;

Whereas, as a matter of fact, Rafael Canevaro has on several occasions acted as a Peruvian citizen, both by running as a candidate for the Senate, where none are admitted except Peruvian citizens and where he succeeded in defending his election, and, particularly, by accepting the office of Consul General for the Netherlands, after having secured the authorization of both the Peruvian Government and the Peruvian Congress;

Whereas, under these circumstances, whatever Rafael Canevaro's status as a national may be in Italy, the Government of Peru has a right to consider him a Peruvian citizen and to deny his status as an Italian claimant. . . .

[Rafael Canevaro's claim was dismissed. The rest of the award, dealing with the claims of Napoléon and Carlos Canevaro, is omitted.]

Done at The Hague, in the palace of the Permanent Court of Arbitration, on May 3, 1912.

State of Vermont, ex rel. Charles A. Phelps v. S. Hollister Jackson

United States. Supreme Court of Vermont. 1907.

79 *Vermont Reports* 504.

[The statement of the case, the arguments of counsel, and part of the opinion are omitted. The facts are stated sufficiently in the opinion.]

Powers, J. This is a petition for a writ of *quo warranto* to test the right of the respondent to hold the office of state's attorney of Washington County. As the case is presented, the only question for our determination is, was Mr. Jackson a citizen of the United States at the time of his election to the office in 1904? . . .

The Rev. John Jackson, the great-grandfather of the respondent, was born at Petersham, Mass., July 2, 1771, and continued to reside in that State until some time after December 21, 1807,—the date of the birth of his daughter, Sarah Saphronia. His citizenship is questioned by the relator's counsel, but not seriously, we think, for, though born a British subject, his continued residence in this country after the Declaration of Independence, giving allegiance to the new government, establishes his American citizenship. No doubt he had the right to elect whether he would retain his native allegiance to the British crown, or become a citizen of this country. But nothing appears to indicate that he elected to adhere to the Crown, so he is to be deemed to be an American citizen. Inglis v. Sailor's Snug Harbor, 3 Pet. 99; Young v. Peck, 21 Wend. 389; Moore v. Wilson, 18 Tenn. 406; Calais v. Marshfield, 30 Me. 511. On this point there is no conflict between the English and American authorities, except that we date the separation of the two countries (the date to which this right of election has reference) from July 4, 1776, while in England it is not considered to have taken place until the treaty of peace in 1783. Inglis v. Sailor's Snug Harbor, *supra;* Doe v. Acklam, 2 B. & C. 779. Nor did John Jackson's mere subsequent removal to Canada affect the citizenship so established. Ainslee v. Martin, 9 Mass. 454; Campbell v. Wallace, (N. H.) 37 Am. Dec. 219; Quimby v. Duncan, *supra;* Minneapolis v. Renn, *supra;* State v. Adams, (Ia.) 24 Am. Rep. 760; Hauenstein v. Lymham, 100 U. S. 483.

While John Jackson was residing at Petersham, his son, Horatio Nelson Jackson, was born there March 5, 1810. The date of this birth is conceded, but it is insisted on behalf of the relator that there is no legitimate evidence before us that Horatio Nelson was born at Petersham, and that the circumstances, historical and otherwise, show that he must have been born in Canada after his father, John Jackson, moved there;

and that the only evidence of the place of birth rests in a family tradition, which is merely hearsay and inadmissable to prove the fact. . . .

None of the circumstances alluded to, nor all of them together are sufficient to meet the presumption and evidence showing the fact to be as claimed by the respondent. We have no hesitation, therefore, in finding that Horatio Nelson Jackson was born in Massachusetts. And this being so he was born an American citizen, and his removal to Canada during his minority would not divest him of his character as such, nor could his father, John Jackson, do anything after his birth to deprive him of it. Van Dyne Cit. 43 (Hernandez's case). His American citizenship attended him, abided with him and was available to him, until he himself, after attaining his majority, by his own voluntary act, did something to legally divest himself of it. He was not required to elect his allegiance, he was born into it.

In this view of the matter, the subsequent life history of the Rev. John Jackson is of no further interest to us in this discussion, and he passes out of the case.

Horatio Nelson Jackson resided in Canada practically all of the time after his removal there until his death. He spent some portions of the later years of his life in the states, but it is not claimed that he established a permanent residence here. He became of age in 1831, married in 1833, and a son was born to him at Brome, P. Q., in 1838. This son is Samuel Nelson Jackson, father of the respondent. The time, then, which elapsed between the date when Horatio Nelson attained his majority and the birth of Samuel Nelson was about seven years. It is to this interval of time that we now direct our attention, for during his minority Horatio Nelson was not competent to expatriate himself,—Ludlam v. Ludlam, 26 N. Y. 356—and the status of the son Samuel became fixed at the date of his birth. The point of our enquiry will be to ascertain whether Horatio Nelson retained the citizenship of his birth until the birth of the son, Samuel Nelson; for if he did, Samuel Nelson was an American citizen at birth. But if Horatio Nelson did anything which amounted to expatriating himself after he became of age and before the birth of the son, it would prevent the son from acquiring American citizenship from the father. . . .

So it is that the first question to determine is, was Horatio Nelson a citizen in 1838 when Samuel Nelson was born? . . .

There is no evidence in this case inconsistent with a continuance of Horatio Nelson's original citizenship during his residence in Canada from the time he came of age to the birth of Samuel Nelson. We are told that he voted in Canada, but whether he did so before 1838 is left to conjecture. It is shown that he held title to real estate there just before the birth of Samuel Nelson. The deed itself is a quit claim of 72 acres with buildings and improvements, but the character of the

property and whether he resided upon it or what he did with it, does not satisfactorily appear. He was appointed a justice of the peace, but not until after the date in question,—1838.

On the contrary, the evidence of the respondent discloses that by his statements,—and these were admissable, Baptiste v. De Volunbun, 5 Har. & J. (Md.) 86—he always claimed to be an American citizen and many circumstances are shown to indicate his intention to adhere to the allegiance of his birth,—and so we find the fact to be that he did adhere to it. . . .

The citizenship acquired by Samuel Nelson Jackson at birth was a qualified one and of that peculiar character under the law which required an election on his part upon attaining his majority or within a reasonable time thereafter whether he would conserve the citizenship of the United States or that of Canada. This election when once made is binding upon him and the country of his choice. Ludlam v. Ludlam, 26 N. Y. at p. 371; Van Dyne on Cit. 38. Such an election Samuel Nelson seasonably made, for he came to this country a minor, completed his education here, resided here several years after attaining his majority, took the freeman's oath, engaged in business, paid taxes, and intended to become and thereby did become an American citizen in the full and unqualified sense of the term. Being desirous of engaging in the ministry, he applied in Massachusetts for certain Congregational funds to assist him in completing his training, but his application not being granted to the extent desired, he made a more advantageous arrangement for funds in Canada under an agreement that he would serve in the ministry there for a period of five years. His subsequent residence in Canada was as an American citizen. He did not, and would not had he been required, take the oath of allegiance there; he did not intend to do, and did not in fact do anything to divest himself of his full rights as a citizen of the United States.

His son, S. Hollister, the respondent, was born in Canada in 1875; born into that same kind of American citizenship which required an election on his part as it had of his father. He came to Vermont permanently to reside in 1895, a minor and upon arriving at full age, made complete election of American citizenship by taking the oaths required by law, securing his enrollment as a voter in Barre, and by exercising and enjoying all the rights and performing all the duties of citizenship from that time until his election as state's attorney of Washington County,—an office which he was, by law duly qualified to accept and fill.

Petition dismissed with costs against the relator Phelps.

GREAT BRITAIN, NATIONALITY AND STATUS OF ALIENS ACT, 1914

Part III, Section 14. 1914.

4 & 5 *Geo. V. c.* 17.

14.—(1) Any person who by reason of his having been born within His Majesty's dominions and allegiance or on board a British ship is a natural-born British subject, but who at his birth or during his minority became under the law of any foreign state a subject also of that state, and is still such a subject, may, if of full age and not under disability, make a declaration of alienage, and on making the declaration shall cease to be a British subject.

(2) Any person who though born out of His Majesty's dominions is a natural-born British subject may, if of full age and not under disability, make a declaration of alienage, and on making the declaration shall cease to be a British subject.[13]

SECTION 2. NATIONALITY BY NATURALIZATION

PROCEEDINGS AGAINST ÆNEAS MACDONALD, ALIAS ANGUS MACDONALD, FOR HIGH TREASON

Great Britain. Special Commission. 1747.

18 *Howell's State Trials* 857.

In the year 1747, a bill of indictment was found against him under the special commission in Surrey for the share he had in the late rebellion. . . .

[13] Sec. 14 of the Act of 1914, reproduced above, is a revision in harmony with more recent British legislation of §4 of the British Naturalization Act of 1870, 33 & 34 Vict. c. 14.

"There is no provision in American law for a declaration of alienage on the part of a person who is born in this country of alien parents or born abroad of American parents, and who acquires dual nationality at birth. It would be a great advantage to have cases of dual nationality settled through general international conventions. The simplest and perhaps most satisfactory solution of this difficult question would be an agreement under which persons born with a dual nationality should after reaching majority be considered citizens of the country in which they are domiciled at the time of reaching majority. Under such a provision those residing in a third country might be considered citizens or subjects of the one of the two countries claiming their allegiance in which they were last domiciled." FLOURNOY, "New British Imperial Law of Nationality," 9 Am. Jour. Int. L. 870, 879.

Cf. provisions forbidding dual nationality in constitutions or laws of Czechoslovakia, Esthonia, Latvia, Lithuania, and Poland, cited note 22, *infra*, 234.

On the general subject of dual nationality and election, see FLOURNOY, "Dual Nationality and Election," 30 Yale L. Jour. 545, 693; FLOURNOY, "International Problems in Respect to Nationality by Birth," 20 Am. Soc. Int. L. Proc. 59; Int. L. Assoc. Rep. (1924) 22 *et seq.*; League of Nations, Committee of Experts on Codification, Questionnaire on Nationality, L. of N. Doc., C. 43. M. 18, 1926, V., 20 Am. Jour. Int. L. Spec. Suppl. 21.

The overt acts charged in the indictment were sufficiently proved. And also that the prisoner was apprehended and in custody before the 1st of January 1746–7.

The counsel for the prisoner insisted that he was born in the dominions of the French king, and on this point they put his defence.

But apprehending that the weight of the evidence might be against them, as indeed it was, with regard to the place of the prisoner's birth, they endeavoured to captivate the jury and bystanders, by representing the great hardship of a prosecution of this kind against a person, who, admitting him to be a native of Great Britain, had received his education from his early infancy in France; and had spent his riper years in a profitable employment in that kingdom, where all his hopes centered. And speaking of the doctrine of natural allegiance, they represented it as a slavish principle, not likely to prevail in these times; especially as it seemed to derogate from the principles of the Revolution.

Here the Court interposed, and declared, that the mentioning the case of the Revolution as a case any way similar to that of the prisoner, supposing him to have been born in Great Britain, can serve no purpose but to bring an odium on that great and glorious transaction. It never was doubted that a subject born, taking a commission from a foreign prince, and committing high treason, may be punished as a subject for that treason, notwithstanding his foreign commission. (Dyer, 298. 300. 1 Hale, 68. 96.) It was so ruled in doctor Storey's case. [1 How. St. Tr. 1087.] And that case was never yet denied to be law. It is not in the power of any private subject to shake off his allegiance, and to transfer it to a foreign prince. Nor is it in the power of any foreign prince by naturalizing or employing a subject of Great Britain to dissolve the bond of allegiance between that subject and the crown.[14]

However, as the prisoner's counsel had mentioned his French commission as a circumstance tending in their opinion to prove his birth in France, the Court permitted it to be read, the attorney general consenting. It was dated the 1st of June 1745, and appointed the prisoner commissary of the troops of France, which were then intended to embark for Scotland.

The Court, with the consent of the counsel for the crown, permitted the cartel between France and Great Britain for the exchange or ransom of prisoners likewise to be read. And observed, that as it relateth barely to the exchange or ransom of prisoners of war, it can never extend to the case of the prisoner at the bar, supposing him to be a subject born. Because by the laws of all nations, subjects taken in arms against their

[14] See WYNNE, Life of Jenkins, II, 712. *Cf.* Marryat v. Wilson, 1 Bos. & Pul. 430, 439. See also Talbot v. Janson, 3 Dall. 133; Williams' Case, 29 Fed. Cas. 1330; CUSHING, "Right of Expatriation," 8 Op. Atty. Gen. 139; KENT, Commentaries, II, 35; VAN DYNE, Citizenship, 269; VAN DYNE, Naturalization, 333.

lawful prince, are not considered as prisoners of war, but as rebels; and are liable to the punishments ordinarily inflicted on rebels.

Lord Chief Justice Lee in his direction to the jury, told them that the overt acts laid in the indictment being fully proved, and not denied by the prisoner, or rather admitted by his defence, the only fact they had to try was, whether he was a native of Great Britain? If so, he must be found guilty. And as to that point, he said the presumption in all cases of this kind is against the prisoner, and the proof of his birth out of the king's dominions, where the prisoner putteth his defence on that issue, lieth upon him. But whether the evidence that had been given in the present case (which he summed up very minutely) did or did not amount to such proof he left to their consideration.

The jury found him Guilty, but recommended him to mercy. He received sentence of death as in cases of high treason; but was afterwards pardoned upon the conditions mentioned afterwards.

The Case of Christian Ernst

United States. Opinion of Attorney-General Black. 1859.

9 *Opinions of Attorneys General* 356.

[The following opinion was in response to a request from the President.]

Christian Ernst (upon whose case you require my opinion) is a native of Hanover, and emigrated to this country in 1851, when he was about nineteen years of age. Last February he was naturalized, and in March, after procuring a regular passport, he went back to Hanover on a temporary visit. He had been in the village where he was born about three weeks when he was arrested, carried to the nearest military station, forced into the Hanoverian army, and there he is at the present time, unable to return home to his family and business, but compelled against his will to perform military service.

This is a case which makes it necessary for the Government of the United States to interfere promptly and decisively, or else acknowledge that we have no power to protect naturalized citizens when they return to their native country under any circumstances whatever. What you will do must of course depend upon the law of our own country, as controlled and modified by the law of nations.

The natural right of every free person, who owes no debts and is not guilty of any crime, to leave the country of his birth in good faith and for an honest purpose, the privilege of throwing off his natural allegiance and substituting another allegiance in its place—the general right, in one word, of expatriation, is incontestible. I know that the common law of England denies it; that the judicial decisions of that country are

opposed to it; and that some of our own courts, misled by British authority, have expressed, though not very decisively, the same opinion. But all this is very far from settling the question. The municipal code of England is not one of the sources from which we derive our knowledge of international law. We take it from natural reason and justice, from writers of known wisdom, and from the practice of civilized nations. All these are opposed to the doctrine of perpetual allegiance. It is too injurious to the general interests of mankind to be tolerated; justice denies that men should either be confined to their native soil or driven away from it against their will. A man may be either exiled or imprisoned for an actual offence against the law of his country; but being born in it is not a crime for which either punishment can be justly inflicted. Among writers on public law the preponderance in weight of authority, as well as the majority in numbers, concur with Cicero, who declares that the right of expatriation is the firmest foundation of human freedom, and with Bynkershoek, who utterly denies that the territory of a State is the prison of her people. In practice, no nation on the earth walks, or ever did walk, by the rule of the common law. All the countries of Europe have received and adopted and naturalized the citizens of one another. They have all encouraged the immigration of foreigners into their territories, and many of them have aided the emigration of their own people. The German States have conceded the existence of the right by making laws to regulate its exercise. Spain and the Spanish American States have always recognized it. England, by a recent statute, (7 and 8 Vic.,) has established a permanent system of naturalization in the very teeth of her common law rule. France has done the same, and besides that, has declared, in the Code Napoleon, (art. 17,) that the quality of a Frenchman will be lost by naturalization in a foreign country. There is no government in Europe or America which practically denies the right. Here, in the United States, the thought of giving it up cannot be entertained for a moment. Upon that principle this country was populated. We owe to it our existence as a nation. Ever since our independence we have upheld and maintained it by every form of words and acts. We have constantly promised full and complete protection to all persons who should come here and seek it by renouncing their natural allegiance and transferring their fealty to us. We stand pledged to it in the face of the whole world. Upon the faith of that pledge millions of persons have staked their most important interests. If we repudiate it now, or spare one atom of the power which may be necessary to redeem it, we shall be guilty of perfidy so gross that no American can witness it without a feeling of intolerable shame.

Expatriation includes not only *emigration* out of one's native country, but *naturalization* in the country adopted as a future residence. When we prove the right of a man to expatriate himself, we establish the lawful

authority of the country in which he settles to naturalize him if its government pleases. What, then, is naturalization? There is no dispute about the meaning of it. The derivation of the word alone makes it plain. All lexicographers and all jurists define it in one way. In its popular, etymological, and legal sense, it signifies the act of adopting a foreigner and clothing him with all the privileges of a native citizen or subject.

There can be no doubt that naturalization does *ipso facto* place the native and the adopted citizen in precisely the same relations with the government under which they live, except in so far as the express and positive law of the country has made a distinction in favor of one or the other. In some countries immigration has been encouraged by giving to adopted citizens certain immunities and privileges not enjoyed by natives. In most, however, political favors have gone the other way. Here, none but a native can be President. In some of our States foreign-born citizens are ineligible to the office of governor, and in one of them they cannot even vote for two years after they are naturalized. But if these restrictions had not been expressly made by positive enactment they certainly would not have existed.

In regard to the protection of our citizens in their rights at home and abroad we have no law which divides them into classes, or makes any difference whatever between them. A native and a naturalized American may, therefore, go forth with equal security over every sea and through every land under heaven, including the country in which the latter was born. Either of them may be taken up for a debt contracted or a crime committed by himself, but both are absolutely free from all political obligations to every country but their own. They are both of them American citizens, and their exclusive allegiance is due to the Government of the United States. One of them never did owe any fealty elsewhere, and the other, at the time of his naturalization, solemnly and rightfully, in pursuance of public law and municipal regulation, threw off, renounced, and abjured forever, all allegiance to every foreign prince, potentate, State, and sovereignty whatsoever, and especially to that sovereign whose subject he had previously been. If this did not work a dissolution of every political tie which bound him to his native country, then our naturalization laws are a bitter mockery, and the oath we administer to foreigners is a delusion and a snare.

There have been and are now persons of very high reputation who hold that a naturalized citizen ought to be protected by the government of his adopted country everywhere except in the country of his birth; but if he goes there, or is caught within the power of his native sovereign, his act of naturalization may be treated as a mere nullity, and he will immediately cease to have the rights of an American citizen. This cannot be true. It has no foundation to rest upon, (and its advocates do not pretend that it has any,) except the dogma which denies altogether the

right of expatriation without the consent of his native country; and that is untenable, as I think I have already shown.

Neither is this view supported by the practice of the world. I need not say that our own naturalization laws are opposed to it in their whole spirit as well as in their express words. The States of Europe are also practically committed against it. No government would allow one of its subjects to divide his allegiance between it and another sovereign; for they all know that no man can serve two masters. In Europe as well as here, the allegiance demanded of a naturalized resident must have been always understood as exclusive. There are not many cases on record, but what few we find are uniform and clear. One Aliberte, a Frenchman, naturalized here, went back and was arrested for an offence against the military law which none except a French subject could commit, but he was discharged when his national character as an American citizen was shown. A Mr. Amther, a native Bavarian, after being naturalized in America, and living here for many years, determined upon returning to his native country and resuming his original political status. The Bavarian government, so far from ignoring his naturalization, expressed a doubt whether he could be re-adopted there. But the most decisive fact which history records is the course of the British and American governments during the war of 1812. The Prince Regent proclaimed it as his determination that every native-born subject of the British crown taken prisoner while serving in the American ranks, should be tried and executed as a traitor to his lawful sovereign. This was undoubtedly right according to the common-law doctrine. The king of England had not given his assent to the expatriation of those people. If the Prince Regent had a right to arrest naturalized Englishmen, Scotchmen, or Irishmen, in Canada, (as the king of Hanover arrested Mr. Ernst in his dominions,) and compel them to fight *for* him, he certainly had a right to hang them for fighting *against* him. But Mr. Madison denied this whole doctrine and all its consequences. He immediately issued a counter proclamation, declaring that if any naturalized citizen of the United States should be put to death on the pretence that he was still a British subject, two English prisoners should suffer in like manner by way of retaliation. The Prince Regent's proclamation was never enforced in a single instance. A principle which our Government successfully resisted under such circumstances will scarcely be submitted to now.

The application of these principles to the case of any naturalized citizen who returns to his native country is simple and easy enough. He is liable, like anybody else, to be arrested for a debt or a crime; but he cannot rightfully be punished for the mere non-performance of a duty which is supposed to grow out of that allegiance which he has abjured and renounced. If he was a deserter from the army, he may be punished

when he goes back, because desertion is a crime. On the other hand, if he was not actually in the army at the time of his emigration, but merely liable, like other members of the State, to be called on for his share of military duty, which he did not perform because he left the country before the time for its performance came round, he cannot justly be molested. Any arrest or detention of him on that account ought to be regarded as a grave offence to his adopted country. What acts are necessary to make him part of the army; what constitutes the crime of military desertion; whether a person drafted, conscribed, or notified, but not actually serving, may be called a deserter if he fails to report himself: these are questions which need not be discussed until they arise.

But it may be said that the government of Hanover has a right to make her own laws and execute them in her own way. This is strictly true of all laws which are intended to enforce the obligations and punish the offences of her own people. But a law which operates on the interests and rights of other States or peoples must be made and executed according to the law of nations. A sovereign who tramples upon the public law of the world cannot excuse himself by pointing to a provision in his own municipal code. The municipal code of each country is the offspring of its own sovereign will; and public law must be paramount to local law in every question where local laws are in conflict. If Hanover would make a legislative decree forbidding her people to emigrate or expatriate themselves upon pain of death, that would not take away the right of expatriation; and any attempt to execute such a law upon one who has already become an American citizen would, and ought to be, met by very prompt reclamation.

Hanover probably has some municipal regulation of her own by which the right of expatriation is denied to those of her people who fail to comply with certain conditions. Assuming that such a regulation existed in 1851, and assuming also that it was violated by Mr. Ernst when he came away, the question will then arise whether the unlawfulness of his emigration makes his act of naturalization void as against the king of Hanover. I answer no, certainly not. He is an American citizen by our law; if he violated the law of Hanover, which forbade him to transfer his allegiance to us, then the laws of the two countries are in conflict, and the law of nations steps in to decide the question upon principles and rules of its own. By the public law of the world we have the undoubted right to naturalize a foreigner, whether his natural sovereign consented to his emigration or not. In my opinion, the Hanoverian government cannot justify the arrest of Mr. Ernst by showing that he emigrated contrary to the laws of that country, unless it can also be proved that the original right of expatriation depends on the consent of the natural sovereign. This last proposition I am sure no man can establish.

United States, An Act Concerning the Rights of American Citizens in Foreign States

Sections 1 and 2. 1868.

15 *United States Statutes at Large* 223.

Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendents, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore,

Be it enacted . . . That any declaration, instruction, opinion, order, or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government.

Sec. 2. And be it further enacted, That all naturalized citizens of the United States, while in foreign states, shall be entitled to, and shall receive from this government, the same protection of persons and property that is accorded to native-born citizens in like situations and circumstances.[15]

Treaty between the North German Confederation and the United States

Articles 1, 2, and 4. Berlin, February 22, 1868.

15 *United States Statutes at Large* 615, 616.

Art. 1. Citizens of the North German Confederation, who become naturalized citizens of the United States of America and shall have resided uninterruptedly within the United States five years, shall be held by the North German Confederation to be American citizens, and shall be treated as such.

Reciprocally: citizens of the United States of America who become naturalized citizens of the North German Confederation, and shall have resided uninterruptedly within North Germany five years, shall be held by the United States to be North German citizens, and shall be

[15] U. S. Rev. Stat., §§1999–2000. See U. S. For. Rel. (1873) II, 1177; Flournoy, "Naturalization and Expatriation," 31 Yale L. Jour. 702, 709; Hyde, I, §§376–387; Moore, Principles of American Diplomacy, ch. 7.

See Browne v. Dexter, 66 Cal. 39; Charles Green's Son v. Salas, 31 Fed. 106. *Cf.* State v. Adams, 45 Ia. 99; Ware v. Wisner, 50 Fed. 310; Comitis v. Parkerson, 56 Fed. 556; Hammerstein v. Lyne. 200 Fed. 165.

treated as such. The declaration of an intention to become a citizen of the one or the other country has not for either party the effect of naturalization.

This article shall apply as well to those already naturalized in either country as those hereafter naturalized.

Art. 2. A naturalized citizen of the one party on return to the territory of the other party remains liable to trial and punishment for an action punishable by the laws of his original country and committed before his emigration; saving, always, the limitation established by the laws of his original country.[16]

Art. 4. If a German naturalized in America renews his residence in North Germany, without the intent to return to America, he shall be held to have renounced his naturalization in the United States. Reciprocally: if an American naturalized in North Germany renews his residence in the United States, without the intent to return to North Germany, he shall be held to have renounced his naturalization in North Germany. The intent not to return may be held to exist when the person naturalized in the one country resides more than two years in the other country.[17]

[16] Art. 2 of the Treaty between Bulgaria and the United States, Nov. 23, 1923, 43 U. S. Stat. L. 1759, 1760, provides: "Nationals of either country who have or shall become naturalized in the territory of the other, as contemplated in Article I, shall not, upon returning to the country of former nationality, be punishable for the original act of emigration, or for failure, prior to naturalization, to respond to calls for military service not accruing until after *bona fide* residence was acquired in the territory of the country whose nationality was obtained by naturalization."

[17] "Further legislative expression of the right of expatriation is represented by the provisions of the naturalization conventions between the United States and a score of foreign countries, determining the citizenship status of members of the contracting states under certain conditions. The first, with the North German Union, was as early as February 22, 1868. European party states to these conventions, with the dates they were signed or concluded, comprise, in alphabetical order, Austria-Hungary (1870), Baden (1868), Bavaria (1868), Belgium (1868), Bulgaria (1923), Denmark (1872), Great Britain (1870, 1871), Hesse (1868), the North German Union (1868), Portugal (1908), Sweden and Norway (1869), and Wurttemberg (1868). In the Western Hemisphere are included the Argentine Republic (1906), Bolivia (1906), Brazil (1906, 1908), Chile (1906), Colombia (1906), Costa Rica (1906, 1911), Cuba (1906), Ecuador (1872, 1906), Guatemala (1906), Haiti (1902), Honduras (1906, 1908), Mexico (1868, 1906), Nicaragua (1906, 1908), Panama (1906), Paraguay (1906), Peru (1906, 1907), Salvador (1906, 1908), and Uruguay (1906, 1908).

"With the exceptions hereafter noted, all of the foregoing conventions became effective. Six of the eighteen party states to the Pan American Naturalization Convention of 1906—Bolivia, Cuba, Mexico, Paraguay, Peru, and Uruguay—apparently failed to ratify it, and Guatemala, which had ratified, denounced it in 1914. . . . Ecuador terminated her convention of 1872 in 1892, by notice, and Mexico took similar action in regard to hers of 1868, terminating it in 1882." Hazard, "International Problems in Respect to Nationality by Naturalization and of Married Women," 20 Am. Soc. Int. L. Proc. 67, 68. See Flournoy, "Naturalization and Expatriation," 31 Yale L. Jour. 702, 714.

United States, An Act in Reference to the Expatriation of Citizens and Their Protection Abroad

Section 2. 1907.

34 *United States Statutes at Large* 1228.

Sec. 2. That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws,[18] or when he has taken an oath of allegiance to any foreign state.[19]

When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: Provided, however, That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe:[20] And provided also, That no American citizen shall be allowed to expatriate himself when this country is at war.

The Case of Nazara Gossin

United States. Opinion of Attorney-General Wickersham. 1910.

28 *Opinions of Attorneys General* 504.

[The following opinion was in response to a request from the Secretary of Commerce and Labor. Part of the opinion is omitted.]

[18] See also Great Britain, Nationality and Status of Aliens Act, 1914, §13, 4 & 5 Geo. V. c. 17.

Cf. Esthonia, Law of Citizenship, 1922, art. 20, G. B. Misc. No. 2 (1927) 26, 29; Egypt, Law of Nationality, 1926, art. 15, G. B. Misc. No. 2 (1927) 21, 24; Latvia, Law of Nationality, 1927, art. 9, G. B. Misc. No. 8 (1927) 5; Poland, Law of Nationality, 1920, art. 11, 114 Br. & For. S. P. 914, 915; Russia, Ordinance regarding Citizenship, 1924, art. 13, G. B. Misc. No. 2 (1927) 68, 72.

Cf. also France, Law of Nationality, 1927, art. 9, 27 Duvergier N. S. 451, 454; Germany, Imperial and State Citizenship Law, 1913, §25, 8 Am. Jour. Int. L. Suppl. 217, 223, *infra*, 233; Italy, Law of Nationality, 1912, art. 8, 106 Br. & For. S. P. 1071, 1072.

[19] See Ex parte Griffin, 237 Fed. 445; Act of 1918, c. 69, 40 U. S. Stat. L. 542, 545. See also United States v. Day, 28 F. (2d) 44.

[20] For the rules prescribed by the Department of State, in effect April 21, 1926, see 20 Am. Soc. Int. L. Proc. 75.

"The second paragraph of section 2 of the Act of March 2, 1907, represented no new principle, but merely crystallized into definite statutory form principles which, as we have seen, had for many years been recognized and applied by the Department of State." Flournoy, "Naturalization and Expatriation," 31 Yale L. Jour. 702, 856.

See also Naturalization Act of 1906, c. 3592, §15, 34 U. S. Stat. L. 596, 601; Luria v. United States, 231 U. S. 9; United States v. Knight, 299 Fed. 571.

I beg to acknowledge the receipt of your letter of the 17th ultimo, requesting my opinion upon the question therein presented, as follows:

"Jebran Gossin, a native of Syria, was naturalized in the United States in 1905. Thereafter, about 1907, he returned to his native country, and was married to a Syrian woman. After remaining in that country for more than two years, he came back to the United States, bringing his wife, Nazara Gossin, with him. Upon reaching the port of New York, the 10th of this month, the man was admitted, but it was found that the woman had trachoma, and she is being detained pending a determination of her right to enter, which seems to hinge upon the question whether her husband is now a citizen of the United States. If he is, then, under section 4 of the expatriation act of March 2, 1907 (34 Stat. 1228), it would appear that his wife is a citizen, and, as such, is not subject to exclusion under the immigration laws. Looking merely at the letter of section 2 of the act referred to, it would seem that, being a naturalized citizen and having resided for more than two years in the country from which he came, there is raised the presumption that he has ceased to be an American citizen, which presumption has not been rebutted in accordance with the proviso contained in that section, and his wife, being an alien, is subject to exclusion.

"However, in view of the title of the act, and the fact that the proviso requires that the presumption shall be overcome by presenting certain evidence to a 'diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe,' I am in doubt as to whether the statute applies to a person who is now in the United States, or who may be seeking admission as a citizen after having resided for more than two years in the country from which he came.

"I have the honor to request, therefore, that you favor me with an expression of your opinion as to the citizenship status of the above-named Nazara Gossin. Inasmuch as the person concerned is being detained in the meanwhile at Ellis Island, an opinion at an early date will be appreciated."

Section 1994 of the Revised Statutes provides:

"Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen."

Nothing to the contrary appearing, I assume that Nazara Gossin "might herself be lawfully naturalized," and hence is to be deemed a citizen upon her marriage to a citizen of the United States. (27 Op. 507, and cases cited.) Her present citizenship status depends, therefore, upon that of her husband; and, under the facts presented, he is now a citizen unless his citizenship has been forfeited under the act of March 2, 1907 (34 Stat. 1228). . . .

Pursuant to the last paragraph of the section quoted, the Department of State has issued a circular to diplomatic and consular officers of the United States, dated April 19, 1907, reading as follows:

"When a naturalized citizen of the United States has resided for two years in the country of his origin, or for five years in any other country, this fact creates a presumption that he has ceased to be an American citizen, but the presumption may be overcome by his presenting to a diplomatic or consular officer proof establishing the following facts:

"(a) That his residence abroad is solely as a representative of American trade and commerce, and that he intends eventually to return to the United States permanently to reside; or,

"(b) That his residence abroad is in good faith for reasons of health or for education, and that he intends eventually to return to the United States to reside; or,

"(c) That some unforeseen and controlling exigency beyond his power to foresee has prevented his carrying out a *bona fide* intention to return to the United States within the time limited by law, and that it is his intention to return and reside in the United States immediately upon the removal of the preventing cause.

"The evidence required to overcome the presumption must be of the specific facts and circumstances which bring the alleged citizen under one of the foregoing heads, and mere assertions, even under oath, that any of the enumerated reasons exist will not be accepted as sufficient."

I infer from your statement of the facts that before leaving Syria Jebran Gossin did not make proof before a consular or diplomatic officer of the United States as provided by the regulations of the State Department. The question then is whether the presumption as to noncitizenship raised by the act by reason of his residence abroad continues notwithstanding his return to the United States.

In my judgment the act was not intended to apply to a case of this kind, but its operation is limited to naturalized citizens while residing in foreign countries. The purpose of the act is, I think, simply to relieve the Government of the obligation to protect such citizens residing abroad after the limit of two or five years, as the case may be, when their residence there is not shown to be of such a character as to warrant the presumption that they intend to return and reside in the United States and thus bear the burdens as well as enjoy the rights and privileges incident to citizenship. Until the time limit has expired the presumption is that they intend to return; after that time it is presumed that they do not intend to return, and it becomes necessary, in order that they may continue to have this Government's protection, to show affirmatively, in accordance with the regulations of the State Department made in pursuance of the act, that it is their *bona fide* intention to return to the United States to live. Obviously, therefore, the essential thing under

the act is the intention to return to and reside in the United States. The highest proof of such an intention is the actual return and residence of such a person, amounting as it does to a demonstration. It is not to be held, therefore, that the act would apply to a case of this kind unless the language used or the circumstances attending its passage compel such a conclusion. The title, language, and history of the act, however, support the views just stated as to its construction. . . .

The fact that the act only authorizes the submission of proof for the purpose of overcoming the presumption as to noncitizenship raised thereby to diplomatic and consular officers of the United States, who necessarily reside abroad, and makes no provision in respect to naturalized citizens coming within the purview of the act who return to the United States, is a further evidence that Congress did not intend the act to apply to a case of this kind. To hold that it did, would produce the absurdity of a naturalized citizen seeking to reënter the United States being held to have ceased to be such, and possibly denied admission, because he had failed to make proof before the proper diplomatic or consular officer abroad of his intention to return to the United States.

As above shown, the presumption as to noncitizenship raised by the act is created for the purpose of relieving the State Department of protecting naturalized citizens abroad when the conditions are apparently such as to indicate that they have no *bona fide* intention to return to and reside in the United States. When a citizen returns to the United States, the necessity for such protection no longer exists, and it is fair to assume that with the cessation of the necessity the presumption created by the act also ceases.

In my opinion, therefore, under the facts stated, Jebran Gossin has not lost his citizenship, and his wife, Nazara Gossin, upon the assumption above stated that she herself might be lawfully naturalized, is also to be deemed a citizen.[21]

GERMANY, IMPERIAL AND STATE CITIZENSHIP LAW

Sections 1, 13, 25, and 33. 1913.

8 *American Journal of International Law Supplement* 217, 220, 223, 226.

Section 1. A German is one who has citizenship in a Federal State (§§3 to 32) or direct Imperial citizenship (§§33 to 35).

Section 13. A former German who has not taken up his residence in Germany may on application be naturalized by the State of which

[21] *Accord:* United States v. Eliasen, 11 F. (2d) 785. *Contra:* United States v. Howe, 231 Fed. 546.

See Stein v. Fleischmann Co., 237 Fed. 679; Banning v. Penrose, 255 Fed. 159; Sinjen v. Miller, 281 Fed. 889, 289 Fed. 388; Nurge v. Miller, 286 Fed. 982; United States v. Gay, 264 U. S. 353; FLOURNOY, "Naturalization and Expatriation," 31 Yale L. Jour. 702, 848; 20 Am. Soc. Int. L. Proc. 67, 73.

he was formerly a citizen, provided his case fulfills the requirements of Nos. 1 and 2 of paragraph 1 of §8; the same applies to one who is descended from a former German or has been adopted as a child of such. Prior to naturalization a report must be made to the Imperial Chancellor; if he raises objections, naturalization does not take place.

Section 25. A German who has neither his residence nor permanent abode in Germany loses his citizenship on acquiring foreign citizenship, provided the foreign citizenship is acquired as a result of his own application therefor or the application of the husband or legal representative; but in the case of a wife or one having a legal representative, only when the conditions exist under which expatriation may be applied for according to §§18 and 19.

Citizenship is not lost by one who before acquiring foreign citizenship has secured on application the written consent of the competent authorities of his home State to retain his citizenship. Before this consent is given the German consul is to be heard.

The Imperial Chancellor may order, with the consent of the Federal Council, that persons who desire to acquire citizenship in a specified foreign country, may not be granted the consent provided for in paragraph 2.

Section 33. Direct Imperial citizenship may be granted—

1. To a foreigner, who has taken up his residence in a colony or to a native of a colony;

2. To a former German, who has not taken up his residence in Germany; the same applies to one who is descended from a former German or has been adopted as a child of such.[22]

United States, An Act to Establish a Bureau of Immigration and Naturalization, and to Provide for a Uniform Rule for the Naturalization of Aliens throughout the United States

Sections 3, 4, 7, and 8. 1906.

34 *United States Statutes at Large* 596, 598, 599.

Sec. 3. That exclusive jurisdiction to naturalize aliens as citizens of the United States is hereby conferred upon the following specified courts:

[22] See Cahn, Reichs- und Staatsangehörigkeitsgesetz, 79, 135, 152; Flournoy, "Observations on the New German Law of Nationality," 8 Am. Jour. Int. L. 477; Keller-Trautmann, Kommentar zum Reichs- und Staatsangehörigkeitsgesetz, 157, 287, 338.

Cf. Constitution of Poland, 1921, art. 87, which provides: "A Polish citizen may not be at the same time a citizen of another state." McBain and Rogers, 405, 418. See also Constitution of Czechoslovakia, 1920, art. 4, McBain and Rogers, 310, 313; Esthonia, Law of Citizenship, 1922, art. 6, G. B. Misc. No. 2 (1927) 26, 27; Latvia,

United States circuit and district courts now existing, or which may hereafter be established by Congress in any State, United States district courts for the Territories of Arizona, New Mexico, Oklahoma, Hawaii, and Alaska, the supreme court of the District of Columbia, and the United States courts for the Indian Territory; also all courts of record in any State or Territory now existing, or which may hereafter be created, having a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited.

That the naturalization jurisdiction of all courts herein specified, State, Territorial, and Federal, shall extend only to aliens resident within the respective judicial districts of such courts. . . .

Sec. 4. That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise:

First. He shall declare on oath before the clerk of any court authorized by this Act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is *bona fide* his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject. And such declaration shall set forth the name, age, occupation, personal description, place of birth, last foreign residence and allegiance, the date of arrival, the name of the vessel, if any, in which he came to the United States, and the present place of residence in the United States of said alien. . . .

Second. Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing, signed by the applicant in his own handwriting and duly verified, in which petition such applicant shall state his full name, his place of residence (by street and number, if possible), his occupation, and, if possible, the date and place of his birth; the place from which he emigrated, and the date and place of his arrival in the United States, and, if he entered through a port, the name of the vessel on which he arrived; the time when and the place and name of the court where he declared his intention to become a citizen of the United States; if he is married he shall state the name of his wife and, if possible, the country of her nativity and her place of residence at the time of filing his petition; and if he has children, the name, date, and place of birth and place of residence of each child living at the time of the filing of his petition. . . .

Law of Nationality, 1927, art. 8, G. B. Misc. No. 8 (1927) 4; Constitution of Lithuania, 1922, art. 9, 120 Br. & For. S. P. 791.

See Treaty of Versailles, June 28, 1919, art. 278, 13 Am. Jour. Int. L. Suppl. 151, 290.

The petition shall set forth that he is not a disbeliever in or opposed to organized government, or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government, a polygamist or believer in the practice of polygamy, and that it is his intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he at the time of filing of his petition may be a citizen or subject, and that it is his intention to reside permanently within the United States, and whether or not he has been denied admission as a citizen of the United States, and, if denied, the ground or grounds of such denial, the court or courts in which such decision was rendered, and that the cause for such denial has since been cured or removed, and every fact material to his naturalization and required to be proved upon the final hearing of his application. . . .

Third. He shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.

Fourth. It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least,[23] and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same.[24] . . .

Sec. 7. That no person who disbelieves in or who is opposed to organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the

[23] See Act of 1790, c. 3, §1, 1 U. S. Stat. L. 103; Act of 1795, c. 20, §1, 1 *ibid.* 414; Act of 1802, c. 28, §1, 2 *ibid.* 153; Act of 1813, c. 42, §12, 2 *ibid.* 809, 811; Act of 1848, c. 72, 9 *ibid.* 240; Act of 1862, c. 200, §21, 12 *ibid.* 594, 597; Act of 1872, c. 322, §29, 17 *ibid.* 262, 268; U. S. Rev. Stat., §2165. The residence requirement in the Act of 1906, above, was substantially amended by Act of March 2, 1929, §6 (H. R. 349, Public, No. 962).

[24] See Act of 1795, c. 20, §1, 1 U. S. Stat. L. 414; Act of 1802, c. 28, §1, 2 *ibid.* 153, 154; U. S. Rev. Stat., §2165.

Government of the United States, or of any other organized government, because of his or their official character, or who is a polygamist, shall be naturalized or be made a citizen of the United States.[25]

Sec. 8. That no alien shall hereafter be naturalized or admitted as a citizen of the United States who can not speak the English language: Provided, That this requirement shall not apply to aliens who are physically unable to comply therewith, if they are otherwise qualified to become citizens of the United States: . . . Provided further, That the requirements of section eight shall not apply to aliens who shall hereafter declare their intention to become citizens and who shall make homestead entries upon the public lands of the United States and comply in all respects with the laws providing for homestead entries on such lands.[26]

In re Moses

United States. Circuit Court, Southern District of New York. 1897.

83 *Federal Reporter* 995.

Petition of Marcus Moses for Writ of Habeas Corpus.

Petitioner came to this country from Roumania, of which country he was a native, and on March 23, 1897, declared his intention of becom-

[25] See Act of 1903, c. 1012, §39, 32 U. S. Stat. L. 1213, 1222.

[26] See Act of 1790, c. 3, 1 U. S. Stat. L. 103; Act of 1795, c. 20, 1 *ibid.* 414; Act of 1798, c. 54, 1 *ibid.* 566; Act of 1802, c 28, 2 *ibid.* 153; U. S. Rev. Stat., §§2165–2174, Flournoy, "Naturalization and Expatriation," 31 Yale L. Jour. 702; United States, Department of Labor, "Historical Sketch of Naturalization in the United States," and "Naturalization Laws and Regulations," (June 15, 1924); Van Dyne, Naturalization. And see Act of March 2, 1929 (H. R. 349, Public, No. 962); Act of March 4, 1929 (H. R. 16440, Public, No. 1011); 23 Am. Jour. Int. L. 399.

On the question whether the Act requires an understanding and appreciation of American institutions, see In re Goldberg, 269 Fed. 392; Williams, "Some Conflicts in the Construction of the Naturalization Laws," 62 Am. L. Rev. 215.

On the question whether the Act authorizes the naturalization of conscientious objectors, see In re Roeper, 274 Fed. 490; In re D—, 290 Fed. 863.

On the question whether the Act authorizes the naturalization of an alien under 21 years of age, see In re Rousos, 119 N. Y. S. 34; United States v. Butikofer, 228 Fed. 918; In re Cordaro, 246 Fed. 735; In re Chamorra, 298 Fed. 669; Petition of Fortunato, 8 F. (2d) 508.

Cf. France, Law of Nationality, 1927, art. 6, 27 Duvergier N. S. 451, 453; Germany, Imperial and State Citizenship Law, 1913, §§8–16, 8 Am. Jour. Int. L. Suppl. 217, 218; Great Britain, Nationality and Status of Aliens Act, 1914, §§2–9, 4 & 5 Geo. V. c. 17, as amended, 1918, 8 & 9 Geo. V. c. 38 (see Keith, Responsible Government in the Dominions, 2d ed., II, 1041); Italy, Law of Nationality, 1912, arts. 4–6, 106 Br. & For. S. P. 1071, 1072; Poland, Law of Nationality, 1920, arts. 8–9, 114 Br. & For. S. P. 914, 915. *Cf.* also recent legislation in respect to naturalization in other countries, in "Nationality and Naturalisation Laws of Certain Foreign Countries," G. B. Misc. No. 7 (1922) Cmd. 1771, G. B. Misc. No. 2 (1927) Cmd. 2853, and G. B. Misc. No. 7 (1928) Cmd. 3221.

ing a citizen of the United States. Since his arrival he has resided in the city of New York. On November 23, 1897, Yette Moses, wife of the petitioner, and five of their children under ten years of age, arrived at this port by the steamship Obdam, and demanded to be permitted to land. On inspection made in accordance with the immigration laws of the United States, they did not appear to the inspecting officers to be clearly, beyond doubt, entitled to admission, and were thereupon detained for a special inquiry, as provided by section 5 of the act of March 3, 1893. Thereupon a special inquiry was held, as provided by the statute, and the officials conducting the same did not make the favorable decisions required by law to entitle them to admission, but held that two of the children were suffering from a loathsome contagious disease, and that the mother and the other three children were persons likely to become a public charge. Thereupon all were excluded from admission into the United States, and are now detained at the barge office immigrant station pending their return to the country whence they came.

[The names of counsel and part of the opinion are omitted.]

LACOMBE, CIRCUIT JUDGE (after stating the facts). The act of August 18, 1894, c. 301 (28 Stat. 390), provides that:

"In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or custom officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the secretary of the treasury."

If, therefore, the petitioner's wife and children are "aliens," this court cannot inquire into the correctness of the decision of the immigration officers. Lem Moon Sing v. U. S., 158 U. S. 540, 15 Sup. Ct. 967. In other words, the only jurisdictional facts which it is necessary for the respondent to establish in a proceeding of this character are—First, that the person seeking admission is an alien; and, second, that the immigration officers made their decision in the way in which the statute requires. . . .

It is further contended that petitioner is not an alien, and that, therefore, his wife and children are not aliens. Undoubtedly the citizenship of his wife and children is the same as his own; but upon the record it does not appear that the petitioner is, as he contends, a citizen of the United States. He began as an alien,—a subject of the king of Roumania. He did not change his condition nor his allegiance by merely coming to this country nor by residing here. Nor has his declaration of intention altered the situation. He does not by that document renounce his allegiance, but merely declares that it is his intention so to do at some later day; and so long as his foreign allegiance continues he remains an alien. Lanz v. Randall, 4 Dill. 425, Fed. Cas. No. 8,080;

Maloy v. Duden, 25 Fed. 673; City of Minneapolis v. Reum, 6 C. C. A. 31, 56 Fed. 576.

The writ is dismissed.[27]

In re Timourian

United States. District Court, Southern District of New York. 1915.

225 *Federal Reporter* 570.

In the matter of the application of Onnik Setrak Timourian to become a citizen of the United States.

[The names of counsel are omitted.]

Augustus N. Hand, District Judge. The petitioner educated himself at Roberts College, Constantinople, for life in the United States, and since he came here in 1909 to enter into partnership with members of his family he has had his entire property and business interests in New York. I feel no doubt that the petitioner is an educated, prosperous man who has for years been legally domiciled in New York and is a most desirable applicant for American citizenship. The only question as to his legal qualifications is due to the fact that on March 12, 1913, he went to Persia on a business trip for his firm to buy rugs and carpets and remained away from the United States until August 13, 1914. He took with him a passport good only for six months, spent but a very short time at his old home in Turkey, maintained himself wholly upon New York funds, was engaged while abroad in no other business than buying for his New York house, and returned as soon as the time required for his trip, which owing to various delays was much longer than he had anticipated, would permit.

I think the interruption of this commercial trip is not, under all the circumstances, sufficient to prevent a finding of that continuous residence within the United States contemplated by the statute. I think the opinion of Judge Betts, In re Alien, Fed. Cas. No. 201a, that of Judge Ward in the recent case of In re Schneider (C. C.) 164 Fed. 335, and the language of Judge McPherson in U. S. v. Cantini, 212 Fed. 925, 129 C. C. A. 445, indicate that a man is not to be deprived of citizenship for lack of continuous residence for five years when he has established and kept a legal domicile in the United States for that time and been out of the country less than one-third of the period and then only by reason

[27] See also Maloy v. Duden, 25 Fed. 673; Berry v. Hull, 6 N. M. 643; Minneapolis v. Reum, 56 Fed. 576; Dorsey v. Brigham, 177 Ill. 250; Creagh v. Equitable Life Assurance Society, 88 Fed. 1; Wallenburg v. Mo. Pac. R. Co., 159 Fed. 217; In re Polsson, 159 Fed. 283; Gardina v. Board of Registrars, 160 Ala. 155; United States v. Uhl, 211 Fed. 628. And see Duquesne v. Brown, 1 Extraterr. Cas. 280. And *cf.* Act of 1907, c. 2534, §1, 34 U. S. Stat. L. 1228 (repealed by Act of 1920, c. 223, §5, 41 U. S. Stat. L. 739, 751).

of unforeseen business exigencies. His domicile during the period of five years is undoubted as well as his intention while on his business trip to return as soon as possible to New York as his permanent home.

I think his case is stronger than that of the sailor whose residence Judge Betts in the case above cited held continuous, within the meaning of the statute, and I shall grant the application accordingly.[28]

United States v. Mulvey

United States. Circuit Court of Appeals, Second Circuit. 1916.

232 *Federal Reporter* 513.

Appeal from the District Court of the United States for the Southern District of New York. . . .

[The case is stated in the opinion. The names of counsel and part of the opinion are omitted.]

Before Coxe and Rogers, Circuit Judges, and Hough, District Judge.

Rogers, Circuit Judge. This is a proceeding in which the government of the United States seeks to have the naturalization of the respondent set aside, canceled and declared null and void, and to have him restrained and enjoined from setting up or claiming any rights, privileges, benefits, or advantages whatsoever under his decree of naturalization. . . .

It appears that the respondent is a native of Ireland and first arrived in the United States from that country in April, 1908, when he reached the port of the city of New York. He remained continuously in New York from that time until July 18, 1912, when he departed from the country taking a ship for Ireland. His return to Ireland was occasioned by news he received of his mother's illness. His intention was to see his mother, who was a widow, and had written him of her illness, and asked that he return; and at the time he left the United States it was with the intention of returning to this country, and of marrying a woman to whom he was engaged, and who lived here. That at the time he left the United States he had the intention of returning is shown by the fact that he left his clothes and a trunk here with his sister, with whom he had lived. After he arrived in Ireland, his mother wanted him to remain with her for a time. This he consented to do, and it was not

[28] See In re an Alien, 1 Fed. Cas. 417; In re Schneider, 164 Fed. 335; United States v. Cantini, 199 Fed. 857; United States v. Rockteschell, 208 Fed. 530; In re Deans, 208 Fed. 1018; United States v. Deans, 230 Fed. 957; United States v. Shanahan, 232 Fed. 169; In re Reichenburg, 238 Fed. 859; United States v. Jorgenson, 241 Fed. 412; United States v. Dick, 291 Fed. 420; In re Neuberger, 6 F. (2d) 387, 13 F. (2d) 541; Petition of Schneider, 19 F. (2d) 404; Hantzopoulos v. United States, 20 F. (2d) 146; In re Kalpachnikoff, 28 F. (2d) 288.

until September 19, 1914, that he left Ireland, arriving in this country on September 27, 1914. When he first reached the United States, two brothers and three sisters were already living here, and they have since remained here. We have no doubt, upon the testimony in the record, that the respondent fully intended to return when he left this country, and that he never changed his intentions.

Having arrived the second time in the United States, as above stated, on September 27, 1914, he applied for his naturalization papers on December 28, 1914, and a final hearing was had on April 13, 1915. The facts in reference to his absence were known to the District Court, but that court was under the impression that he was entitled to naturalization and had not lost his residence by his visit to Ireland.

The question is whether an alien, who came to the United States five years prior to his naturalization, but has been absent from the United States during the five-year period for a period of two years and two months, and during the entire period of his absence has intended to return to this country, is entitled to have such absence disregarded upon his actual return to the United States, so that the time of his absence may be counted as a part of "the continued term of five years next preceding his admission" to citizenship during which he must have resided in the United States.

In other words, what did Congress mean when it enacted that no alien should be admitted to become a citizen "who has not for the continued term of five years next preceding his admission resided within the United States"? Must the alien be actually resident within the country for the entire period of five years, so that a temporary absence at any time during the period will deprive him of the advantage of the previous actual residence, and make it necessary to date the beginning of his "continued term of five years" from the date of his return, rather than from the date of his original arrival? It cannot be supposed that Congress intended that any such unreasonable construction should be placed upon the act. Where adherence to the strict letter of a statute would lead to injustice or to manifest absurdity, it cannot be supposed that the lawmaking body intended any such result. In such cases the duty devolves upon the court to search out the true meaning of the statute and to permit the spirit or reason of the law to prevail over its letter. A thing may be within the letter of a statute, and yet not within the statute, because not within its spirit, nor within the intention of its makers. See Holy Trinity Church v. United States, 143 U. S. 457, 459, 12 Sup. Ct. 511, 36 L. Ed. 226 (1892).

This court does not entertain the idea that Congress meant by this enactment that an alien must be actually and physically within the United States for every day of the five-year period. And if it is not necessary that the alien be actually present within the territory of the

United States for every moment of the five-year period, then the court is confronted with the question how much of the time may he be absent. This obviously raises a question of some difficulty. But the difficulty it presents must not lead the court into the absurdity of concluding that the continuous character of an alien's residence is fatally destroyed if, for any purpose and for any length of time, he temporarily goes beyond the country's borders. We think that each case of this kind must be decided according to its own circumstances. If an alien departs from the United States with no intention of returning, he may by that act lose his residence in this country, so that if, after a time, he again changes his mind and returns to this country, the continuous character of his previous residence has been fatally destroyed, and the five-year period of continuous residence will date from his return. If, however, he departs for a temporary purpose and with an intention of returning, which exists during the whole period of his absence, and at length does return, then the question of whether his absence has put an end to the continuous character of his residence is one which the court must determine according to the facts of the case.

In the case at bar the respondent was absent for nearly one-half of the prescribed period of five years. The purpose of requiring aliens applying for citizenship to reside continuously within the country for five years is not only to satisfy the government as to the good faith of the applicant and as to his good character, but it is also to afford the alien a sufficient opportunity to understand and familiarize himself with our institutions and mode of government. In the opinion of Congress five years is none too long a period for this purpose. That being the case, we have no doubt that an absence from the United States for a period of two years and two months from the time the alien arrived will preclude him from being entitled to naturalization five years from the date of his original arrival. Actual residence within the country for a little over half of the required time and a constructive residence for the balance of the time is not a compliance with the act of Congress.

The Naturalization Act of 1790 (Act March 26, 1790, c. 3, 1 Stat. 103), and that of 1795 (Act Jan. 29, 1795, c. 20, 1 Stat. 414), and that of 1802 (Act April 14, 1802, c. 28, 2 Stat. 153), did not require aliens applying for citizenship to maintain a "continuous" residence within the country for the prescribed period. But Act March 3, 1813, c. 42, §12, 2 Stat. 809, first provided that the alien must have resided in the United States "for the continued term of five years next preceding his admission," and added, "without being at any time during the said five years, out of the territory of the United States." The last-mentioned clause was repealed by Act June 26, 1848, c. 72, 9 Stat. 240. But since the act of 1813 the law has required residence for the continuous term of five years, or, as the act now reads, "for the continued term of five

years." The fact that in the earliest acts a "continuous" residence was not required, while in the latter acts and in the existing law it must be for a "continued term," is significant. It is also significant that, while retaining "the continuous term" of the act of 1813, there has been eliminated the clause "without being at any time during the said five years, out of the territory of the United States." And while a resident domicile in this country might not be interrupted by transient absences *animo revertendi*, we are satisfied that for the purposes of this act it is interrupted by an absence which extends over a period of two years and two months. To hold otherwise, it seems to us, is to destroy and make of little effect the obvious purpose of Congress in establishing the continued term of five years.

This case is somewhat similar in its facts to that of United States v. Cantini, 212 Fed. 925, 129 C. C. A. 445 (1914), decided in the Third Circuit. In that case, as in this, the government sought to cancel a certificate of naturalization. The defendant came from Italy to the United States and had been in this country for more than nine years, when he returned to Italy to visit his parents for three months. For various reasons his stay there was prolonged. The court below found as a fact that he had never abandoned, nor intended to abandon, his residence in this country. He remained away, however, for two years, returning on August 22, 1910. Naturalization was granted him in 1911. The government asked to have the certificate canceled on the ground that he had not resided in the United States for the continued term of five years next preceding his admission. The District Court denied the relief asked, on the ground that, as there had been no change in his domicile during the period of his absence, his right to naturalization was not lost. The Court of Appeals reversed the case, saying that the undisputed facts before it seemed to establish the fact that the man had not resided continuously within the United States for five years preceding his application. . . .

The decree dismissing the petition is reversed, with instructions to enter an order of cancellation, but without prejudice to the respondent's right to make a new application at the proper time.[29]

[The opinion of Hough, J., dissenting, upon the ground that the naturalization order should have been reviewed by appeal instead of by proceeding for cancellation, is omitted.]

[29] See United States v. Aakervik, 180 Fed. 137; United States v. Cantini, 212 Fed. 925; In re Brash, 235 Fed. 1003; United States v. Griminger, 236 Fed. 285; In re Cook, 239 Fed. 782; United States v. Bragg, 257 Fed. 588; In re Tataseo, 298 Fed. 346; United States v. Kummer, 300 Fed. 106; Petition of Penalosa, 19 F. (2d) 404; Petition of Oganesoff, 20 F. (2d) 978; Petition of Covelli, 21 F. (2d) 432; In re Barron, 26 F. (2d) 106. And see Act of March 2, 1929, §6 (H. R. 349, Public, No. 962).

In re Hopp

United States. District Court, Eastern District of Wisconsin. 1910.

179 *Federal Reporter* 561.

Petition by Albert Peter Hopp to be admitted to citizenship. . . .

[The names of counsel are omitted.]

Quarles, District Judge. This is a case arising under the naturalization statute. Act June 29, 1906, c. 3592, 34 Stat. 596 (U. S. Comp. St. Supp. 1909, p. 475). The applicant has complied with all the requirements of the law, and his proofs are satisfactory, unless his answers to certain questions propounded to him, which will be presently considered, are a bar to the application. The following facts were either established by the evidence or conceded upon the argument:

The applicant is a saloon keeper, whose place of business is in the city of Milwaukee, a city having approximately 350,000 inhabitants. It is estimated that 75 per cent. of the population are of foreign birth, and of this number a large proportion are of German extraction. There are, and for many years last past have been, more than 2,000 saloons doing business in Milwaukee. For more than 40 years the state statute, the "Sunday closing act," as it is called, has been upon the statute book. During all of that time no effort has been made, either by the municipal or state authorities, to enforce that statute within the city of Milwaukee. During all this time these saloons have been kept open on the Sabbath Day, without concealment or disguise. The old German adheres with tenacity to the habits and customs of the fatherland. He wishes to have the saloon kept open on Sunday, not for the purpose of revelry or debauch, but as a meeting place for friends and neighbors, and he looks upon it as his club, where he may associate in a friendly way with acquaintances, sip his beer, and smoke his pipe. He views it purely as a social matter. During all these years no drunkenness or disorder has resulted. Ardent temperance people, seeing that no evil results follow this practice in this community, have ceased all agitation on the subject. In short, the public sentiment of the city is in harmony with the view suggested by the applicant in his testimony. The applicant testified that as a matter of personal preference he would much prefer to close up his place on Sunday, but that when his 2,000 competitors kept open he was obliged to do likewise or lose his patronage; that, if any effort were to be made on behalf of the municipality or the public to enforce the Sunday closing law, he would gladly acquiesce and close his place.

Upon the hearing the learned district attorney was forced to admit that, in view of the state of public opinion in the city of Milwaukee, it would be impossible for the executive branch of the state government

to enforce the Sunday closing act in this community. Public sentiment is still the all-compelling power, as it was when the Roman maxim proclaimed that "the voice of the people is the voice of God." Any Legislature that establishes police regulations in defiance of public sentiment must suffer the humiliation of seeing their mandate disregarded. The question is whether, under all these circumstances, the court should find that the applicant has not behaved himself as a man of good moral character during the five years last past.

Let us now refer to the statute. This act requires that two witnesses shall depose that they each have personal knowledge that petitioner is a person of good moral character, and that he is in every way qualified in their opinion to be admitted as a citizen of the United States. By subdivision 4 of section 4 it is provided:

"It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the state or territory where such court is at the time held, one year at least, and that during that time he has behaved as a man of good moral character and attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same."

It will thus be perceived that Congress has drawn the distinction between moral character as an ultimate fact and good reputation based on behavior, which must be an inference. The court merely passes upon behavior, for no human tribunal can search the heart where character is presumed to reside. What is meant by good moral character, as the terms are used in this act? What standard does the statute contemplate? It is plain that it does not require the highest degree of moral excellence. A good moral character is one that measures up as good among the people of the community in which the party lives; that is, up to the standard of the average citizen. Ordinary care is the test of liability in every case of negligence. This standard is arrived at, not by the over-cautious or the reckless man, but by the average man, representing the great mass of men. So here, where the law says a good moral character, it means such a reputation as will pass muster with the average man. It need not rise above the level of the common mass of people.

Applying this test to the particular case, we find that the views and behavior of the applicant are in accord with the overwhelming majority of the people in this community. It is not contended that the applicant must be able to rise to such moral elevation that he may analyze, criticise, and reject the prevailing opinions and settled convictions of his fellowmen, and in the clear blue of righteousness choose for himself a course of action dictated by his quickened conscience. To meet such

a test a man must be a philosopher, while the statute is satisfied with a citizen whose behavior is up to the level of the average citizen. There is nothing in the mental attitude of the applicant, as disclosed by his examination, which would brand him as a deliberate lawbreaker. His willingness and desire to obey the law, if insisted upon by the constituted authority, distinguishes this case from the Illinois case which has been pressed upon our attention. In that case the front door of the saloon was closed, indicating a knowledge of the law and a pretended desire for its enforcement, while the open back door indicated stealth and a deliberate purpose to circumvent the law. This was coupled with a solemn determination on the part of the applicant to adhere to his lawless course at all hazards.

It must be remembered that the act of keeping open one's saloon on the Sabbath is unlawful, not in and of itself, but merely because it has been prohibited by an arbitrary act of the Legislature. Men of the highest moral character always have and always will differ as to the proper enforcement of sumptuary and police regulations. I cannot see that the applicant should be denied citizenship because he has fallen in with the general public sentiment of the community in which he lives. There is in the conduct and attitude of the applicant no moral turpitude, and nothing evincing a calloused conscience, and it would not, in my judgment, be a fair construction of the act of Congress to require the applicant to rise above his environment and show by his behavior that his moral character was above the level of the average citizen.

For these reasons, the objections will be overruled, and the applicant will be admitted to citizenship.[30]

Ex parte Elson

United States. District Court, Western District of Texas. 1924.

299 *Federal Reporter* 352.

Petition by Charles Elson for naturalization. . . .

Smith, District Judge. The petition of Charles Elson for naturalization is denied upon the sole ground that it has not been made to appear to the satisfaction of the court, as required by paragraph 4 of section 4 of the Naturalization Act (Comp. St. §4352), that during the five years immediately preceding the date of his application "he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." The testimony shows that petitioner is now, and was at the time of filing his petition, and prior thereto, engaged in the saloon business in Juarez, a city in the republic of Mexico just across

[30] *Contra:* United States v. Gerstein, 284 Ill. 174; 1 A. L. R. 318.

the Rio Grande from El Paso, Tex.; that the two cities are separated only by the river, and connected by bridges over which street railways, vehicles of all sorts, and foot passengers are constantly crossing, except during certain hours at night; and that the petitioner's saloon in Juarez, where intoxicating liquors are kept for sale, is patronized by residents of El Paso, as well as those of Juarez.

The Eighteenth Amendment to the Constitution of the United States prohibits the sale of intoxicating liquors within the United States, and the Congress has passed a law, the National Prohibition Act (Comp. St. Ann. Supp. 1923, §10138¼ *et seq.*), to carry the amendment into effect. Thus prohibition of the sale of intoxicating liquors is a principle of our Constitution and the policy of our laws; and I do not believe a person who sets up a place for selling intoxicating liquors just beyond our boundary line, to be patronized by our own people, and where he can escape the criminal provisions of our laws, can be said to behave as a man of good moral character, or that he is attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. While he does not violate our Constitution, nor our law, he actually by practice sets himself against a principle of the Constitution and the law, a well-settled policy of our government, and in such close proximity to our territory as to inflict upon the people within our own borders the evil which our Constitution and laws were designed to prevent. The petitioner testifies that he is in sympathy with the National Prohibition Act and favored its enforcement; but his professions do not square with his conduct.

Petition is denied.[31]

[31] Naturalization has been denied, or, if previously granted, the certificate has been cancelled, on the ground that the candidate has not behaved "as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same," in the following cases: In re Spenser, 5 Sawy. 195 (convicted of perjury, but pardoned more than five years before filing petition); Ex parte Sauer, 81 Fed. 355 n. (socialist); In re Di Clerico, 158 Fed. 905 (used naturalization papers fraudulently procured); In re Ross, 188 Fed. 685 (convicted of second degree murder, but discharged more than five years before filing petition); In re Trum, 199 Fed. 361 (violated liquor laws); In re Centi, 211 Fed. 559 (violated election laws); United States v. Leles, 236 Fed. 784 (conducted resort of bad repute); In re Addis, 252 Fed. 886 (convicted of conspiring to hire others to enlist in service of foreign state); United States v. Swelgin, 254 Fed. 884 (I. W. W.); United States v. Stuppiello, 260 Fed. 483 (anarchist); In re Sigelman, 268 Fed. 217 (citizenship desired chiefly to protect petitioner in returning to Russia for abandoned family); In re Silberschutz, 269 Fed. 398 (claimed draft exemption as alien enemy after filing declaration); In re Tomarchio, 269 Fed. 400 (claimed draft exemption as alien after filing declaration); In re Rubin, 272 Fed. 697 (claimed draft exemption as alien after filing declaration); United States v. Olsen, 272 Fed. 706 (I. W. W.); United States v. Kichin, 276 Fed. 818 (bigamist); In re Shanin, 278 Fed. 739 (claimed draft exemption as alien before filing declaration); In re Bonner, 279 Fed. 789 (violated Volstead Act); In re Linder, 292 Fed. 1001 (claimed draft exemption as alien enemy before filing

UNITED STATES, REVISED STATUTES

Second Edition, section 2169. 1878.

Sec. 2169. The provisions of this Title [Title XXX, Naturalization] shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent.[32]

UNITED STATES v. BHAGAT SINGH THIND

United States. Supreme Court. 1923.

261 *United States Reports* 204.

Questions certified by the Circuit Court of Appeals, arising upon an appeal to that court from a decree of the District Court dismissing, on motion, a bill brought by the United States to cancel a certificate of naturalization.

[The case is stated in the opinion. The arguments of counsel are omitted.]

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This cause is here upon a certificate from the Circuit Court of Appeals, requesting the instruction of this Court in respect of the following questions:

"1. Is a high caste Hindu of full Indian blood, born at Amrit Sar, Punjab, India, a white person within the meaning of section 2169, Revised Statutes?

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declaration); In re Nagy and Others (three cases), 3 F. (2d) 77, 78, 79 (violated Volstead Act); In re Olson, 4 F. (2d) 417 (I. W. W.); United States v. Wexler, 8 F. (2d) 880 (divorced for adultery); In re Caroni, 13 F. (2d) 954 (convicted of manslaughter, but paroled more than ten years before filing petition); Petition of Oganesoff, 20 F. (2d) 978 (offered bribe to judge's secretary while petition was pending); In re Spiegel, 24 F. (2d) 605 (obtained in United States rabbinical decree of divorce, valid in Poland, from wife living in Poland, and later remarried in United States); United States v. Unger, 26 F. (2d) 114 (divorced for adultery).

Naturalization has been granted to candidates who claimed draft exemption in the following cases: In re Miegel, 272 Fed. 688 (claimed exemption as alien enemy after filing declaration); In re Levy, 278 Fed. 621 (claimed exemption as alien before filing declaration); In re Siem, 284 Fed. 868, 299 Fed. 582 (claimed exemption as alien after filing declaration); In re Naturalization of Aliens, 1 F. (2d) 594 (claimed exemption either as alien enemy before filing declaration, as alien enemy after filing declaration, as alien before filing declaration, or as alien after filing declaration). See 21 Am. Jour. Int. L. 40, 47 n. 39.

[32] See Act of 1790, c. 3, §1, 1 U. S. Stat. L. 103; Act of 1795, c. 20, §1, 1 *ibid.* 414; Act of 1802, c. 28 §1, 2 *ibid.* 153; Act of 1870, c. 254, §7, 16 *ibid.* 254, 256; U. S. Rev. Stat., 1875, §2169; Act of 1875, c. 80, §1, 18 U. S. Stat. L. 316, 318; United States v. Wong Kim Ark, 169 U. S. 649, 701, *supra*, 190; 199.

"2. Does the act of February 5, 1917, (39 Stat. L. 875, section 3) disqualify from naturalization as citizens those Hindus, now barred by that act, who had lawfully entered the United States prior to the passage of said act?"

The appellee was granted a certificate of citizenship by the District Court of the United States for the District of Oregon, over the objection of the naturalization examiner for the United States. A bill in equity was then filed by the United States, seeking a cancellation of the certificate on the ground that the appellee was not a white person and therefore not lawfully entitled to naturalization. The District Court, on motion, dismissed the bill (268 Fed. 683) and an appeal was taken to the Circuit Court of Appeals. No question is made in respect of the individual qualifications of the appellee. The sole question is whether he falls within the class designated by Congress as eligible.

Section 2169, Revised Statutes, provides that the provisions of the Naturalization Act "shall apply to aliens, being free white persons, and to aliens of African nativity and to persons of African descent."

If the applicant is a white person within the meaning of this section he is entitled to naturalization; otherwise not. In Ozawa v. United States, 260 U. S. 178, we had occasion to consider the application of these words to the case of a cultivated Japanese and were constrained to hold that he was not within their meaning. As there pointed out, the provision is not that any particular class of persons shall be excluded, but it is, in effect, that only white persons shall be included within the privilege of the statute. "The intention was to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified. It is not enough to say that the framers did not have in mind the brown or yellow races of Asia. It is necessary to go farther and be able to say that had these particular races been suggested the language of the act would have been so varied as to include them within its privileges," (p. 195) citing Dartmouth College v. Woodward, 4 Wheat. 518, 644. Following a long line of decisions of the lower federal courts, we held that the words imported a racial and not an individual test and were meant to indicate only persons of what is popularly known as the Caucasian race. But, as there pointed out, the conclusion that the phrase "white persons" and the word "Caucasian" are synonymous does not end the matter. It enabled us to dispose of the problem as it was there presented, since the applicant for citizenship clearly fell outside the zone of debatable ground on the negative side; but the decision still left the question to be dealt with, in doubtful and different cases, by the "process of judicial inclusion and exclusion." Mere ability on the part of an applicant for naturalization to establish a line of descent from a Caucasian ancestor will not *ipso facto* and necessarily conclude the inquiry. "Caucasian"

is a conventional word of much flexibility, as a study of the literature dealing with racial questions will disclose, and while it and the words "white persons" are treated as synonymous for the purposes of that case, they are not of identical meaning—*idem per idem.*

In the endeavor to ascertain the meaning of the statute we must not fail to keep in mind that it does not employ the word "Caucasian" but the words "white persons," and these are words of common speech and not of scientific origin. The word "Caucasian" not only was not employed in the law but was probably wholly unfamiliar to the original framers of the statute in 1790. When we employ it we do so as an aid to the ascertainment of the legislative intent and not as an invariable substitute for the statutory words. Indeed, as used in the science of ethnology, the connotation of the word is by no means clear and the use of it in its scientific sense as an equivalent for the words of the statute, other considerations aside, would simply mean the substitution of one perplexity for another. But in this country, during the last half century especially, the word by common usage has acquired a popular meaning, not clearly defined to be sure, but sufficiently so to enable us to say that its popular as distinguished from its scientific application is of appreciably narrower scope. It is in the popular sense of the word, therefore, that we employ it as an aid to the construction of the statute, for it would be obviously illogical to convert words of common speech used in a statute into words of scientific terminology when neither the latter nor the science for whose purposes they were coined was within the contemplation of the framers of the statute or of the people for whom it was framed. The words of the statute are to be interpreted in accordance with the understanding of the common man from whose vocabulary they were taken. See Maillard v. Lawrence, 16 How. 251, 261.

They imply, as we have said, a racial test; but the term "race" is one which, for the practical purposes of the statute, must be applied to a group of living persons now possessing in common the requisite characteristics, not to groups of persons who are supposed to be or really are descended from some remote, common ancestor, but who, whether they both resemble him to a greater or less extent, have, at any rate, ceased altogether to resemble one another. It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today; and it is not impossible, if that common ancestor could be materialized in the flesh, we should discover that he was himself sufficiently differentiated from both of his descendants to preclude his racial classification with either. The question for determination is not, therefore, whether by the speculative processes of ethnological reasoning we may present a probability to the scientific mind that they have the same origin, but

whether we can satisfy the common understanding that they are now the same or sufficiently the same to justify the interpreters of a statute—written in the words of common speech, for common understanding, by unscientific men—in classifying them together in the statutory category as white persons. In 1790 the Adamite theory of creation—which gave a common ancestor to all mankind—was generally accepted, and it is not at all probable that it was intended by the legislators of that day to submit the question of the application of the words "white persons" to the mere test of an indefinitely remote common ancestry, without regard to the extent of the subsequent divergence of the various branches from such common ancestry or from one another.

The eligibility of this applicant for citizenship is based on the sole fact that he is of high caste Hindu stock, born in Punjab, one of the extreme northwestern districts of India, and classified by certain scientific authorities as of the Caucasian or Aryan race. The Aryan theory as a racial basis seems to be discredited by most, if not all, modern writers on the subject of ethnology. A review of their contentions would serve no useful purpose. It is enough to refer to the works of Deniker (Races of Man, 317), Keane (Man: Past and Present, 445–6), Huxley (Man's Place in Nature, 278) and to the Dictionary of Races, Senate Document No. 662, 61st Cong., 3d sess., 1910–1911, p. 17.

The term "Aryan" has to do with linguistic and not at all with physical characteristics, and it would seem reasonably clear that mere resemblance in language, indicating a common linguistic root buried in remotely ancient soil, is altogether inadequate to prove common racial origin. There is, and can be, no assurance that the so-called Aryan language was not spoken by a variety of races living in proximity to one another. Our own history has witnessed the adoption of the English tongue by millions of Negroes, whose descendants can never be classified racially with the descendants of white persons notwithstanding both may speak a common root language.

The word "Caucasian" is in scarcely better repute. It is at best a conventional term, with an altogether fortuitous origin, which, under scientific manipulation, has come to include far more than the unscientific mind suspects. According to Keane, for example, (The World's Peoples, 24, 28, 307, *et seq.*) it includes not only the Hindu but some of the Polynesians, (that is the Maori, Tahitians, Samoans, Hawaiians and others), the Hamites of Africa, upon the ground of the Caucasic cast of their features, though in color they range from brown to black. We venture to think that the average well informed white American would learn with some degree of astonishment that the race to which he belongs is made up of such heterogeneous elements.

The various authorities are in irreconcilable disagreement as to what constitutes a proper racial division. For instance, Blumenbach has five

races; Keane following Linnaeus, four; Deniker, twenty-nine. The explanation probably is that "the innumerable varieties of mankind run into one another by insensible degrees," and to arrange them in sharply bounded divisions is an undertaking of such uncertainty that common agreement is practically impossible.

It may be, therefore, that a given group cannot be properly assigned to any of the enumerated grand racial divisions. The type may have been so changed by intermixture of blood as to justify an intermediate classification. Something very like this has actually taken place in India. Thus, in Hindustan and Berar there was such an intermixture of the "Aryan" invader with the dark-skinned Dravidian.

In the Punjab and Rajputana, while the invaders seem to have met with more success in the effort to preserve their racial purity, intermarriages did occur producing an intermingling of the two and destroying to a greater or less degree the purity of the "Aryan" blood. The rules of caste, while calculated to prevent this intermixture, seem not to have been entirely successful.

It does not seem necessary to pursue the matter of scientific classification further. We are unable to agree with the District Court, or with other lower federal courts, in the conclusion that a native Hindu is eligible for naturalization under §2169. The words of familiar speech, which were used by the original framers of the law, were intended to include only the type of man whom they knew as white. The immigration of that day was almost exclusively from the British Isles and Northwestern Europe, whence they and their forbears had come. When they extended the privilege of American citizenship to "any alien, being a free white person," it was these immigrants—bone of their bone and flesh of their flesh—and their kind whom they must have had affirmatively in mind. The succeeding years brought immigrants from Eastern, Southern and Middle Europe, among them the Slavs and the dark-eyed, swarthy people of Alpine and Mediterranean stock, and these were received as unquestionably akin to those already here and readily amalgamated with them. It was the descendants of these, and other immigrants of like origin, who constituted the white population of the country when §2169, reënacting the naturalization test of 1790, was adopted; and there is no reason to doubt, with like intent and meaning.

What, if any, people of primarily Asiatic stock come within the words of the section we do not deem it necessary now to decide. There is much in the origin and historic development of the statute to suggest that no Asiatic whatever was included. The debates in Congress, during the consideration of the subject in 1870 and 1875, are persuasively of this character. In 1873, for example, the words "free white persons" were unintentionally omitted from the compilation of the Revised

Statutes. This omission was supplied in 1875 by the act to correct errors and supply omissions. C. 80, 18 Stat. 318. When this act was under consideration by Congress efforts were made to strike out the words quoted, and it was insisted upon the one hand and conceded upon the other, that the effect of their retention was to exclude Asiatics generally from citizenship. While what was said upon that occasion, to be sure, furnishes no basis for judicial construction of the statute, it is, nevertheless, an important historic incident, which may not be altogether ignored in the search for the true meaning of words which are themselves historic. That question, however, may well be left for final determination until the details have been more completely disclosed by the consideration of particular cases, as they from time to time arise. The words of the statute, it must be conceded, do not readily yield to exact interpretation, and it is probably better to leave them as they are than to risk undue extension or undue limitation of their meaning by any general paraphrase at this time.

What we now hold is that the words "free white persons" are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word "Caucasian" only as that word is popularly understood. As so understood and used, whatever may be the speculations of the ethnologist, it does not include the body of people to whom the appellee belongs. It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as white. The children of English, French, German, Italian, Scandinavian, and other European parentage, quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin. On the other hand, it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry. It is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely racial difference, and it is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation.

It is not without significance in this connection that Congress, by the Act of February 5, 1917, c. 29, §3, 39 Stat. 874, has now excluded from admission into this country all natives of Asia within designated limits of latitude and longitude, including the whole of India. This not only constitutes conclusive evidence of the congressional attitude of opposition to Asiatic immigration generally, but is persuasive of a similar attitude toward Asiatic naturalization as well, since it is not likely that Congress would be willing to accept as citizens a class of persons whom it rejects as immigrants.

It follows that a negative answer must be given to the first question, which disposes of the case and renders an answer to the second question unnecessary, and it will be so certified.

Answer to question No. 1, No.[33]

United States, An Act Relative to the Naturalization and Citizenship of Married Women

1922.

42 *United States Statutes at Large* 1021.

Be it enacted . . . That the right of any woman to become a naturalized citizen of the United States shall not be denied or abridged because of her sex or because she is a married woman.

Sec. 2. That any woman who marries a citizen of the United States after the passage of this Act, or any woman whose husband is naturalized after the passage of this Act, shall not become a citizen of the United

[33] See also Ozawa v. United States, 260 U. S. 178.

Naturalization has been granted by the lower federal courts in the following cases: In re Rodriguez, 81 Fed. 337 (Mexican); In re Najour, 174 Fed. 735 (Syrian); In re Halladjian, 174 Fed. 834 (Armenian); In re Mudarri, 176 Fed. 465 (Syrian); In re Ellis, 179 Fed. 1002 (Syrian); United States v. Balsara, 180 Fed. 694 (Parsee); In re Akhay Kumar Mozumdar, 207 Fed. 115 (Hindu); Dow v. United States, 226 Fed. 145 (Syrian); In re Mohan Singh, 257 Fed. 209 (Hindu); In re Thind, 268 Fed. 683 (Hindu); United States v. Cartozian, 6 F. (2d) 919 (Armenian).

Naturalization has been denied by lower federal or state courts, on the ground that the petitioner was not a free white person or a person of African nativity or African descent, in the following cases: In re Ah Yup, 5 Sawy. 155 (Chinese); In re Camille, 6 Fed. 256 (one-half Indian); In re Kanaka Nian, 6 Utah 259 (native Hawaiian); In re Saito, 62 Fed. 126 (Japanese); In re Po, 28 N. Y. Supp. 383 (Burmese); In re Gee Hop, 71 Fed. 274 (Chinese); In re Burton, 1 Alaska 111 (Indian); In re Buntaro Kumagai, 163 Fed. 922 (Japanese); In re Knight, 171 Fed. 299 (one-quarter Chinese and one-quarter Japanese); In re Young, 198 Fed. 715 (one-half Japanese); In re Lampitoe, 232 Fed. 382 (three-quarters native Filipino); Petition of Charr, 273 Fed. 207 (Korean); Petition of Dong Chong, 287 Fed. 546 (Chinese); In re Fisher, 21 F. (2d) 1007 (three-quarters Chinese); In re Feroz Din, 27 F. (2d) 568 (Afghan).

On the question whether natives of the Philippine Islands are entitled to naturalization, notwithstanding U. S. Rev. Stat., §2169, *supra*, 248, by virtue of the Act of 1906, c. 3592, §30, 34 U. S. Stat. L. 596, 606, providing "That all the applicable provisions of the naturalization laws . . . shall apply to and be held to authorize the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States, and who may become residents of any State or organized Territory of the United States," see In re Alverto, 198 Fed. 688; In re Lampitoe, 232 Fed. 382; In re Mallari, 239 Fed. 416; In re Rallos, 241 Fed. 686; In re Bautista, 245 Fed. 765; Toyota v. United States, 268 U. S. 402; 27 Op. Atty. Gen. 12. See Act of 1918, c. 69, 40 U. S. Stat. L. 542.

See McGovney, "Race Discrimination in Naturalization," 8 Ia. L. Bulletin 129, 211.

States by reason of such marriage or naturalization; but, if eligible to citizenship,[34] she may be naturalized upon full and complete compliance with all requirements of the naturalization laws,[35] with the following exceptions:

(a) No declaration of intention shall be required;

(b) In lieu of the five-year period of residence within the United States and the one-year period of residence within the State or Territory where the naturalization court is held, she shall have resided continuously in the United States, Hawaii, Alaska, or Porto Rico for at least one year immediately preceding the filing of the petition.[36]

Sec. 3. That a woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage after the passage of this Act, unless she makes a formal renunciation of her citizenship before a court having jurisdiction over naturalization of aliens: Provided, That any woman citizen who marries an alien ineligible to citizenship shall cease to be a citizen of the United States.[37] If at the termination of the marital status she is a citizen of the United States she shall retain her citizenship regardless of her residence. If during the continuance of the marital status she resides continuously for two years in a foreign State of which her husband is a citizen or subject, or for five years continuously outside the United States, she shall thereafter be subject to the same presumption as is a naturalized citizen of the United States under the second paragraph of section 2 of the Act entitled "An Act in reference to the expatriation of citizens and their protection abroad," approved March 2, 1907. Nothing herein shall be construed to repeal or amend the provisions of Revised Statutes 1999 or of section 2 of the Expatriation Act of 1907 with reference to expatriation.

Sec. 4. That a woman who, before the passage of this Act, has lost her United States citizenship by reason of her marriage to an alien eligible for citizenship, may be naturalized as provided by section 2 of this Act: Provided, That no certificate of arrival shall be required to be filed with her petition if during the continuance of the marital status she shall have resided within the United States. After her naturalization she shall have the same citizenship status as if her marriage had taken place after the passage of this Act.

Sec. 5. That no woman whose husband is not eligible to citizenship shall be naturalized during the continuance of the marital status.

Sec. 6. That section 1994 of the Revised Statutes and section 4 of the Expatriation Act of 1907 are repealed. Such repeal shall not terminate citizenship acquired or retained under either of such sections

[34] See Chang Chan v. Nagle, 268 U. S. 346.

[35] See Dorto v. Clark, 300 Fed. 568. *Cf.* Gomez v. Nagle, 6 F. (2d) 520.

[36] See In re Attyah, 12 F. (2d) 323.

[37] See Ex parte Hing, 22 F. (2d) 554.

nor restore citizenship lost under section 4 of the Expatriation Act of 1907.

Sec. 7. That section 3 of the Expatriation Act of 1907 is repealed. Such repeal shall not restore citizenship lost under such section nor terminate citizenship resumed under such section.[38] A woman who has resumed under such section citizenship lost by marriage shall, upon the passage of this Act, have for all purposes the same citizenship status as immediately preceding her marriage.[39]

United States, An Act in Reference to the Expatriation of Citizens and Their Protection Abroad

Section 5. 1907.

34 *United States Statutes at Large* 1228, 1229.

Sec. 5. That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent:[40] Provided, That such naturalization or resumption takes place during the minority of such child:[41] And provided further, That the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States.[42]

[38] See Ex parte Fung Sing, 6 F. (2d) 670.

[39] See Act of 1855, c. 71, §2, 10 U. S. Stat. L. 604; U. S. Rev. Stat., §1994; Act of 1907, c. 2534, §§3, 4, 34 U. S. Stat. L. 1228, 1229; 20 Am. Soc. Int. L. Proc. 67, 84.

Cf. France, Law of Nationality, 1927, art. 8, 27 Duvergier N. S. 451, 454; Germany, Imperial and State Citizenship Law, 1913, §§6, 17, 8 Am. Jour. Int. L. Suppl. 217, 218, 221; Great Britain, Nationality and Status of Aliens Act, 1914, §§10, 11, 4 & 5 Geo. V. c. 17; Italy, Law of Nationality, 1912, arts. 10, 11, 106 Br. & For. S. P. 1071, 1073. And see Calbairac, La Nationalité de la Femme Mariée; Wold, "Compilation of Nationality Laws as Affected by Marriage," Hearings Before Committee on Immigration and Naturalization, House of Representatives, 70th Congress, 1st Session (1928).

[40] See In re Lazarus, 24 F. (2d) 243; In re Citizenship Status of Minor Children, 25 F. (2d) 210; In re Bishop, 26 F. (2d) 148.

[41] See In re Tate, 1 F (2d) 457.

[42] See Act of 1790, c. 3, §1, 1 U. S. Stat. L. 103; Act of 1795, c. 20, §3, 1 *ibid.* 414, 415; Act of 1802, c. 28, §4, 2 *ibid.* 153, 155; U. S. Rev. Stat., §2172.

See United States v. Williams, 132 Fed. 894; Zartarian v. Billings, 204 U. S. 170; United States v. Rodgers, 185 Fed. 334; United States v. Tod, 297 Fed. 385; Kaplan v. Tod, 267 U. S. 228.

Cf. France, Law of Nationality, 1927, art. 7, 27 Duvergier N. S. 451, 453; Great Britain, Nationality and Status of Aliens Act, 1914, §§5, 12, 4 & 5 Geo. V. c. 17; Italy, Law of Nationality, 1912, art. 12, 106 Br. & For. S. P. 1071, 1074.

An Advisory Opinion of the Supreme Judicial Court of Maine[43] on a Question of Collective Naturalization

United States. Supreme Judicial Court of Maine. 1878.

68 *Maine Reports* 589.

[Part of the opinion is omitted.]

On a question proposed by the senate, February 16, 1878.

Ordered. That the justices of the supreme judicial court be requested to give their opinion on the following question; and in case it is found impracticable to give such opinion before the adjournment of the present legislature, to report the same to the governor, to be by him promulgated:

"Question. Does the treaty concluded at Washington, August 9th, 1842, for the purpose of determining the boundaries between the territories of the United States and the possessions of Her Britannic Majesty, in North America, confer the elective franchise on foreign born persons residing on the disputed territory in the north-eastern portion of this state, at the time of the treaty, and not otherwise naturalized?"

To the question proposed, we have the honor to answer as follows:

The preamble to the treaty of Washington recites that "certain portions of the line of boundary between the United States of America and the British dominions in North America, described in the second article of the treaty of peace of 1783, have not yet been ascertained and determined, notwithstanding the repeated attempts, which have been heretofore made for that purpose; and whereas it is now thought to be for the interest of both parties, that avoiding further discussions of their respective rights in this respect, under said treaty, they should agree on a conventional line in said portions of the said boundary, such as may be convenient to both parties, with such equivalents and compensations as are just and reasonable."

It is obvious that there was no definite and ascertained boundary on that part of the line which divided the territory of the United States from the province of New Brunswick; for the first article of the treaty defines and establishes the boundary by a conventional line. The boundary as described in the treaty of 1783 gives place to a new and conventional line for agreeing to which there are to be such equivalents and compensations "as are deemed just and reasonable." The preamble to the treaty concedes that no line had been "ascertained and determined." It ignores the line of 1783 and establishes a new one. The line thus agreed upon is the line established by the treaty. It is the line and the only line recognized by both nations. Whatever portion of the disputed territory which had been under the jurisdiction of one government and became by the conventional line the acknowledged

[43] See Constitution of Maine, Art. VI, §3, Me. Rev. Stat., 1916, p. 29.

territory of the other, is territory acquired by the treaty, the right to which was thereby first and conclusively determined. . . .

The territory in question being acquired by treaty, the government transferring it ceases to have any jurisdiction over it. It no longer owes protection to those residing upon it, and they no longer owe it allegiance. The inhabitants residing upon the territory transferred have the right of election. They may remove from the territory ceded if they prefer the government ceding the territory. If they elect to remain, their allegiance is at once due to the government to which the cession has been made, and they are entitled to the corresponding right of protection from such government. From being subjects of the queen of Great Britain they become citizens of the United States. The inhabitants of territory ceded from one government to another are collectively naturalized, and have all the rights of natural born subjects by mere force of the cession of the soil without the necessity of anything being expressed to that effect. Westlake Private International Law, 28. Thus, all persons who were citizens of Texas at the date of annexation became citizens of the United States by virtue of the collective naturalization effected by the joint resolution of Congress of March 1, 1845, though no allusion to citizenship is found therein. These views, whenever the questions discussed have been involved, have been uniformly sustained. 13 Opinions of Attorneys General, 397.

By "foreign born persons," we understand are meant the inhabitants residing upon the disputed territory, subjects of the queen of Great Britain and owing allegiance to her, who by the treaty are now within the jurisdiction of the United States and subject to the government of Maine. Persons born within the actual territory of the state can hardly be regarded as "foreign born," and, if born within the territory of Maine under the temporary jurisdiction of a foreign government, their rights as American citizens would not be affected by such temporary jurisdiction, but upon its termination would be revived in full force.

We answer, therefore, that the treaty concluded at Washington, August 9, 1842, confers the elective franchise on the subjects of the queen of Great Britain residing on the disputed territory in the northeastern portion of the state, at the time of the treaty and not otherwise naturalized.[44]

Tobin v. Walkinshaw and Others

United States. Circuit Court, Districts of California. 1856.

McAllister's Reports 186.

This action was ejectment, and defendants pleaded to the jurisdiction of the court, on the ground that Alexander Forbes, one of the defendants,

[44] *Cf.* Contzen v. United States, 179 U. S. 191. See In re Pfleiger, 254 Fed. 511.

was not an alien and subject of Great Britain, as alleged in the complaint. Issue was taken by replication, and submitted to the jury, who returned a verdict in which they found that James Alexander Forbes, one of the defendants in this case, was, at the time of the institution of this suit, an alien and subject of Great Britain. A motion is now made to set aside the verdict of the jury. . . .

[Part of the statement of the case and part of the opinion are omitted.]

McAllister, J.—To sustain their plea, defendants relied on the admitted facts, that said Forbes, a native of Great Britain, was at the date of the treaty of Quadalupe Hidalgo a naturalized citizen of Mexico, that he has continued to reside in California since the execution of the treaty, and that he has never made any declaration of an intention to retain the rights of a Mexican citizen. These facts, it was contended, with the subsequent admission of California into the Union, fixed at once and by mere operation of law, the status of American citizenship upon the defendant Forbes. To disaffirm the plea, and sustain the allegation that defendant was an alien, plaintiff proved that in 1851 the defendant, against whom two actions at law had been instituted in the courts of this State, petitioned for their removal, and had them removed, from the state courts into the District Court of the United States for the Northern District of the State of California (then exercising circuit-court powers), on the ground, that he was, at the time, an alien, and subject of the kingdom of Great Britain. That to accomplish that object, he executed bonds reciting that fact, and his attorney, under his instructions, swore to the fact. It was also in proof, that in the same year (1851), a suit was brought on the equity side of said District Court; and to the bill filed the answer of defendant admitted that he was at that time an alien, and subject of Great Britain. Lastly, it was deposed by a witness whose testimony was not attempted to be impeached, that the defendant, in 1851, told him he was not a citizen of the United States, that he did not intend to become one at present, because he desired to be able to litigate in the courts of the United States. . . .

The argument of counsel is, that the provisions of the treaty of "Guadalupe Hidalgo," with the residence of defendant in California, being a naturalized citizen of Mexico, for a year after the date of that instrument, the fact that no evidence was produced to prove defendant ever made a declaration of his intention to retain the rights of a Mexican citizen, together with the admission of California into the Union, all fixed, once and forever, upon the defendant the status of an American citizen, which cannot be altered by the testimony. The consideration of this argument involves, to some extent, a construction of the article of the treaty of Guadalupe Hidalgo, upon which it is predicated. This article stipulates as to those Mexicans who should prefer to remain in the ceded territory, that they may either retain the title and rights of

Mexican citizens, or acquire those of American citizens; but declares that they shall be under the obligation to make their election, within one year from the date of the exchange of the ratification of the treaty, and those who shall remain after the expiration of that year, without having declared their intention to retain the character of Mexican citizens, shall be considered to have elected to become citizens of the United States.[45] We will first consider this article as giving a right of election. If he elected to retain the character of a Mexican, he was to manifest it by a declaration, whether in writing, verbally, or by matter of record, is not stated. The treaty is more indefinite as to the manner in which he is to manifest a contrary intention. In fact, it prescribes no way in which he is to manifest his intent not to become a citizen of the United States. The omission to make a declaration to continue a Mexican, and his residence for a year after the date of the treaty, would be *prima-facie* evidence of his election to become a citizen of the United States. There is also one rule of evidence prescribed by the treaty as to his intention, the fact of his remaining in the country without having made any declaration of his intention. This cannot be deemed conclusive testimony, for election presupposes intention; it is an operation of the will. If the legal conclusion be absolutely fixed upon him in despite of the intent or the purpose of his residence, what becomes of the right of election? . . .

[In an omitted part of the opinion the court considered the admissibility of testimony tending to show an election.]

[45] Art. 8 of the Treaty between Mexico and the United States, Guadalupe Hidalgo, Feb. 2, 1848, provided in part as follows:

"Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever.

"Those who shall prefer to remain in the said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States." (9 U. S. Stat. L. 922, 929.)

Art. 9 provided as follows: "Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution; and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction." (9 *ibid.* 922, 930.)

But the court does not consider that the right of election was given to the defendant by the Treaty of Guadalupe Hidalgo; and therefore the discussion as to the admissibility of testimony might have been dispensed with. The intention of the 9th article of that instrument was to fix the status of all Mexicans who should prefer to remain in the ceded territory. By a principle of international law, on a transfer of territory by one nation to another, the relations of the inhabitants towards each other undergo no change; but their relations with their former sovereign are dissolved and new ones between them and the government which has acquired their territory are created. The same act which transferred their territory, transfers the allegiance of those who remain in it, and the law which may be denominated political is changed. American Insurance Co. v. Canter (1 Peters, 542). This right to change the political relations of the inhabitants of a ceded territory arises out of the character of those relations as recognized by the law of nature and nations. Birth binds man by the tie of natural allegiance to his native soil, and such allegiance gives, by the principles of universal law, to the country in which he was born rights unknown to mere voluntary or statutory allegiance. Upon the right to transfer this natural allegiance has been engrafted, this right of election in the party whether he will retain his allegiance to his old sovereign, or pay allegiance to the new. Should he elect to retain his allegiance, he must do so without injury to the new government; and such election is generally accompanied by removal from the country, unless regulated by treaty. The object of the treaty of "Guadalupe Hidalgo" was to regulate the exercise of this right of election by such parties as by the principles of international law were subject to their jurisdiction as contracting parties. The Mexican government stipulated for a right for Mexicans resident in the territory, to elect at any time within a year after the date of the treaty to retain their title and rights as Mexicans; the government of the United States guarded against the abuse of the right, by limiting the time within which it was to be executed, and stipulating that if the election was not made within the time limited, they should be considered as having elected to become citizens of the United States. The right of the two governments thus to stipulate in relation to native-born Mexicans, under the law of nations, is unquestionable. It was evidently proper that the status of all such should be fixed. If they were neither to continue Mexican citizens nor become citizens of the United States, a whole people would become disfranchised. They would have no status as citizens, owe no allegiance, and be left in the anomalous position of a people without a country. Not so with the defendant Forbes. So soon as he had been released from the voluntary allegiance to Mexico, he was remitted to his original status. No power existed in one government to transfer, or in the other to receive, the voluntary or statutory allegiance

of a naturalized citizen. Neither had the right to say to such, "You shall continue your allegiance to Mexico, although she has conveyed it away; or you shall become a citizen of the United States." The allegiance of the naturalized citizen is the offspring of municipal law. Unlike natural allegiance, its support does not rest upon the law of nature and the code of nations. The only relations that Mexico or the United States could change, were those arising from those sources. Nor does the language of the treaty authorize the conclusion that the contracting parties intended to include within the word "Mexicans" naturalized citizens of foreign countries. The language of the treaty of Guadalupe Hidalgo, differs materially from that used in the treaty by which Florida was acquired in 1819, and the treaty of Paris, in 1803, by which Louisiana was ceded to the United States. In the 8th article of the treaty of Guadalupe Hidalgo, Mexicans are only mentioned as entitled to the rights of election. The whole of this article refers to Mexicans; and the 9th article speaks of "Mexicans" only, and provides, that those who do not preserve the character of Mexican citizens shall be subsequently incorporated into, and become entitled to all the rights of citizens of the United States. Naturalized citizens are nowhere included *eo nomine*, within the provisions of the treaty; and in the opinion of the court, it was not intended to include them. This construction of the treaty is sought to be defeated by the assumption, that the change in the political relations of the inhabitants of the ceded territory was contemplated to be made by the treaty with their consent, by giving to them the right of election; hence, that it is to be reasonably concluded that naturalized citizens were intended to be included in the term "Mexicans." The answer is, first, it is a violence to the language of the treaty so to construe it; secondly, the allegiance of the naturalized citizen was not a subject of transfer between the contracting parties; and thirdly, the argument surrenders the whole question; because if the defendant was included in the treaty, his consent was essential to entitle him to exercise the right of election. This is the very question found by the jury on the trial of the issue of election or no election, upon evidence the court considers competent on the trial of such an issue. In a word, if the defendant Forbes, a naturalized citizen of Mexico, is to be brought within the provisions of the treaty because he consented to them, then his consent, involving intention and election, is an issuable fact which has been found against defendants by the jury. But in the opinion of the court, the election was given only to Mexicans who remained in the ceded territory longer than one year after the date of the treaty, who were during that interval to select to retain Mexican rights, or be considered citizens of the United States. Both governments had the right so to negotiate in regard to Mexicans; but in relation to the defendant Forbes, a naturalized citizen, his voluntary allegiance might be released

by Mexico—not transferred. On his release, he was remitted to his original status of a British subject, derived from his birth; and the courts know no principle of law which would authorize the government of the United States to compel the transfer of the defendant's voluntary allegiance from Mexico to themselves. The contracting parties did not intend to do so. The court considering the defendant without the provisions of the treaty, his claim to be a citizen of the United States under them cannot be sustained; and he stood at the execution of the treaty, and now stands, where his acts and declarations and original status have placed him—an alien, and subject of Great Britain.

The motion to set aside the verdict in this case, must be overruled.[46]

UNITED STATES, AN ACT TO ESTABLISH A BUREAU OF IMMIGRATION AND NATURALIZATION, AND TO PROVIDE FOR A UNIFORM RULE FOR THE NATURALIZATION OF ALIENS THROUGHOUT THE UNITED STATES

Section 15. 1906.

34 *United States Statutes at Large* 596, 601.

Sec. 15. That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured.

. . .

The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this Act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws.

JOHANNESSEN V. UNITED STATES

United States. Supreme Court. 1912.

225 *United States Reports* 227.

The facts, which involve the power of the court under the act of June 29, 1906, c. 3592, to cancel a certificate of naturalization on the ground that it was fraudulently issued, are stated in the opinion.

[The arguments of counsel and part of the opinion are omitted.]

MR. JUSTICE PITNEY delivered the opinion of the court.

[46] On collective naturalization, in general, see HYDE, I, §352; PILLET, I, 259; VAN DYNE, Naturalization, 265.

This was a proceeding under §15 of the act of June 29, 1906, c. 3592, 34 Stat. 596, 601, instituted by the district attorney of the United States for the Northern District of California, to cancel a certificate of citizenship, granted to the appellant by a state court long prior to the passage of the act referred to, on the ground that it had been fraudulently and illegally procured. The case was heard upon demurrer to an amended petition, which demurrer was overruled; and thereupon, no answer being filed, the court proceeded to make a decree setting aside and canceling the certificate. The appellant brings that decree here for review.

The facts, as set forth in the amended petition and admitted by the demurrer, are as follows: Johannessen, the appellant, is a native of Norway, and arrived in the United States for the first time in the month of December, 1888. Less than four years thereafter, and on October 6, 1892, he applied to the Superior Court of Jefferson County, in the State of Washington, under §2165 of the Revised Statutes of the United States, to be admitted to citizenship, and procured from that court a certificate admitting him to such citizenship. This certificate was based upon the perjured testimony of two witnesses, to the effect that Johannessen had resided within the limits and under the jurisdiction of the United States for five years at least then last past. The facts were not discovered by the Government until June 29, 1908, when Johannessen made a voluntary statement to the Department of Justice in the form of an affidavit, which is made a part of the amended petition, and wherein he admits that the certificate of citizenship was illegally procured, in that he had not been a resident of the United States for five years at the time it was issued.

The petition contains all necessary averments to show the jurisdiction of the District Court over the present action, leaving only the merits in controversy. . . .

[In an omitted part of the opinion the court quoted provisions of the naturalization statutes applicable to the case.]

The principal contentions in the argument for appellant are, that a decree of naturalization is a judgment of a competent court and subject to all the rules of law regarding judgments as such; that a court of equity could not, prior to June 29, 1906, set aside or annul such a judgment for fraud intrinsic the record, that is, founded upon perjured testimony, or any matter which was actually presented and considered in giving the judgment; and that if the act of June 29, 1906, authorizes the impeachment of the preëxisting judgment of a coördinate court for fraud consisting of the introduction of relevant perjured testimony, it is unconstitutional as an exercise of judicial power by the legislature.

It was long ago held in this court, in a case arising upon the early acts of Congress which submitted to courts of record the right of aliens

to admission as citizens, that the judgment of such a court upon the question was, like every other judgment, complete evidence of its own validity. Spratt v. Spratt, 4 Pet. 393, 408. This decision, however, goes no further than to establish the immunity of such a judgment from collateral attack. See also Campbell v. Gordon, 6 Cranch, 176.

It does not follow that Congress may not authorize a direct attack upon certificates of citizenship in an independent proceeding such as is authorized by §15 of the act of 1906. Appellant's contention involves the notion that because the naturalization proceedings result in a judgment, the United States is for all purposes concluded thereby, even in the case of fraud or illegality for which the applicant for naturalization is responsible. This question may be first disposed of.

The Constitution, Art. I, §8, gives to Congress power "to establish an uniform Rule of Naturalization." Pursuant to this authority it was enacted, as above quoted from the Revised Statutes, that an alien might be admitted to citizenship "in the following manner and not otherwise"; §2165 requiring proof of residence within the United States for five years at least; and §2170 declaring a continued term of five years' residence next preceding his admission to be essential. An examination of this legislation makes it plain that while a proceeding for the naturalization of an alien is in a certain sense a judicial proceeding, being conducted in a court of record and made a matter of record therein, yet it is not in any sense an adversary proceeding. It is the alien who applies to be admitted, who makes the necessary declaration and adduces the requisite proofs, and who renounces and abjures his foreign allegiance, all as conditions precedent to his admission to citizenship of the United States. He seeks political rights to which he is not entitled except on compliance with the requirements of the act. But he is not required to make the Government a party nor to give any notice to its representatives.

The act of June 29, 1906, in §11 (34 Stat. 599), declares that the United States shall have the right to appear in naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of his petition, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of naturalization. No such provision was contained in the act as it formerly stood. For present purposes we assume, however, that the Government had such an interest as entitled it, even without express enactment, to raise an issue upon an alien's application for admission to the privileges of citizenship. What may be the effect of a judgment allowing naturalization in a case where the Government has appeared and litigated the matter does not now concern us. (See 2 Black, Judgts., §534, a.) What we have to say relates to such a case as is presented by the present record, which is the ordinary case of an alien appearing before one of the courts designated by law for the purpose, and, without

notice to the Government and without opportunity, to say nothing of duty, on the part of the Government to appear, submitting his application for naturalization with *ex parte* proofs in support thereof, and thus procuring a certificate of citizenship. In view of the great numbers of aliens thus applying at irregular times in the various courts of record of the several States and in the Federal Circuit and District Courts throughout the Union, and bringing their applications on to summary hearing without previous notice to the Government of the United States or to the public, it is of course impossible that the public interests should be adequately represented, and in our opinion the sections quoted from the Revised Statutes are not open to any construction that would give a conclusive effect to such an investigation when conducted at the instance of and controlled by the interested individual alone.

The foundation of the doctrine of *res judicata*, or estoppel by judgment, is that both parties have had their day in court. 2 Black, Judgts., §§500, 504. The general principle was clearly expressed by Mr. Justice Harlan, speaking for this court in Southern Pacific R. Co. v. United States, 168 U. S. 1, 48:

"That a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies."

Sound reason, as we think, constrains us to deny to a certificate of naturalization, procured *ex parte* in the ordinary way, any conclusive effect as against the public. Such a certificate, including the "judgment" upon which it is based, is in its essence an instrument granting political privileges, and open like other public grants to be revoked if and when it shall be found to have been unlawfully or fraudulently procured. It is in this respect closely analogous to a public grant of land (Rev. Stat., §2289, etc.), or of the exclusive right to make, use and vend a new and useful invention (Rev. Stat., §4883, etc.). . . .

[In an omitted part of the opinion the court referred to cases sustaining judicial review of land patents and of patents for inventions.]

Whether the judicial review of a certificate of naturalization should be conducted in one mode or another is a matter plainly resting in legislative discretion. Section 15 of the act of June 29, 1906 (34 Stat. 601), provides for a proceeding in a "court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit," upon fair notice to the party holding the certificate of citizenship that is under attack. No criticism is made of this mode of procedure.

The views above expressed render it unnecessary for us to go into the question whether on general principles and without express legislative authority, a court of equity, at the instance of the Government, might

set aside a certificate of citizenship or restrain its use, for fraud or the like. In United States v. Norsch, 42 Fed. Rep. 417, it was declared that the Government could sue in a Federal court for the cancellation of a certificate that had been procured by fraud in a state court, but it was held that the facts set forth in the bill did not make out a sufficient case of fraud. In United States v. Gleason, 78 Fed. Rep. 396, 90 Fed. Rep. 778, the contrary conclusion was reached upon the main question. These two cases arose prior to the act of 1906.

Since the passage of that act, the district courts have quite generally sustained the action for a cancellation of fraudulent certificates. United States v. Nisbet, 168 Fed. Rep. 1005; United States v. Simon, 170 Fed. Rep. 680; United States v. Mansour, 170 Fed. Rep. 671; United States v. Meyer, 170 Fed. Rep. 983; United States v. Luria, 184 Fed. Rep. 643; United States v. Spohrer, 175 Fed. Rep. 440. In the latter case Judge Cross used the following pertinent language (at p. 442): "An alien friend is offered under certain conditions the privilege of citizenship. He may accept the offer and become a citizen upon compliance with the prescribed conditions, but not otherwise. His claim is of favor, not of right. He can only become a citizen upon and after a strict compliance with the acts of Congress. An applicant for this high privilege is bound, therefore, to conform to the terms upon which alone the right he seeks can be conferred. It is his province, and he is bound, to see that the jurisdictional facts upon which the grant is predicated actually exist, and if they do not he takes nothing by his paper grant. Fraud cannot be substituted for facts." And again, at p. 446: "That the government, especially when thereunto authorized by Congress, has the right to recall whatever of property has been taken from it by fraud, is, in my judgment, well settled, and, if that be true of property, then by analogy and with greater reason it would seem to be true where it has conferred a privilege in answer to the prayer of an *ex parte* petitioner."

The contention that the act of June 29, 1906, in authorizing the impeachment of certificates of naturalization theretofore issued for fraud consisting of the introduction of perjured testimony, is unconstitutional as an exercise of judicial power by the legislative department, is in effect disposed of by what has been said. The act does not purport to deprive a litigant of the fruits of a successful controversy in the courts; for, as already shown, the proceedings for naturalization are not in any proper sense adversary proceedings, but are *ex parte* and conducted by the applicant for his own benefit. The act in effect provides for a new form of judicial review of a question that is in form, but not in substance, concluded by the previous record, and under conditions affording to the party whose rights are brought into question full opportunity to be heard. Retrospective acts of this character have often been held not to be an assumption by the legislative department of

judicial powers. Sampeyreac v. United States, 7 Pet. 222, 239; Freeborn v. Smith, 2 Wall. 160, 175; Garrison v. New York, 21 Wall. 196, 202; Freeland v. Williams, 131 U. S. 405, 413; Stephens v. Cherokee Nation, 174 U. S. 445, 478.

An alien has no moral nor constitutional right to retain the privileges of citizenship if, by false evidence or the like, an imposition has been practiced upon the court, without which the certificate of citizenship could not and would not have been issued. As was well said by Chief Justice Parker in Foster v. Essex Bank, 16 Massachusetts, 245, 273, "there is no such thing as a vested right to do wrong." . . .

[In an omitted part of the opinion the court held §15 of the Act of 1906 retrospective in operation and not objectionable as an *ex post facto* law within the Constitution, Art. 1, §9.]

The decree under review should be

Affirmed.[47]

United States v. Sakharam Ganesh Pandit

United States. Circuit Court of Appeals, Ninth Circuit. 1926.

15 *Federal Reporter* (2*d Series*) 285.

Appeal from the District Court of the United States for the Southern Division of the Southern District of California. . . .

Suit under section 15 of the Naturalization Act, June 29, 1906 (section 4374, Comp. St.), was commenced June 23, 1923, to cancel a certificate of naturalization issued to the defendant on the 7th day of May, 1914. Naturalization is alleged to have been "illegally procured" in that defendant was at all times a high caste Hindu of full Indian blood. The defendant answered by denial, and set up a number of affirmative defenses, all of which, except *res judicata* or estoppel by judgment, were striken on motion of the United States. At the trial the court found the defendant to be a high-class Hindu of the Brahman caste, and of full Indian blood, that he has a status of high social standing in his native country of India; that he attended in India the Pathashala (orthodox Sanskrit University), in Benares, India, and had conferred upon him at Dgarwar, in 1904, the degree of Mahamahopadhyaya (Ph. D.); that at the hearing the United States appeared by the examiner of the Bureau of Naturalization, United States Department of Labor, and

[47] See also Luria v. United States, 231 U. S. 9; United States v. Ginsberg, 243 U. S. 472; United States v. Ness, 245 U. S. 319.

Cf. United States v. Richmond, 17 F. (2d) 28; United States v. Srednik, 19 F. (2d) 71.

On the right of appeal in naturalization cases, see Tutun v. United States, 270 U. S. 568; Hazard, "Right of Appeal in Naturalization Cases in the Federal Courts," 21 Am. Jour. Int. L. 40.

contested the defendant's right to naturalization upon the same ground upon which cancellation is sought, cross-examined the defendant and his witnesses, filed a brief in support to his objection to the naturalization of the defendant and when judgment in favor of the defendant was rendered the "examiner" made a full report in writing to the "United States government authorities at Washington;" that nothing was done thereafter "to change, modify, or reverse the said judgment;" that the defendant on the faith of such judgment entered upon the study of law and was on December 20, 1917, after examination by the "bar examiners of the state of California," admitted to practice in the courts of the state of California, and was thereafter admitted to practice in the District Courts of the United States and in this court; that he is a member in good standing in all such courts; that he was appointed by the Governor of California to the office of notary public, from which he is receiving some income; that he has acquired a home in Los Angeles of the value of $15,000; that he married a white woman, born in the state of Michigan, a citizen of the United States, and resides with his wife in his home; that he is the eldest in his father's family, and was entitled to inherit the family home of $30,000 value, together with other properties in his ancestral home valued at from $100,000 to $250,000; that his wife had entered 320 acres of land in Imperial Valley, California, upon which she had spent $1,500 in reclamation and since marriage he has spent $500 additional for such purpose; that if defendant's certificate is canceled his wife will become an alien and lose her right to the land; that defendant will lose his notarial commission and be deprived of his right to practice law in the state courts, as that rests upon citizenship, and a like loss of the federal license to practice; that he has by becoming a citizen lost his inheritance in the old country and his social status.

The defendant in his petition for naturalization gives Los Angeles as his residence; occupation, lecturer and teacher; place of birth, Ahmedabed, India; emigrated to the United States from Southampton, England, and renounced allegiance to George V, King of Great Britain and Ireland. Upon the record a clear issue of fact was raised. The United States and the defendant had their day in court. The question of fact was distinctly put in issue and directly determined by a competent court having jurisdiction. The court, after timely deliberation, said: "I am therefore of the opinion that the petitioner has succeeded in establishing beyond all reasonable doubt that he is a 'free white person' within the meaning of the Naturalization Act. He will therefore be admitted to citizenship." From a decree dismissing the case, the government appeals. . . .

[The names of counsel are omitted.]

Before Gilbert and Rudkin, Circuit Judges, and Neterer, District Judge.

NETERER, DISTRICT JUDGE (after stating the facts as above). This court, in Akhay Kumar Mozumdar v. United States (C. C. A.) 299 F. 240, reviewed decree of cancellation of certificate, and in United States v. Siem (C. C. A.) 299 F. 582, reviewed decree denying cancellation, both actions brought under section 15 of the Naturalization Act. The question of *res judicata* was not presented or considered in either case. The cumulative remedy provided by sections 11 and 15 (Comp. St. §§4370, 4374) in *ex parte* cases (U. S. v. Thind, 261 U. S. 204, 43 S. Ct. 338, 67 L. Ed. 616) has not been considered by this court or the Supreme Court with relation to final judgments or effect on *res judicata* where the court had jurisdiction and the United States appeared. In the Thind Case the action in equity was begun within the time in which an appeal could be prosecuted and the effect was in the nature of appeal. No point was made as to procedure or as to *res judicata.*

It would scarcely be contended that the intent of the Congress was to grant a new trial, except in *ex parte* cases where a final judgment is entered, when the law provides a remedy enforceable in the courts according to the regular course of legal procedure and the remedy pursued and a status decreed. The Supreme Court in Tutun v. United States, 46 S. Ct. 425, 70 L. Ed. 456, said: "Whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the Constitution, whether the subject of the litigation be property or status. A petition for naturalization is clearly a proceeding of that character."

The judgment being final in a proceeding according to the regular course of law, the giving of section 15 unlimited scope would in effect grant a new trial at the government's election, and as to that the court in De Chastellux v. Fairchild, 15 Pa. 18, 20 (53 Am. Dec. 570), said: "If anything is self-evident in the structure of our government, it is that the Legislature has no power to order a new trial, or to direct the court to order it, either before or after judgment. The power to order new trials is judicial; but the power of the Legislature is not judicial. It is limited to the making of laws; not to the exposition or execution of them. The functions of the several parts of the government are thoroughly separated, and distinctly assigned to the principal branches of it, the Legislature, the executive, and the judiciary, which, within their respective departments, are equal and co-ordinate."

The issue in the trial court was clearly an issue of fact. The defendant asserted a status, "free white person," within the meaning of the Naturalization Act. This status the court determined as a question of fact, in considering the evidence presented and after the issue was fully briefed and argued. The court erred in its conclusions. "'Erroneous' means deviating from the law. . . . Courts often speak of erroneous rulings,

and always as meaning such as deviate from or are contrary to the law, but the term 'erroneous' is never used by courts or law writers as designating a corrupt or evil act." Thompson v. Doty, 72 Ind. 336 at 338. It means having power to act, but error in its exercise. Matter of N. Y. Catholic Protectory, 8 Hun. (N. Y.) 91, 196. See, also, Chemung Nat. Bank v. Elmira, 53 N. Y. 609; Tiedt v. Carstensen, 61 Iowa, 365, 16 N. W. 214.

The question of *res judicata* was raised in Johannessen v. United States, 225 U. S. 227, 238, 32 S. Ct. 613, 615 (56 L. Ed. 1066). The court said: "The foundation of the doctrine of *res judicata*, or estoppel by judgment, is that both parties have had their day in court. 2 Black, Judgts., secs. 500, 504. The general principle was clearly expressed by Mr. Justice Harlan, speaking for this court in Southern Pacific R. Co. v. United States, 168 U. S. 1, 48 (18 S. Ct. 18, 27, 42 L. Ed. 355), 'that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies.'" And then it was said: "Sound reason, as we think, constrains us to deny to a certificate of naturalization, procured *ex parte* in the ordinary way, any conclusive effect as against the public."

The court in this decision recognized the doctrine of *res judicata*, except in *ex parte* cases, applicable to a naturalization hearing. In Tutun v. United States, Neuberger v. United States, 270 U. S. 568, at page 577, 46 S. Ct. at page 427 (70 L. Ed. 459) Justice Brandeis said: "In passing upon the application the court exercises judicial judgment." In Mut. Benefit Life Ins. Co. v. Tisdale, 91 U. S. 238, 245 (23 L. Ed. 314) the court said: "This certificate is, against all the world, a judgment of citizenship, from which may follow the right to vote and hold property."

It is thus conclusively established by the Supreme Court that a judgment granting a certificate of naturalization is a final judgment. The correctness of the findings to support the judgment does not affect it. Milne v. Deen, 121 U. S. 525, 7 S. Ct. 1004, 30 L. Ed. 980. And it is conclusive as to all *media concludendi*, and cannot be impeached by showing that it was based on mistake of law. Fauntleroy v. Lum, 210 U. S. 230, 28 S. Ct. 641, 52 L. Ed. 1039; American Express Co. v. Mullins, 212 U. S. 311, 29 S. Ct. 381, 53 L. Ed. 525, 15 Ann. Cas. 536.

In disposing of the issues in the several cases, the Supreme Court did give expression to general principles of law and to the duty and power of courts, or the meaning of provisions of the Act. The point here did not even lurk in the record, nor was it brought to the court's attention, and what was said was *obiter dictum*, and as said by Justice Sutherland in Webster v. Fall, 266 U. S. 507, 45 S. Ct. 148, 69 L. Ed. 411, cannot constitute a precedent. See, also, New v. Oklahoma, 195 U. S. 252, 25 S. Ct. 68, 49 L. Ed. 182; Tefft, Weller & Co. v. Munsuri, 222 U. S.

114, 32 S. Ct. 67, 56 L. Ed. 118; Wolff Packing Co. v. Industrial Court, 267 U. S. 552, 45 S. Ct. 441, 69 L. Ed. 785.

In Ozawa v. United States, 260 U. S. 178, 43 S. Ct. 65, 67 L. Ed. 199, a Japanese was denied admission by the District Court. On appeal to this court, the question of eligibility of the applicant was certified to the Supreme Court, and the court answered in the negative. In United States v. Thind, 261 U. S. 204, 43 S. Ct. 338, 67 L. Ed. 616, a high-caste Hindu was admitted to citizenship over the objection of the United States, and a bill in equity was filed within 60 days seeking cancellation, and on appeal to this court after decree, and on certification to the Supreme Court by appropriate questions affecting the applicant's qualifications, the issue was determined. The question of *res judicata* was not raised. In Tutun v. United States, 46 S. Ct. 425, 70 L. Ed. 455, the only issue was whether an order of naturalization is a final order, from which an appeal will lie, and the court said: "In passing upon the application the court exercises judicial judgment." Chief Justice Taft, in North Carolina R. Co. v. Story, 268 U. S. 288, 292, 45 S. Ct. 531, 533, 69 L. Ed. 959, said: "Coming now to the merits, it may be conceded that the first judgment against the company in favor of the administrator, however erroneous it was in view of the cases of Missouri Pac. R. (Co.) v. Ault, 256 U. S. 554 (41 S. Ct. 593, 65 L. Ed. 1087), and North Carolina R. Co. v. Lee, Administrator, 260 U. S. 16 (43 S. Ct. 2, 67 L. Ed. 104), not having been appealed from, was *res judicata.*"

By the same token erroneously granting naturalization to the defendant, the right to citizenship having been distinctly put in issue, the United States appearing and contesting, and the issue directly determined by a court of competent jurisdiction, the judgment, not having been modified or reversed, cannot now be disputed.

The judgment is affirmed.[48]

The Case of Medina

Costa Rica and the United States. Mixed Claims Commission. 1862.

Moore, History and Digest of the International Arbitrations to Which the United States Has Been a Party, Volume III, page 2583.

The firm of Crisanto Medina & Sons, composed of "Crisanto Medina, Perfecto Medina, and Crisanto Medina, jr.," presented, as naturalized citizens of the United States, a claim against Costa Rica to the commission under the convention between the two countries of July 2, 1860.

[48] *Contra:* United States v. Unger, 26 F. (2d) 114. *Cf.* In re Stasinopulos, 21 F. (2d) 71. See United States v. Mozumdar, 296 Fed. 173, aff'd 299 Fed. 240; United States v. Khan, 1 F. (2d) 1006; United States v. Ali, 7 F. (2d) 728; Maney v. United States, 278 U. S. 17; Hazard, "Doctrine of Res Judicata in Naturalization Cases in the United States," 23 Am. Jour. Int. L. 50.

Perfecto Medina, son of Crisanto, sr., was the first of the three that was naturalized, but he had no interest in the firm when the claim arose. Crisanto Medina, sr., was naturalized by the court of common pleas of the city of New York, December 31, 1859. He made his declaration of intention in 1856, and immediately afterward went to Costa Rica, where he remained till the end of 1859 as a sort of financial agent of that government and as consul of Ecuador. His naturalization was attacked before the commission on the ground that it was not granted in accordance with law. His counsel, Messrs. Caleb Cushing and Ch. Eames, contended that the decree of naturalization was final and conclusive. They argued that such decrees in the United States were judicial, not "ministerial" acts; and that, as judicial acts, involving a construction of the laws of the United States, they were to be received as containing a sound construction of the law, as well in Costa Rica as in the United States. They said: . . .

"Regarding the question as a domestic one of purely judicial character, in which light we have thus far considered it, we might concede, for the argument's sake, that in some possible form, by some possible party, a certificate of naturalization imprudently granted by the court, as, for instance, without the previous declaration of intention having been made, might be vacated in and by the same court. The government of Costa Rica might have the same right as a private person, perhaps, to appear in the courts of the United States, and might, perhaps, if so disposed, attack the naturalization of Crisanto Medina in the court of common pleas of the city of New York, or that of Perfecto and of Crisanto, jr., in the district court of Massachusetts. (See Richards v. McDaniel, Nott & McCord's Rep., vol. 2, p. 351.)

"But the Government of Costa Rica can not do that collaterally, and before this commission. Here, the Medinas are citizens of the United States by decrees of competent courts, the records of which in due form are before the commission. Those decrees, thus evidenced in due form, are final and conclusive here, both in pursuance of general principles of jurisprudence and of the particular principles established in this class of cases. . . .

"We affirm that every government has the sovereign right to determine in what way persons may become naturalized citizens, and its determination of the matter of form is conclusive, and the application of those forms to a given person or persons is unassailable, except, perhaps, by the government to which such person or persons owed previous allegiance. And if one government wrongfully naturalizes the subject of another, that is a public wrong, to be dealt with diplomatically by the government wronged; it can not be attacked collaterally in the country of the alleged wrongful naturalization, even by the wronged government.

"But Costa Rica has no such right of reclamation against the United States' naturalization of Crisanto Medina, previously the subject of the Argentine Republic, or of Perfecto and Crisanto, jr., previously the subjects of Nicaragua. As to Costa Rica, at any rate, if not as to the Argentine Republic and that of Nicaragua, the Medinas are to be deemed to have been naturalized here in the forms required by the sovereign law; that naturalization is the act of national sovereignty; as such it is valid, final, and incontrovertible here as against Costa Rica. If Costa Rica be aggrieved by this, her only remedy is by diplomatic complaint to the Government of the United States."

[Part of the argument of Medina's counsel is omitted.]

On the part of Costa Rica, Mr. James Mandeville Carlisle, as counsel for that government, replied. That judgments of naturalization were final and conclusive, as the acts of courts of competent jurisdiction, Mr. Carlisle said that he did not, "as a general proposition of the municipal law of the United States," deny. But was the act of naturalization "conclusive on all the world in all cases?" The authorities produced by counsel for claimants to prove this proposition were, said Mr. Carlisle, either cases of "unmixed municipal judgment," or cases "where nothing appeared in the record, or by the act of the party, to show either want of jurisdiction or fraud." In the case at bar two elements existed, either of which deprived those cases of all applicability. First, the commission was "a tribunal deriving its jurisdiction not alone from the United States, but in equal degree from another sovereign power—the Republic of Costa Rica." "The convention," continued Mr. Carlisle, "which is its charter, obliges it to inquire into and determine, amongst other things, the citizenship of the claimants. And although the proceedings of a court of the United States, or of either of the States, are undoubtedly evidence here, and very weighty evidence, upon this question—not to be lightly overruled—it does not follow that they constitute full proof. They are evidence, not proof. The courts of the United States, and of the several States, proceeding upon the applications of aliens to be naturalized, are not international courts. They act in a purely municipal character, and for merely municipal ends. It can not be said that they adjudicate *in rem*, at least for any other than municipal purposes, if indeed it be adjudication at all."

Mr. Carlisle then referred to the *ex parte* character of the proceeding and argued that it was "repugnant to common reason that the success of a party in procuring a judicial order concerning only his own condition and interests, and where, neither in form nor substance, could there be any *litis contestatio*, should absolutely foreclose all the world." The most, said Mr. Carlisle, that could be claimed for decrees of naturalization, admitting them to be judgments, was that, as to Costa Rica, they stood on the footing of foreign judgments. But foreign judgments were

conclusive only in certain cases. "Judgments *in rem*," continued Mr. Carlisle, "without doubt have a more extended influence in jurisprudence than other judgments; and a judgment upon the status of a person is, in certain cases, regarded as a judgment *in rem*. But it is submitted that no case can be found of such a judgment admitted to any quality of the *res judicata*, where there was not a *contestatio*, either in form or substance."

But, in the second place, Mr. Carlisle argued that it was always competent to impeach a judgment, whether foreign or domestic, for fraud. The naturalization of Crisanto Medina was, he contended, an imposition and a fraud. If the facts in regard to him had been placed before the court, his application would undoubtedly have been rejected. Upon such a state of facts the court had no jurisdiction to grant him naturalization. "The suppression of these facts," said Mr. Carlisle, "amounts to fraud, invalidating the act of naturalization if wilfully done, and if ignorantly done he has now himself, in this cause here pending, furnished the evidence that the court had no jurisdiction to make him a citizen. Upon either ground the act of naturalization is void."

Mr. Carlisle then referred to the statutes requiring continuous residence within the United States during the five years preceding naturalization, which was intended to be a period of probation, "to familiarize the candidate with the constitution of the country, and to acquaint him with the duties of a citizen on the one hand, and on the other to subject him to a sort of test of fitness for the new condition." Under the circumstances Mr. Carlisle contended that a fraud must have been practiced, either intentionally or ignorantly, upon the court which granted the certificate of naturalization.

THE UMPIRE, THE COMMANDER BERTINATTI, rendered, December 31, 1862, the following decision:

"This claim comes before me first on the preliminary objection by which the claimants are denied the quality of citizens of the United States. They admit that they are not native-born citizens, but allege to have been naturalized, and present the naturalization papers as evidence which can not be controverted.

"The circumstance that naturalization in the United States is granted by a general law of Congress to all who prove before certain courts that they have complied with the conditions of the same law, has led the claimants to regard the record of the declaration of naturalization as a real sentence, namely, the act of a court endowed with power to judge between contending parties—*contentiosa jurisdictio*—judging in the last resort, and having special jurisdiction to decide a question of *status* when it is raised, to which sentence, thus considered as definitive, may properly be applied the well-known principle, *res judicata pro veritate habetur*, in regard to those who were parties to the judgment.

"If this principle should be applied to the present case, it would lead to erroneous consequences. The judgments given in the United States are not binding in Costa Rica, without being declared executable there according to a treaty, in the manner prescribed by the same. A declaration of naturalization, even if it were a definitive sentence, could not claim a particular privilege of being admitted there as an absolute truth, though its intrinsic falsity might be evident.

"An act of naturalization be it made by a judge *ex parte* in the exercise of his *voluntario jurisdictio*, or be it the result of a decree of a king bearing an administrative character; in either case its value, on the point of evidence, before an international commission, can only be that of an element of proof, subject to be examined according to the principle—*locus regit actum*, both intrinsically and extrinsically, in order to be admitted or rejected according to the general principles in such a matter.

"To attack such an act because obtained by *obseptio* as it has been alleged by Costa Rica, showing that truth was concealed and falsity alleged, in order to evade the law of the United States, far from being an offense against their territorial sovereignty, denying it the power of giving naturalization to foreigners, is on the contrary an homage to the same sovereignty; because it could never be the intention of the legislator, either in a kingdom or in a republic, that his laws may be violated or evaded with impunity.

"Moreover, the question in this case is not as to the right of the United States to naturalize a foreigner, though he may not have complied with the conditions prescribed by their law. The claimants have alleged to have been naturalized by complying with said law; and they must prove their allegation to the commission which is to judge, first of their quality of citizens of the United States, and afterward of their claim.

"The certificates exhibited by them being made in due form, have for themselves the presumption of truth; but when it becomes evident that the statements therein contained are incorrect, the presumption of truth must yield to truth itself.

"It has been alleged in behalf of the claimants that even admitting that their acts of naturalization are intrinsically void, it is not in the power of this commission to reject them as proof, if they are not first set aside as fraudulent by the same tribunal from which they were obtained.

"To admit this would give those certificates in a foreign land or before an international tribunal an absolute value which they have not in the United States, where they may eventually be set aside, while Costa Rica, not recognizing the jurisdiction of any tribunal in the United States, would be left with no remedy. Moreover, this commission would be placed in an inferior position, and denied a faculty which is said to belong to a tribunal in the United States.

"If we examine this question with a view to the law of the United States, and if in the matter under consideration we establish a contrast between the powers of a tribunal of one of the States and the powers of the federal constitution, of treaties and of other acts which the executive can make in virtue of his faculty of treating with foreign nations, and so also with the powers of this joint commission, which precisely is the result of the exercise of that faculty, there can be no doubt as to which of the two shall be the supreme law of the land.

"Consequently this commission judges according to truth and justice, and can not be prevented from examining the intrinsic value of an act exhibited as evidence by any limitation or extrinsic objection arising from a matter of form established by the municipal law of the United States. The claimants having chosen to place themselves under the jurisdiction of this commission, must bring before it proofs which are really true and not merely considered so by a fiction introduced by the municipal law of the United States.

"Now, the proofs offered by Costa Rica and the admission made by the claimants themselves have established that the two sons were *minors* and could have been naturalized only by the naturalization of their father, Crisanto Medina; but when he received his certificate of naturalization from the court of common pleas of New York in 1859, he had not been a resident of the United States for the term of five years, which the law requires as a period of probation and a proof of a determined and constant intention to become a *bona fide* citizen of the United States.

"The residence of a man,' says Hon. Judge Daly, 'is the place where he abides with his family, or abides himself, making it the chief seat of his affairs and interests.' Now, the residence of Crisanto Medina for many years previous to 1856 had been, no doubt, at Costa Rica, where he abode with his family and made it the seat of his business. During that year he visited New York, declared there his intention to become a citizen of the United States, and immediately went back to Costa Rica, where he continued to abide and to have the seat of his business. Moreover, he engaged there in business requiring his presence for many years to come, and accepted the office of consul resident for Ecuador.

"Three years after that declaration the said claimant made another visit to New York, took out his naturalization papers and went back to reside in Costa Rica. That he left or did not leave his family in New York or in any other part of the United States during those three years between 1856 and 1859 is immaterial. In fact, he did not reside in the United States either five years or three years; nor even one year in the State of New York. Had this been represented to Hon. Judge Daly, he could not have granted the certificate of naturalization; and should the

case be legally brought now before that learned judge he could not hesitate a moment to set aside that certificate. . . .

"In conclusion, my opinion is that the claimants have no standing before this commission, and therefore, without prejudice to their rights and actions against the Government of Costa Rica, to be asserted before the ordinary tribunals, I hereby dismiss their demand."[49]

SECTION 3. JURISDICTION OF NATIONALS[50]

Douglas and Another, Assignees of Stein and Smith, Bankrupts, v. Forrest, Executor of James Hunter

Great Britain. Court of Common Pleas. 1828.

4 *Bingham's Reports* 686.

[The statement of the case, the arguments of counsel, and part of the opinion are omitted. The facts are stated sufficiently in the opinion.]

Best C. J. This was an action brought by the assignees of Stein and Co. bankrupts, against the executor of the will of John Hunter.

On the 31st May 1799 the testator acknowledged himself to be indebted to Stein and Co. in the sum of 447*l.* 6s. 3d.; and on the 11th June, in the same year, he acknowledged that he owed 75*l.* to Robert Smith, one of the bankrupts, and one of the firm of Stein and Co. These debts were contracted in Scotland, of which country the deceased was

[49] On Dec. 14, 1882, the arbitrators representing Spain and the United States on the arbitration tribunal created by the agreement of 1871 between the two countries (2 U. S. Treaties 1661) agreed upon the following rule: "When an allegation of naturalization is traversed and the allegation is established *prima facie* by the production of a certificate of naturalization, or by other competent and sufficient proof, the allegation can only be impeached by showing that the court which granted the judgment of naturalization was without jurisdiction, or by showing, in conformity with the adjudications of the courts of the United States on similar matters, that fraud, consisting of intentional and dishonest misrepresentation or suppression of material facts by the party obtaining the judgment, was practiced upon it, or that the naturalization was granted in violation of a treaty stipulation or of a rule of international law; and that naturalization invests the individual with the rights of a citizen of his adopted country in the country of origin or elsewhere not less than in the country of adoption." Moore, Int. Arb., III, 2621. This rule embodied with slight modification an instruction of Secretary Frelinghuysen to Mr. Suydam, United States advocate before the tribunal. Moore, Int. Arb., III, 2619, 2620.

See Flutie Cases, Venez. Arb. (1903) 38; Hyde, I, §371; Moore, Int. Arb., III, 2589; Ralston, Int. Tribunals, 173; Van Dyne, Naturalization, 141.

On nationality, in general, see Fauchille, I, Pt. I, 841; Hall, 8th ed., 275; Oppenheim, 4th ed., I, §§293–313; Pradier-Fodéré, III, 647; 23 Am. Jour. Int. L. Suppl., Special Number, 11; note 2, *supra*, 189.

[50] This section deals only with jurisdiction in civil cases. On the jurisdiction of crimes committed by nationals abroad, see ch. 7, §1, *infra*, 683.

On territorial jurisdiction in civil cases, see ch. 4, §5, *infra*, 399.

a native, and in which he had a heritable property. Shortly after the year 1799 the deceased went to India. He died in India in 1817, having never revisited Scotland.

On the 25th February 1802 two decrees were pronounced in the Court of Session in Scotland against the deceased, one at the instance of Stein and Co., and the other at the instance of Robert Smith. . . . It appeared, from these decrees that the deceased was out of Scotland at the time the proceedings were instituted in these causes. He never had any notice of those proceedings. The decrees stated, that the deceased had been (according to the law of Scotland) summoned at the market cross of Edinburgh, and at the pier and shore of Leith. A Scotch advocate proved, that, by the law of Scotland, the Court of Session might pronounce judgment against a native Scotchman who had heritable property in that country, for a debt contracted in Scotland, although the debtor had no notice of any of the proceedings, and was out of Scotland at the time. After such proclamations as were mentioned in these decrees had been made, the same witness proved, that a person against whom such a decree was pronounced, might, at any time within forty years, dispute the merits of such decree; but that after the expiration of forty years, it was conclusive against him, and all who claimed under him.

By a decree of the Court of Session, of the date of the 5th July 1804, that Court adjudged that certain property which the deceased possessed in Scotland should belong to Robert Smith and his heirs, in payment and satisfaction of the sum of 75 *l.*, with interest, from the 11th June 1799. By another decree of the same date, the Court of Sessions adjudged, that certain other property of the deceased in Scotland should belong to Stein and Co. and their heirs, in payment and satisfaction of the sum of 447*l.* 6s. 3d., with interest, from the 11th of June 1799. . . .

The Plaintiffs rested their claim on these decrees. The Defendant insisted that these decrees would not support an action in our Courts, because they were repugnant to the principles of justice, having been pronounced whilst the deceased was at a great distance from Scotland, and without any notice given to him that any proceedings were instituted against him. . . .

The questions to be decided are, first, whether an action can be maintained in England on these judgments of the Court of Session in Scotland. Secondly, whether the replication is an answer to the pleas of the statute of limitations.

On the first question we agree with the Defendant's counsel, that if these decrees are repugnant to the principles of universal justice, this Court ought not to give effect to them; but we think that these decrees are perfectly consistent with the principles of justice. If we held that they were not consistent with the principles of justice, we should condemn

the proceedings of some of our own courts. If a debt be contracted within the city of London, and the creditor issues a summons against the debtor, to which a return is made, that the debtor hath nothing within the city by which he may be summoned, or, in plainer words, hath nothing by the seizure of which his appearance may be enforced, goods belonging to the debtor in the hands of a third person, or money due from a third person to the debtor, may be attached; and unless the debtor appears within a year and a day, and disputes his debt, he is for ever deprived of his property or the debts due to him.

In such cases the defendant may be in the East Indies whilst the proceedings are going on against him in a court in London, and may not know that any such proceedings are instituted. Instead of the forty years given by the Scotch law, he has only one year given to him to appear and prevent a decision that finally transfers from him his property. Lord Chief Justice De Grey thought this custom of foreign attachment was an unreasonable one, but it has existed from the earliest times in London, and in other towns in England, and in many of our colonies from their first establishment. Lord Chief Justice De Grey and the Court of Common Pleas, after much consideration, decided against the validity of the attachment, according to the report in 3 Wilson 297., because the party objecting to it had never been summoned or had notice. The report of the same case in 2 Blackstone, 834., shews that the Court did not think a personal summons necessary, or any summons that could convey any information to the person summoned, but a summons with a return of *nihil;* that is, such a summons as I have mentioned, namely, one that shews that the debtor is not within the city, and has nothing there, by the seizing of which he may be compelled to appear. The 54 G. 3. c. 137. not only recognizes the practice on which these decrees are founded, as being according to the law of Scotland, but enacts, that on notices being given at the market cross at Edinburgh, and on the pier and shore of Leith, to debtors out of the kingdom, in default of their appearance the creditors may issue a sequestration against their effects. Can we say that a practice which the legislature of the United Kingdom has recognized and extended to other cases is contrary to the principles of justice?

A natural-born subject of any country, quitting that country, but leaving property under the protection of its law, even during his absence, owes obedience to those laws, particularly when those laws enforce a moral obligation.

The deceased, before he left his native country, acknowledged, under his hand, that he owed the debts; he was under a moral obligation to discharge those debts as soon as he could. It must be taken for granted, from there being no plea of *plene administravit*, that the deceased had the means of paying what was due to the bankrupts. The law of Scotland

has only enforced the performance of a moral obligation, by making his executor pay what he admitted was due, with interest during the time that he deprived his creditors of their just debts.

The reasoning of Lord Ellenborough, in the case of Buchanan v. Rucker [1 Campb. 63, 9 East 192], is in favour of these decrees. Speaking of a case decided by Lord Kenyon, his Lordship says, in that case the defendant had property in the island, and might be considered as virtually present. The Court decided against the validity of the attachment, because it did not appear that the party attached ever was in the island, or had any property in it. In both these respects that case is unlike the present. In the case of Cavan v. Stewart, Lord Ellenborough says, you must prove him summoned, or, at least, that he was once in the island of Jamaica, when the attachment issued.

To be sure if attachments issued against persons who never were within the jurisdiction of the Court issuing them, could be supported and enforced in the country in which the person attached resided, the legislature of any country might authorize their courts to decide on the rights of parties who owed no allegiance to the government of such country, and were under no obligation to attend its courts, or obey its laws. We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the laws of which country his property was, at the time those judgments were given, protected. The debts were contracted in the country in which the judgments were given, whilst the debtor resided in it. . . .

[In an omitted part of the opinion the court held that the replication in the case was a good answer to the pleas of the statute of limitations.]

. . . The *postea* must be delivered to the Plaintiffs, and the verdict entered for them, for 862*l*.

Judgment for the Plaintiffs.[51]

[51] See also Cowan v. Braidwood, 1 M. & G. 882.

"It seems to be pretty clear that every person domiciled within a territory is subject, so long as this domicile continues, to the jurisdiction of his sovereign, and therefore is personally subject to the courts of the sovereign. This is recognized in the common practice of permitting service of process at the last and usual place of abode of a defendant. . . . This principle has been generally, though not universally, accepted in America. If the sovereign of domicile has this power, it would seem *a fortiori* that the sovereign of allegiance would equally have such power; and it is believed that this is the case." BEALE, "Jurisdiction of Courts over Foreigners," 26 Harv. L. Rev. 193, 296.

See Rousillon v. Rousillon, 14 Ch. D. 351, 371; Emanuel v. Symon [1908] 1 K. B. 302, 309, 312.

WALBURGA GRUBEL, APPELLANT, v. GUSTAV NASSAUER, RESPONDENT

United States. Court of Appeals of New York. 1913.

210 *New York Reports* 149.

Appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 21, 1911, affirming a judgment in favor of defendant entered upon a decision of the court at a Trial Term, a jury having been waived.

The nature of the action and the facts, so far as material, are stated in the opinion.

[The arguments of counsel are omitted.]

CULLEN, CH. J. In December, 1901, the defendant and his wife departed from the empire of Germany, of which country, or of the kingdom of Bavaria, which is a constituent part of such empire, he was a subject and resident. He came to the city of New York, where he has resided and engaged in business ever since. In June, 1906, the defendant filed notice of his intention of becoming a citizen of the United States. Subsequent to that time and on July 11th, 1907, the plaintiff, also a resident of and a subject of Bavaria, recovered in the courts of that kingdom a judgment against the defendant on an obligation alleged to have been incurred before the latter's departure from that country. The process on which the judgment was founded was not served upon the defendant personally, but by publication, and at that time he was not within the empire.

The trial court held that the judgment was without efficacy in this country and rendered judgment for the defendant, which has been affirmed by the Appellate Division. We think the judgments below were right, and the opinion of the learned trial judge leaves very little to be added by us. The whole argument of the appellant is based on the proposition that at the time of the recovery of the judgment the defendant was still a subject or citizen of Germany or Bavaria, and, therefore, bound by its laws. In one sense this is doubtless true, and it may be assumed that the judgment is conclusive against the defendant in the country where it was recovered, and there would be enforced against him or his property. But the judgments of the courts of no country have, necessarily, any extraterritorial effect. When they are enforced in a foreign country, which as a rule they are to a certain extent, it is solely by virtue of comity. The elaborate review of this subject by the Supreme Court of the United States in Hilton v. Guyot (159 U. S. 113) renders further discussion unnecessary.[52]

[52] *Cf.* Schibsby v. Westenholz, 6 Q. B. 155, 159, *infra*, 288, 290. See DICEY, 4th ed., 433; GOODRICH, Conflict of Laws, 451; PIGGOTT, Foreign Judgments, 2d ed., 4; WESTLAKE, Private Int. L., 7th ed., 394.

The question then is how far comity should induce us to respect a foreign judgment obtained without personal service of process against a citizen of a foreign country domiciled here at the time of the recovery of the judgment. There is some confusion in the dicta of text writers on the subject (Story's Conflict of Laws, section 599 *et seq.;* Black on Judgments, section 836 *et seq.*), and there has been fluctuation in the decisions of the courts. The only case, however, I can find in which a judgment of a foreign country recovered against a citizen of that country upon whom, absent therefrom, constructive service only was had, was upheld, is that of Douglas v. Forrest (4 Bing. 686). In that case the judgment was recovered in Scotland and enforced in England. The grounds on which the decision was made are not very clearly stated in the opinion. On the other hand, in Smith v. Grady (68 Wis. 215), the court refused to recognize a judgment recovered in a court of Canada against a Canadian residing in Wisconsin who was personally served with process in that state. We think the decisions below were right on principle. By the requirement of the Federal Constitution each state is required to give full faith and credit to the judgments of the other states. It is not a matter of comity between the states, but of obligation imposed by the paramount law. Yet it is settled that a judgment for money recovered in one state without personal service of process on the defendant in that state cannot be enforced without the state. In Pennoyer v. Neff (95 U. S. 714, 727) it was held: "Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to the proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability." It seems to us unreasonable that we should give greater respect to judgments recovered in a foreign country than to a judgment recovered in one of our sister states.

The learned counsel for the appellant places great reliance on the decision of this court in Hunt v. Hunt (72 N. Y. 217). One of the questions in that case was the efficacy of a judgment of divorce recovered in the courts of Louisiana, substituted service only having been made on the defendant. The validity of the divorce was upheld. Both parties were not only citizens of Louisiana but domiciled there, while in the present case the domicile of the defendant was in this state. But here is the vital difference between the two cases: The rule as to the invalidity of judgments obtained without personal service upon the defendant does not apply in full integrity to divorce cases. The distinction between actions of that character and others is recognized in the very case of Hunt v. Hunt. There Judge Folger quoted from Schibsby v. Westenholz

(L. R. (6 Q. B.) 155), where it was said: "If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them." Commenting on this case the learned judge said: "He was speaking of the laws of France, providing for a substituted service upon a party absent from the territory of that realm. We do not adopt the doctrine of these cases now, further than to apply it to this case." (p. 238.) Judge Folger then sums up the decision in the case before him as follows: "It is our conclusion, whatever grounds may be stated, that in a suit for divorce, a valid judgment *in personam*, so as to effect a dissolution of the marriage contract, which shall be prevalent everywhere, may be rendered against a defendant not within the territorial jurisdiction during the progress of the suit, if that be the place of his citizenship and domicile, though process be served upon him only in some method prescribed by the laws of that jurisdiction as a substitute for personal service, and though he has not voluntarily appeared." (p. 241.) So, also, in Atherton v. Atherton (181 U. S. 155, 162) it was said: "The rule as to the notice necessary to give full effect to a decree of divorce is different from that which is required in suits *in personam*." (See, also, 2 Kent's Comm. 110.) It is again to be noticed that in Hunt v. Hunt and Atherton v. Atherton the domicile as well as the citizenship of the defendants were in the state where the judgment of divorce was obtained, while in the present case the reverse is the fact.

The judgment appealed from should be affirmed, with costs.

Werner, Hiscock, Chase, Collin, Cuddeback and Hogan, JJ., concur.

Judgment affirmed.[53]

Cook v. Tait, United States Collector of Internal Revenue for the District of Maryland

United States. Supreme Court. 1924.

265 *United States Reports* 47.

Error to a judgment of the District Court, dismissing on demurrer an action to recover money paid, under protest, as income taxes.

[The case is stated in the opinion. Part of the arguments of counsel are omitted.]

Mr. Charles Claflin Allen, Jr., and Mr. Charles Claflin Allen, with whom Mr. Frederic N. Watriss was on the briefs, for plaintiff in error.

I. Congress has no power to impose a tax upon income received by a native citizen of the United States who was at the time when the

[53] *Accord*: Smith v. Grady, 68 Wis. 215. *Contra:* Ouseley v. Lehigh Valley Trust & Safe-Deposit Co., 84 Fed. 602. See Dicey, 4th ed., 396; Goodrich, Conflict of Laws, 139; Westlake, Private Int. L., 7th ed., 399; 27 Harv. L. Rev. 464.

income was received permanently resident and domiciled in the Republic of Mexico, when such income was derived solely from real and personal property permanently located at all times without the territorial jurisdiction of the United States and solely within the territorial jurisdiction of the Republic of Mexico. . . .

Mr. Solicitor General Beck for defendant in error. . . .

All taxes are personal obligations of the citizen, even though measured in amount by his property or the income thereof. Taxes are not imposed upon property as such but upon its owner. . . .

The jurisdiction of a national sovereign over its subjects is not confined to its territorial domain. I Hyde, Int. Law, pp. 410–412, 423, 435–446. Treason may be punished no matter where the treasonable acts have occurred. 35 Henry VIII, c. 2; Criminal Code, §1. This is also true of conspiracy, United States v. Bowman, 260 U. S. 94; of cannibalism, Regina v. Dudley, 15 Cox C. C. 624; and by English law it is true of offenses by Crown officials. 11 William III, c. 12; 42 Geo. III, c. 85, §1. Subjects who go to uncivilized countries take their national law with them. I Hyde, *supra*, p. 451. Our Criminal Code (§§308, 309) forbids the sale of arms, liquors, or opium to the aboriginal natives of Pacific islands which are not in the possession of or under the protection of any civilized power; and an act of Congress (March 3, 1915, c. 74, §§1–13, 38 Stat. 817) regulates the practice of pharmacy and the sale of poisons in consular districts in China. Under treaties the United States has established consular courts for American citizens in several countries. So also, personal representatives of a sovereign, members of the diplomatic corps, carry their national law with them, and they are immune from the operation of the laws of the country to which they are sent. I Hyde, *supra*, pp. 746–763.

Counsel for the plaintiff urge that the imposition of such a tax upon him would be subversive of the sovereignty of Mexico. The rules of international law, however, indicate that there is no subversion of the sovereignty of the country when a resident alien obeys the command of his own national sovereign, unless the command of his sovereign conflicts with the command of the local sovereign.

The leading text writers upon international law concede that a national sovereign has the power to impose taxes upon its nonresident citizens regardless of the sources from which such incomes are derived. I Oppenheim, Int. Law, p. 195; Bar, Int. Law, 2d ed., p. 247; Story, Conflict of Laws, 7th ed., pp. 21, 22, 682; I Westlake, Int. Law, pp. 111, 112, 206, 208; I Hyde, Int. Law, p. 362; Webster, The Law of Citizenship, 1891, pp. 167, 168.

The payment of an income tax by a nonresident citizen is looked upon as *prima facie* evidence of citizenship. The failure to pay such an income tax is, *inter alia*, of considerable weight in determining that

the nonresident citizen has given up his allegiance to the United States. Borchard, Diplomatic Protection of Citizens Abroad, pp. 694–697, 706, 728 *et seq.;* Mr. Fish, Secretary of State, to Mr. MacVeagh, December 13, 1870, Foreign Relations, 1871, pp. 887–888; The Charming Betsy, 2 Cr. 64.

As pointed out in Minor v. Happersett, 21 Wall. 162, a citizen owes allegiance to his nation and is entitled to its protection. . . .

Mr. Justice McKenna delivered the opinion of the Court.

Action by plaintiff in error, he will be referred to as plaintiff, to recover the sum of $298.34 as the first installment of an income tax paid, it is charged, under the threats and demands of Tait.

The tax was imposed under the Revenue Act of 1921, which provides by §210 (42 Stat. 227, 233): "That, in lieu of the tax imposed by section 210 of the Revenue Act of 1918, there shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax of 8 per centum of the amount of the net income in excess of the credits provided in section 216: Provided, That in the case of a citizen or resident of the United States the rate upon the first $4,000 of such excess amount shall be 4 per centum."

Plaintiff is a native citizen of the United States and was such when he took up his residence and became domiciled in the City of Mexico. A demand was made upon him by defendant in error, designated defendant, to make a return of his income for the purpose of taxation under the Revenue Laws of the United States. Plaintiff complied with the demand, but under protest, the income having been derived from property situated in the City of Mexico. A tax was assessed against him in the sum of $1,193.38, the first installment of which he paid, and for it, as we have said, this action was brought.

The question in the case, and which was presented by the demurrer to the declaration is, as expressed by plaintiff, whether Congress has power to impose a tax upon income received by a native citizen of the United States who, at the time the income was received, was permanently resident and domiciled in the City of Mexico, the income being from real and personal property located in Mexico.

Plaintiff assigns against the power not only his rights under the Constitution of the United States but under international law, and in support of the assignments cites many cases. It will be observed that the foundation of the assignments is the fact that the citizen receiving the income, and the property of which it is the product, are outside of the territorial limits of the United States. These two facts, the contention is, exclude the existence of the power to tax. Or to put the contention another way, as to the existence of the power and its exercise, the person receiving the income, and the property from which he receives it, must both be within the territorial limits of the United States to be

within the taxing power of the United States. The contention is not justified, and that it is not justified is the necessary deduction of recent cases. In United States v. Bennett, 232 U. S. 299, the power of the United States to tax a foreign built yacht owned and used during the taxing period outside of the United States by a citizen domiciled in the United States was sustained. The tax passed on was imposed by a tariff act, but necessarily the power does not depend upon the form by which it is exerted.

It will be observed that the case contained only one of the conditions of the present case, the property taxed was outside of the United States. In United States v. Goelet, 232 U. S. 293, the yacht taxed was outside of the United States but owned by a citizen of the United States who was "permanently resident and domiciled in a foreign country." It was decided that the yacht was not subject to the tax—but this as a matter of construction. Pains were taken to say that the question of power was determined "wholly irrespective" of the owner's "permanent domicile in a foreign country." And the Court put out of view the situs of the yacht. That the Court had no doubt of the power to tax was illustrated by reference to the income tax laws of prior years and their express extension to those domiciled abroad. The illustration has pertinence to the case at bar, for the case at bar is concerned with an income tax, and the power to impose it.

We may make further exposition of the national power as the case depends upon it. It was illustrated at once in United States v. Bennett by a contrast with the power of a State. It was pointed out that there were limitations upon the latter that were not on the national power. The taxing power of a State, it was decided, encountered at its borders the taxing power of other States and was limited by them. There was no such limitation, it was pointed out, upon the national power; and the limitation upon the States affords, it was said, no ground for constructing a barrier around the United States "shutting that government off from the exertion of powers which inherently belong to it by virtue of its sovereignty."

The contention was rejected that a citizen's property without the limits of the United States derives no benefit from the United States. The contention, it was said, came from the confusion of thought in "mistaking the scope and extent of the sovereign power of the United States as a nation and its relations to its citizens and their relations to it." And that power in its scope and extent, it was decided, is based on the presumption that government by its very nature benefits the citizen and his property wherever found, and that opposition to it holds on to citizenship while it "belittles and destroys its advantages and blessings by denying the possession by government of an essential power required to make citizenship completely beneficial." In other words,

the principle was declared that the government, by its very nature, benefits the citizen and his property wherever found and, therefore, has the power to make the benefit complete. Or to express it another way, the basis of the power to tax was not and cannot be made dependent upon the situs of the property in all cases, it being in or out of the United States, and was not and cannot be made dependent upon the domicile of the citizen, that being in or out of the United States, but upon his relation as citizen to the United States and the relation of the latter to him as citizen. The consequence of the relations is that the native citizen who is taxed may have domicile, and the property from which his income is derived may have situs, in a foreign country and the tax be legal—the government having power to impose the tax.

Judgment affirmed.[54]

Mr. Justice McReynolds took no part in the consideration or decision of this case.

France, Civil Code

Book I, Title I, Chapter I, Articles 14 and 15. 1803.

14. A foreigner, although not resident in France, may be cited before the French courts, to enforce the execution of engagements contracted by him in France with a Frenchman; he may be summoned before the tribunals of France, on account of engagements entered into by him with Frenchmen in a foreign country.

15. A Frenchman may be summoned before a French court, for engagements contracted by him in a foreign country, though with a foreigner.

Schibsby v. Westenholz and Others

Great Britain. Court of Queen's Bench. 1870.

Law Reports 6 *Court of Queen's Bench* 155.

[The statement of the case, the arguments of counsel, and part of the opinion are omitted. The facts are stated sufficiently in the opinion.]

The judgment of the Court (Blackburn, Mellor, Lush, and Hannen, JJ.) was delivered by

Blackburn, J.—This was an action on a judgment of a French tribunal given against the defendants for default of appearance.

The pleas to the action were, amongst others, a plea of never indebted, and, thirdly, a special plea asserting that the defendants were not

[54] See Lévitt, "Income Tax Predicated Upon Citizenship," 11 Va. L. Rev. 607. See also Act of 1926, c. 762, 44 U. S. Stat. L. 835.

Cf. Barnett's Trusts [1902] 1 Ch. 847.

resident or domiciled in France, or in any way subject to the jurisdiction of the French court, nor did they appear; and that they were not summoned, nor had any notice or knowledge of the pending of the proceedings, or any opportunity of defending themselves therefrom. On these pleas issue was joined.

On the trial before me the evidence of a French *avocat* was given, by which it appeared that by the law of France a French subject may sue a foreigner, though not resident in France, and that for this purpose an alien, if resident in France, was considered by the French law as a French subject. The mode of citation in such a case, according to the French law, is by serving the summons on the *Procureur Impérial.* If the foreign defendant thus cited does not within one month appear, judgment may be given against him, but he may still, at any time within two months after judgment, appear and be heard on the merits. After that lapse of time the judgment is final and conclusive. The practice of the imperial government is, in such a case, to forward the summons thus served to the consulate of the country where the defendant is resident, with directions to intimate the summons, if practicable, to the defendant; but this, as was explained by the *avocat*, is not required by the French law, but is simply done by the imperial government voluntarily from a regard to fair dealing.

It appeared by other evidence that the plaintiff in this case was a Dane resident in France. The defendants were also Danes, resident in London and carrying on business there. A written contract had been made between the plaintiff and defendants, which was in English, and dated in London, but no distinct evidence was given as to where it was signed. We think, however, that, if that was material, the fair intendment from the evidence was that it was made in London. By this contract the defendants were to ship in Sweden a cargo of Swedish oats free on board a French or Swedish vessel for Caen, in France, at a certain rate for all oats delivered at Caen. Payment was to be made on receipt of the shipping documents, but subject to correction for excess or deficiency according to what might turn out to be the delivery at Caen. From the correspondence it appeared that the plaintiff asserted, and the defendants denied, that the delivery at Caen was short of the quantity for which the plaintiff had paid, and that the plaintiff made some other complaints as to the condition of the cargo which were denied by the defendants. The plaintiff very plainly told the defendants that if they would not settle the claim he would sue them in the French courts. He did issue process in the manner described, and the French consulate in London served on the defendants a copy of the citation.

The following admissions were then made, namely: that the judgment was regular according to French law; that it was given in favour of the plaintiff, a foreigner domiciled in France, against the defendants, domi-

ciled in England, and in no sense French subjects, and having no property in France.

I then ruled that I could not enter into the question whether the French judgment was according to the merits, no fraud being alleged or shown.

I expressed an opinion (which I have since changed) that, subject to the third plea, the plaintiff was entitled to the verdict, but reserved the point.

The jury found that the defendants had notice and knowledge of the summons and the pendency of the proceedings in time to have appeared and defended the action in the French court. I then directed the verdict for the plaintiff, but reserved leave to enter the verdict for the defendants on these facts and this finding. . . .

A rule was accordingly obtained by Sir George Honyman, against which cause was shown in the last term and in the sittings after it before my Brothers Mellor, Lush, Hannen, and myself. . . .

It is unnecessary to repeat again what we have already said in Godard v. Gray. [6 Q. B. 139].

We think that, for the reasons there given, the true principle on which the judgments of foreign tribunals are enforced in England is that stated by Parke, B., in Russell v. Smyth, 9 M. & W. at p. 819, and again repeated by him in Williams v. Jones, 13 M. & W. at p. 633, that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action.

We were much pressed on the argument with the fact that the British legislature has, by the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), ss. 18 and 19, conferred on our courts a power of summoning foreigners, under certain circumstances, to appear, and in case they do not, giving judgment against them by default. It was this consideration principally which induced me at the trial to entertain the opinion which I then expressed and have since changed. And we think that if the principle on which foreign judgments were enforced was that which is loosely called "comity," we could hardly decline to enforce a foreign judgment given in France against a resident in Great Britain under circumstances hardly, if at all, distinguishable from those under which we, *mutatis mutandis*, might give judgment against a resident in France; but it is quite different if the principle be that which we have just laid down.

Should a foreigner be sued under the provisions of the statute referred to, and then come to the courts of this country and desire to be discharged,

the only question which our courts could entertain would be whether the Acts of the British legislature, rightly construed, gave us jurisdiction over this foreigner, for we must obey them. But if, judgment being given against him in our courts, an action were brought upon it in the courts of the United States (where the law as to the enforcing foreign judgments is the same as our own), a further question would be open, *viz.*, not only whether the British legislature had given the English courts jurisdiction over the defendant, but whether he was under any obligation which the American courts could recognize to submit to the jurisdiction thus created. This is precisely the question which we have now to determine with regard to a jurisdiction assumed by the French jurisprudence over foreigners. . . .

The question we have now to answer is, Can the empire of France pass a law to bind the whole world? We admit, with perfect candour, that in the supposed case of a judgment, obtained in this country against a foreigner under the provisions of the Common Law Procedure Act, being sued on in a court of the United States, the question for the court of the United States would be, Can the Island of Great Britain pass a law to bind the whole world? We think in each case the answer should be, No, but every country can pass laws to bind a great many persons; and therefore the further question has to be determined, whether the defendant in the particular suit was such a person as to be bound by the judgment which it is sought to enforce.

Now on this we think some things are quite clear on principle. If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them.

If at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them; though before finally deciding this we should like to hear the question argued. But every one of those suppositions is negatived in the present case.

Again, we think it clear, upon principle, that if a person selected, as plaintiff, the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him. . . .

[In an omitted part of the opinion the court considered General Steam Navigation Co. v. Guillou, 11 M. & W. 877, and Simpson v.

Fogo, 1 John. & H. 18, 29 L. J. Ch. 657, 1 Hem. & M. 195, 32 L. J. Ch. 249.]

We think it better . . . to express no opinion as to the effect of the appearance of a defendant, where it is so far not voluntary that he only comes in to try to save some property in the hands of the foreign tribunal. But we must observe that the decision in De Cosse Brissac v. Rathbone, 6 H. & N. 301, 30 L. J. (Ex.) 238, is an authority that where the defendant voluntarily appears and takes the chance of a judgment in his favour he is bound.

In Douglas v. Forrest, 4 Bing. at p. 703 (E. C. L. R. vol. 33), the Court, deciding in favour of the party suing on a Scotch judgment, say: "We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the laws of which country his property was, at the time those judgments were given, protected. The debts were contracted in the country in which the judgments were given, whilst the debtor resided in it." Those circumstances are all negatived here. We should, however, point out that, whilst we think that there may be other grounds for holding a person bound by the judgment of the tribunal of a foreign country than those enumerated in Douglas v. Forrest, 4 Bing. at p. 703 (E. C. L. R. vol. 13), we doubt very much whether the possession of property, locally situated in that country and protected by its laws, does afford such a ground. It should rather seem that, whilst every tribunal may very properly execute process against the property within its jurisdiction, the existence of such property, which may be very small, affords no sufficient ground for imposing on the foreign owner of that property a duty or obligation to fulfil the judgment. But it is unnecessary to decide this, as the defendants had in this case no property in France. As to this, see London and North Western Railway Company v. Lindsay, 3 Macq. 99.

We think, and this is all that we need decide, that there existed nothing in the present case imposing on the defendants any duty to obey the judgment of a French tribunal.

We think, therefore, that the rule must be made absolute.

Rule absolute.[55]

[55] "Vainly is it said that the foreigner, in contracting with a Frenchman, with knowledge of the provision of art. 14 of the Code Napoleon, is deemed to have renounced the right to be judged by his native judges. For the individual who cannot submit himself within his own country, of his own volition, to judges other than those designated by the legislation of the state, *a fortiori* cannot act contrary to the rules of competence established by public international law." Court of Appeal of Naples, in Girard v. Tramontano, 12 Jour. du Dr. Int. Privé 464, 465.

See Duflos v. Burlingham, 34 L. T. 688; Rousillon v. Rousillon, 14 Ch. D. 351, 370; Beale, "Jurisdiction of Courts Over Foreigners," 26 Harv. L. Rev. 193, 209; Pillet, Principes, 228; 12 Jour. du Dr. Int. Privé 465 n.

CAIGNET v. PETTIT ET AL

United States. Supreme Court of Pennsylvania. 1795.

2 *Dallas' Reports* 234.

This was a *Scire Facias* against the defendants, as garnishees of Gilbaud, Rouge & Co. French citizens, residing in the West Indies. A rule was obtained by the defendants to shew cause why the proceedings should not be qualified, upon the ground, that the plaintiff was also a French citizen, and that, therefore, the Court was precluded from exercising any jurisdiction, by the 12th article of the Consular Convention, which provides, that "all differences and suits between the citizens of France, in the United States, or between the citizens of the United States, within the dominions of France &c. shall be determined by the respective Consuls and Vice-Consuls, either by a reference to arbitrators, or by a summary judgment and without costs. No officer of the country, civil or military, shall interfere therein, or take any part whatever in the matter: and the appeals from the said Consular sentences shall be carried before the tribunals of France, or of the United States, to whom it may appertain to take cognizance therefore."

The facts, respecting the plaintiff's citizenship, were briefly these:—He was a native of France, and resided in the Island of St. Domingo, at the period of the French revolution. He had afterwards accepted an office from Louis XVI. under the constitution establishing a limited monarchy; but previously to the abolition of monarchy, and the introduction of the Republican system (the 10th of Sept. 1792) he came to America, took an oath of allegiance to the State of Pennsylvania, under the act of March 1789 (2 vol. Dall. Edit. p. 676) which act, however, was at that time obsolete, and purchased a tract of land, on which he resided. He had not been naturalized conformably to the act of Congress; but he had frequently been heard to express his abhorrence of the existing constitution of France; he had never done any act shewing his assent to it; and he had declared an intention to settle, permanently, in America.

The plaintiff's counsel (Lewis & Levy) made two points—1st. That the 12th art. of the Consular Convention applies only to cases where both parties, being French citizens, are actually resident within the United States, and, therefore, does not embrace the case of a foreign attachment.—2d. That the plaintiff never was a citizen of the French Republic; and in support of the latter position they cited the following authorities: Vatt. B. I. ch. 13. s. 161. 167. 2 Vent. 362. 3. 3 Bl. Com. 298. Vatt. B. 3. ch. 18. s. 293. 295. *Ibid.* B. I. ch. 19. s. 220. 213. 2 Heinec. 220. Art. of Confed. s. 4. Johnson's Dict. "Citizen" 1 Dall. Rep. 58.

For the defendants, it was urged, by Dallas & Du Ponceau, on the 1st point, that the Consular Convention extended to all differences and suits between French citizens; that a foreign attachment was, unquestionably, a suit; and that the difference, or suit, existing in the United States, it was not material, either to the words or spirit of the article, that both the parties should be actually resident within the United States. On the 2d point, it was answered, that the plaintiff necessarily remained a French citizen, 'till he renounced his allegiance, or had done some act incompatible with it;—that he was not a citizen of the United States; and unless he was a citizen of France, he exhibited the extraordinary spectacle of a human being who had no country!

By the court.—Many important topics have been discussed, in the course of this argument; but we do not think it necessary to decide on more than one of them. The sole question is—were both the plaintiff and the original defendants citizens of the French Republic, at the time of instituting this suit? We are clearly of opinion, from the facts disclosed in the affidavits which have been read, that the plaintiff was not then, nor is he now, a citizen of France. It is true, that he has not acquired the rights of citizenship here; nor, as it appears, in any other country: but, whatever may be the inconvenience of that situation, he had an undoubted right to dissent from the revolution; and, as a member of the minority, to refuse allegiance to the new government, and withdraw from the territory of France. Every thing that could be said or done to manifest such a determination, has been said and done by the plaintiff, except the act of becoming the subject, or citizen, of another country.

Let the rule be discharged.[56]

Nationality Decrees in Tunis and Morocco

France and Great Britain. Permanent Court of International Justice. 1923.

Publications of the Permanent Court of International Justice, Series B, Advisory Opinion No. 4.

Second (Extraordinary) Session.

Present: MM. Loder, President; Weiss, Vice-President; Lord Finlay, MM. Nyholm, Moore, Anzilotti, Huber, Judges; MM. Beichmann, Negulesco, Deputy Judges.

[56] See Stoeck v. Public Trustee [1921] 2 Ch. 67; Gargas, "Die Staatenlosen," Bibliotheca Visseriana, VII, 1; Oppenheim, 4th ed., I, §§311–313; Williams, "Denationalization," B. Y. B. Int. L. (1927) 45; B. Y. B. Int. L. (1926) 97, 104; 31 Yale L. Jour. 702, 858; Act of 1918, c. 69, §1, 40 U. S. Stat. L. 542, 545.

Cf. Norddeutsche Grundkreditbank v. Elsbach, 34 Entscheidungen des Reichsgerichts in Civilsachen 392, 22 Jour. du Dr. Int. Privé 850.

Advisory Opinion No. 4.

[On November 8th, 1921, a Decree was promulgated by the Bey of Tunis, the first article of which enacts as follows:

"With the exception of citizens, subjects or nationals of the Protecting Power (other than our own subjects), every person born in the territory of our Kingdom of parents one of whom was also born there, is a Tunisian, subject to the provisions of conventions or treaties binding the Tunisian Government."

On the same date, the President of the French Republic issued a Decree of which the first article was as follows:

"Every person born in the Regency of Tunis of parents of whom one, justiciable as a foreigner in the French Courts of the Protectorate, was also born there, is French."

Similar legislation was introduced at the same time in Morocco (French Zone).

The British Ambassador in Paris protested to the French Government against the application to British subjects of the decrees promulgated in Tunis, and also stated that his Government was unable to recognize that the decrees put into force in the French Zone of Morocco were applicable to persons entitled to British nationality. As it was not found possible to adjust the divergence of views, the British Government proposed to the French that the matter should be referred to the Court, invoking amongst other things, the Franco-British Arbitration Convention of October 14th, 1903. The French Government refused to submit the matter to arbitral or judicial settlement, whereupon the British Government stated, on July 14th, 1922, that it had no alternative but to submit the dispute to the Council of the League of Nations, relying on Articles 13 and 15 of the Covenant. The Quai d'Orsay replied that the question was not one for consideration by the Council of the League of Nations, having regard to the reservation made in paragraph 8 of Article 15 of the Covenant concerning questions which by international law are solely within the domestic jurisdiction of one Party.

The Governments concerned then came to an agreement, under the auspices of the Council, to the effect that the latter should request the Court to give an advisory opinion on this question of jurisdiction, *viz.* whether the dispute is or is not, by international law, solely a matter of domestic jurisdiction.

On October 4th, 1922, the Council passed a resolution to this effect. The Request was communicated by the Registrar of the Court to the Members of the League of Nations (through the Secretary-General of the League), and to the States mentioned in the Annex to the Covenant.

An extraordinary session of the Court (Second Session) was held, from January 8th to February 7th, 1923, to deal with the question.]

[The above statement of the case is taken from the Annual Report, Publications of the Permanent Court of International Justice, Series E, No. 1, p. 195. Part of the opinion is omitted.]

I. On October 4th, 1922, the Council of the League of Nations adopted the following resolution (Official Journal of the League of Nations, 3rd year, No. 11 (Part 2), page 1206; French Counter-Case, pages 48 and 49):
(English text).

"The Council has examined the proposals made by Lord Balfour and M. Léon Bourgeois on the subject of the following question, placed on its agenda of August 11th at the request of the Government of His Britannic Majesty:

" 'Dispute between France and Great Britain as to the Nationality Decrees issued in Tunis and Morocco (French zone) on November 8th, 1921, and their application to British subjects, the French Government having refused to submit the legal questions involved to arbitration.'

"The Council, noting that friendly conversations have taken place between the representatives of the two Governments and that they have agreed on the proposals to be made to the Council;

"Expresses its entire adhesion to the principles contained in these proposals, and has adopted the following resolution:

"(a) The Council decides to refer to the Permanent Court of International Justice, for its opinion, the question whether the dispute referred to above is or is not by international law solely a matter of domestic jurisdiction (Article 15, paragraph 8, of the Covenant);

"(b) And it requests the two Governments to bring this matter before the Permanent Court of International Justice, and to arrange with the Court with regard to the date on which the question can be heard and with regard to the procedure to be followed;

"(c) Furthermore, the Council takes note that the two Governments have agreed that, if the opinion of the Court upon the above question is that it is not solely a matter of domestic jurisdiction, the whole dispute will be referred to arbitration or to judicial settlement under conditions to be agreed between the Governments.

"(d) The Secretary-General of the League will communicate paragraphs (a) and (b) to the Court." . . .

[In an omitted part of the opinion the court summarized the proceedings, reproduced textually the final conclusions submitted by the representatives of the two governments, and stated the facts out of which the controversy arose.]

III. The question before the Court for advisory opinion is as follows:

"Whether the dispute between France and Great Britain as to the Nationality Decrees issued in Tunis and Morocco (French zone) on November 8th, 1921, and their application to British subjects, is or is

not, by international law, solely a matter of domestic jurisdiction (Article 15, paragraph 8, of the Covenant)." . . .

IV. Under the terms of sub-section (a) of the Council's resolution, the Court, in replying to the question stated above, has to give an opinion upon the nature and not upon the merits of the dispute, which, under the terms of sub-section (c) may, in certain circumstances, form the subject of a subsequent decision.

The Court therefore wishes to emphasise that no statement or argument comprised in the present opinion can be interpreted as indicating a preference on the part of the Court in favour of any particular solution, as regards the whole or any individual point of the actual dispute.

The analysis of the diplomatic correspondence given under Part II above, and the fact that the Council's resolution in its sub-section (a) refers in parenthesis to paragraph 8 of Article 15 of the Covenant, lead to the conclusion that the question submitted to the Court must be read and answered in the light of the provisions of that paragraph.

The paragraph to which sub-section (a) of the Council's resolution expressly refers is as follows:
(English text).

"If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement."
(French text).

"*Si l'une des parties prétend et si le Conseil reconnaît que le différend porte sur une question que le droit international laisse à la compétence exclusive de cette partie, le Conseil le constatera dans un rapport, mais sans recommander aucune solution.*"

Special attention must be called to the word "*exclusive*" in the French text, to which the word "solely" (within the domestic jurisdiction) corresponds in the English text. The question to be considered is not whether one of the parties to the dispute is or is not competent in law to take or to refrain from taking a particular action, but whether the jurisdiction claimed belongs solely to that party.

From one point of view, it might well be said that the jurisdiction of a State is exclusive within the limits fixed by international law—using this expression in its wider sense, that is to say, embracing both customary law and general as well as particular treaty law. But a careful scrutiny of paragraph 8 of Article 15 shows that it is not in this sense that exclusive jurisdiction is referred to in that paragraph.

The words "solely within the domestic jurisdiction" seem rather to contemplate certain matters which, though they may very closely concern the interests of more than one State, are not, in principle, reg-

ulated by international law. As regards such matters, each State is sole judge.

The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain.

For the purpose of the present opinion, it is enough to observe that it may well happen that, in a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law. Article 15, paragraph 8, then ceases to apply as regards those States which are entitled to invoke such rules, and the dispute as to the question whether a State has or has not the right to take certain measures becomes in these circumstances a dispute of an international character and falls outside the scope of the exception contained in this paragraph. To hold that a State has not exclusive jurisdiction does not in any way prejudice the final decision as to whether that State has a right to adopt such measures.

This interpretation follows from the actual terms of paragraph 8 of Article 15 of the Covenant, and, in the opinion of the Court, it is also in harmony with that Article taken as a whole.

Article 15, in effect, establishes the fundamental principle that any dispute likely to lead to a rupture which is not submitted to arbitration in accordance with Article 13 shall be laid before the Council. The reservations generally made in arbitration treaties are not to be found in this Article.

Having regard to this very wide competence possessed by the League of Nations, the Covenant contains an express reservation protecting the independence of States; this reservation is to be found in paragraph 8 of Article 15. Without this reservation, the internal affairs of a country might, directly they appeared to affect the interests of another country, be brought before the Council and form the subject of recommendations by the League of Nations. Under the terms of paragraph 8, the League's interest in being able to make such recommendations as are deemed just and proper in the circumstances with a view to the maintenance of peace must, at a given point, give way to the equally essential interest of the individual State to maintain intact its independence in matters which international law recognises to be solely within its jurisdiction.

It must not, however, be forgotten that the provision contained in paragraph 8, in accordance with which the Council, in certain circumstances, is to confine itself to reporting that a question is, by international

law, solely within the domestic jurisdiction of one Party, is an exception to the principles affirmed in the preceding paragraphs and does not therefore lend itself to an extensive interpretation.

This consideration assumes especial importance in the case of a matter which, by international law, is, in principle, solely within the domestic jurisdiction of one Party, but in regard to which the other Party invokes international engagements which, in the opinion of that Party, are of a nature to preclude in the particular case such exclusive jurisdiction. A difference of opinion exists between France and Great Britain as to how far it is necessary to proceed with an examination of these international engagements in order to reply to the question put to the Court.

It is certain—and this has been recognised by the Council in the case of the Aaland Islands—that the mere fact that a State brings a dispute before the League of Nations does not suffice to give this dispute an international character calculated to except it from the application of paragraph 8 of Article 15.

It is equally true that the mere fact that one of the parties appeals to engagements of an international character in order to contest the exclusive jurisdiction of the other is not enough to render paragraph 8 inapplicable. But when once it appears that the legal grounds (*titres*) relied on are such as to justify the provisional conclusion that they are of juridical importance for the dispute submitted to the Council, and that the question whether it is competent for one State to take certain measures is subordinated to the formation of an opinion with regard to the validity and construction of these legal grounds (*titres*), the provisions contained in paragraph 8 of Article 15 cease to apply and the matter, ceasing to be one solely within the domestic jurisdiction of the State, enters the domain governed by international law. . . .

V. The main arguments developed by the Parties in support of their respective contentions are as follows:

1. A. The French Decrees relate to persons born, not upon the territory of France itself, but upon the territory of the French Protectorates of Tunis and of the French zone of Morocco. Granted that it is competent for a State to enact such legislation within its national territory, the question remains to be considered whether the same competence exists as regards protected territory.

The extent of the powers of a protecting State in the territory of a protected State depends, first, upon the Treaties between the protecting State and the protected State establishing the Protectorate, and, secondly, upon the conditions under which the Protectorate has been recognised by third Powers as against whom there is an intention to rely on the provisions of these Treaties. In spite of common features possessed by Protectorates under international law, they have individual

legal characteristics resulting from the special conditions under which they were created, and the stage of their development.

The position in the present case is determined by the international documents enumerated below:

(a) As regards Tunis: The Treaty of Casr-Said of May 12th, 1881, between France and Tunis; the Treaty between the same Powers signed at La Marsa on June 8th, 1883; the correspondence between France and Great Britain, 1881–1883 (British Case, Appendix No. 6, and French Counter-Case, pages 77 *et seq.;* Supplementary Documents submitted by the British Government). (See also the documents referred to under Nos. 2 and 3 below).

(b) As regards Morocco: the Treaty of Fez of March 30th, 1912, between France and Morocco; the Anglo-French Declaration regarding Egypt and Morocco, dated April 8th, 1904; Sir Edward Grey's note to M. Daeschner, dated November 14th, 1911. (French Counter-Case, page 139; British Counter-Case, Appendix No. 9); letter from M. Kiderlen-Waechter, Secretary of State for Foreign Affairs of the German Empire to M. Jules Cambon, Ambassador of the French Republic at Berlin, dated November 4th, 1911 (read during the hearing by the French Agent).

The question whether the exclusive jurisdiction possessed by a protecting State in regard to nationality questions in its own territory extends to the territory of the protected State depends upon an examination of the whole situation as it appears from the standpoint of international law. The question therefore is no longer solely one of domestic jurisdiction as defined above. (See Part IV.)

B. The French Government contends that the public powers (*puissance publique*) exercised by the protecting State, taken in conjunction with the local sovereignty of the protected State, constitute full sovereignty equivalent to that upon which international relations are based, and that therefore the protecting State and the protected State may, by virtue of an agreement between them, exercise and divide between them within the protected territory the whole extent of the powers which international law recognises as enjoyed by sovereign States within the limits of their national territory. This contention is disputed by the British Government.

The Court observes that, in any event, it will be necessary to have recourse to international law in order to decide what the value of an agreement of this kind may be as regards third States, and that the question consequently ceases to be one which, by international law, is solely within the domestic jurisdiction of a State, as that jurisdiction is defined above.

2. A. Great Britain denies that the Decrees of November 8th, 1921, are applicable to British subjects, and relies in support of her contention

upon the Treaties concluded by her with the two States which were subsequently placed under protectorate (Treaty between Great Britain and Morocco dated December 9th, 1856, and Treaty between Great Britain and Tunis dated July 19th, 1875). By virtue of these Treaties, persons claimed as British subjects would enjoy a measure of extra-territoriality incompatible with the imposition of another nationality.

According to the French contention, as developed in the course of the oral statements, these Treaties, which were concluded for an indefinite period, that is to say, in perpetuity, have lapsed by virtue of the principle known as the *clausula rebus sic stantibus* because the establishment of a legal and judicial regime in conformity with French legislation has created a new situation which deprives the capitulatory regime of its *raison d'être.*

It is clearly not possible to make any pronouncement upon this point without recourse to the principles of international law concerning the duration of the validity of treaties. It follows, therefore, that in this respect also the question does not, by international law, fall solely within the domestic jurisdiction of a State, as that jurisdiction is defined above.

B. As regards Tunis more especially, France contends that, following upon negotiations between the French and British Governments, Great Britain formally renounced her rights of jurisdiction in the Regency (Note from Lord Granville to M. Tissot dated June 20th, 1883, British Case, Appendix No. 6; French Counter-case page 82; Order in Council of December 31st, 1883), and that by the Franco-British Arrangement of September 18th, 1897, she accepted a new basis for the relations between France and herself in Tunis. It appears from the Cases and Counter-Cases that the two Governments take different views with regard to the scope of the declarations made by Great Britain in this respect and also with regard to the construction to be placed upon the Arrangement of 1897.

The appreciation of these divergent points of view involves, owing to the very nature of the divergence, the interpretation of international engagements. The question therefore does not, according to international law, fall solely within the domestic jurisdiction of a single State, as that jurisdiction is defined above.

C. As far as Morocco is concerned, it is certain that Great Britain still exercises there her consular jurisdiction. France argues that Great Britain, by consenting to the Franco-German Convention of November 4th, 1911, with regard to Morocco, agreed to renounce her capitulatory rights as soon as the new judicial system contemplated by the Convention had been introduced.

The British Government, on the contrary, contends that the Franco-German Convention of 1911—its adhesion to which was conditional

upon the internationalisation of the town and district of Tangiers, a condition which has not yet been fulfilled—was not an agreement for the suppression of the capitulatory regime: in this respect, the relations between France and Great Britain are, it is said, still governed by the second of the Secret Articles of the Anglo-French Declaration of April 8th, 1904 (British Counter-Case, Appendix No. 7).

In the case of Morocco also, therefore, as in the case of Tunis, there is a difference with regard to the interpretation of international engagements. The international character of the legal situation follows not only from the fact that the two governments concerned place a different construction upon the obligations undertaken, but also from the fact that Great Britain exercises capitulatory rights in the territory of the French Protectorate in Morocco. Again, from this standpoint, the question does not, according to international law, fall solely within the domestic jurisdiction of a State, as that jurisdiction is defined above.

3. Apart from all considerations which relate to the protectorate and to the capitulations in Tunis, Great Britain relies, as regards that country, upon the most-favoured-nation clause (Anglo-French Arrangement of September 18th, 1897, and the Notes of March 8th and May 23rd, 1919, exchanged between the French and British Governments on the subject of that Arrangement; see British Case Appendix 9, and French Counter-Case, page 64), in order to assert a claim to benefit by Article 13 of the Franco-Italian Consular Convention of September 28th, 1896. This Article expressly contemplates the preservation of their nationality by Italian subjects in Tunis. France, however, denies that the most-favoured-nation clause relied upon by Great Britain is applicable in the present case, because of the exclusively economic bearing of that clause and because of the synallagmatic character of the Franco-Italian Convention.

It follows that the question is one which, by international law, does not fall solely within the domestic jurisdiction of a single State as defined above.

4. According to the French Government, paragraph 2 of Article 1 of the Arrangement of September 18th, 1897, should be interpreted as a formal recognition by Great Britain of the competence of France to legislate with regard to the situation of persons in Tunis, and more particularly with regard to their nationality, under the same conditions as in France. This construction is disputed by the British Government.

Since, even assuming the French contention to be correct, the question whether France possesses such competence in this respect would still depend, as regards Great Britain, on the construction to be placed upon the most-favoured-nation clause mentioned under No. 3, this question is not, according to international law, solely a matter of domestic jurisdiction as defined above.

The Court, not having to enter into the merits of the dispute, confines itself to consideration of the facts set down under Nos. 1, 2, 3 and 4.

In the opinion of the Court, these facts suffice, even when considered separately, to prove that the dispute arises out of a matter which, by international law, is not solely within the domestic jurisdiction of France as such jurisdiction is defined in this opinion.

For these reasons:

The Court is of opinion that the dispute referred to in the Resolution of the Council of the League of Nations of October 4th, 1922, is not, by international law, solely a matter of domestic jurisdiction (Article 15, paragraph 8, of the Covenant), and therefore replies to the question submitted to it in the negative.

Done in French and English, the French text being authoritative, at the Peace Palace, The Hague, this seventh day of February, nineteen hundred and twenty-three, in two copies, one of which is to be deposited in the archives of the Court and the other to be forwarded to the Council of the League of Nations. . . .

M. Altamira took part in the deliberations of the Court concerning the present opinion but had to leave The Hague before the terms of the opinion were finally settled.[57]

[57] See Permanent Court of International Justice, Acquisition of Polish Nationality, P. C. I. J. Publ., Series B, Advisory Opinion No. 7.

"It is indeed obvious, not only from the general consensus of authors but from the actual conditions of the world, that the question of nationality is one which directly affects international relations. The modern world is a world of individuals organized into or under states: it is just as much an international question to what state a man belongs as to what state a territory belongs. International rights and duties depend constantly on the nationality of individuals. To say that for questions of nationality there is no international law is to hand over a large mass of international matters to anarchy. But this is not to deny that according to international law, nationality as a general rule is left to be settled by municipal regulations." WILLIAMS, "Denationalization," B. Y. B. Int. L. (1927) 45, 51.

CHAPTER IV

TERRITORIAL AUTHORITY IN THE LAW OF NATIONS

SECTION 1. ACQUISITION OF TERRITORIAL AUTHORITY

HALL, INTERNATIONAL LAW

Eighth Edition, page 125, sections 30–31. 1924.

§30. The territorial property of a state consists in the territory occupied by the state community and subjected to its sovereignty, and it comprises the whole area, whether of land or water, included within definite boundaries ascertained by occupation, prescription, or treaty, together with such inhabited or uninhabited lands as are considered to have become attendant on the ascertained territory through occupation or accretion, and, when such area abuts upon the sea, together with a certain margin of water.

§31. A state may acquire territory through a unilateral act of its own by occupation, by cession consequent upon contract with another state or with a community or single owner, by gift, by prescription through the operation of time, or by accretion through the operation of nature.[1]

JOHNSON AND GRAHAM'S LESSEE v. WILLIAM M'INTOSH

United States. Supreme Court. 1823.

8 *Wheaton's Reports* 543.

Error to the District Court of Illinois. This was an action of ejectment for lands in the State and District of Illinois, claimed by the plaintiffs under a purchase and conveyance from the Piankeshaw Indians, and by the defendant, under a grant from the United States. It came up on a case stated, upon which there was a judgment below for the defendant. . . .

[Part of the statement of the case, the arguments of counsel, and part of the opinion are omitted.]

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court. The plaintiffs in this cause claim the land, in their declaration mentioned, under two grants, purporting to be made, the first in 1773, and the last in 1775, by the chiefs of certain Indian tribes, constituting the Illinois

[1] See HEIMBURGER, Der Erwerb der Gebietshoheit.

and the Piankeshaw nations; and the question is, whether this title can be recognised in the Courts of the United States?

The facts, as stated in the case agreed, show the authority of the chiefs who executed this conveyance, so far as it could be given by their own people; and likewise show, that the particular tribes for whom these chiefs acted were in rightful possession of the land they sold. The inquiry, therefore, is, in a great measure, confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country.

As the right of society, to prescribe those rules by which property may be acquired and preserved is not, and cannot be drawn into question; as the title to lands, especially, is and must be admitted to depend entirely on the law of the nation in which they lie; it will be necessary, in pursuing this inquiry, to examine, not singly those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations, whose perfect independence is acknowledged; but those principles also which our own government has adopted in the particular case, and given us as the rule for our decision.

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.

The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles.

Spain did not rest her title solely on the grant of the Pope. Her discussions respecting boundary, with France, with Great Britain, and with the United States, all show that she placed it on the rights given by discovery. Portugal sustained her claim to the Brazils by the same title.

France, also, founded her title to the vast territories she claimed in America on discovery. However conciliatory her conduct to the natives may have been, she still asserted her right of dominion over a great extent of country not actually settled by Frenchmen, and her exclusive right to acquire and dispose of the soil which remained in the occupation of Indians. . . .

The States of Holland also made acquisitions in America, and sustained their right on the common principle adopted by all Europe. . . .

No one of the powers of Europe gave its full assent to this principle, more unequivocally than England. The documents upon this subject are ample and complete. So early as the year 1496, her monarch granted a commission to the Cabots, to discover countries then unknown to Christian people, and to take possession of them in the name of the king of England. Two years afterwards, Cabot proceeded on this voyage, and discovered the continent of North America, along which he sailed as far south as Virginia. To this discovery the English trace their title.

In this first effort made by the English government to acquire territory on this continent, we perceive a complete recognition of the principle which has been mentioned. The right of discovery given by this commission, is confined to countries "then unknown to all Christian people;"

and of these countries Cabot was empowered to take possession in the name of the king of England. Thus asserting a right to take possession, notwithstanding the occupancy of the natives, who were heathens, and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery. . . .

[In an omitted part of the opinion the court reviewed numerous grants and negotiations resting upon the principle of discovery and occupation.]

Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognised in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians. . . .

[In an omitted part of the opinion the court pointed out that the principles approved by European powers in the period of discovery and colonization had been adopted by the United States.]

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.

The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees. The validity of the titles given by either has never been questioned in our Courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with, and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians. . . .

[In an omitted part of the opinion the court considered the right of conquest as applied to Indian territories, the nature of the Indian title, crown rights in the Indian lands during the colonial period, and various opinions and incidents invoked by counsel.]

After bestowing on this subject a degree of attention which was more required by the magnitude of the interest in litigation, and the able and elaborate arguments of the bar, than by its intrinsic difficulty, the Court is decidedly of opinion, that the plaintiffs do not exhibit a title which can

be sustained in the Courts of the United States; and that there is no error in the judgment which was rendered against them in the District Court of Illinois.

Judgment affirmed, with costs.[2]

UNITED STATES, AN ACT TO AUTHORIZE PROTECTION TO BE GIVEN TO CITIZENS OF THE UNITED STATES WHO MAY DISCOVER GUANO

Sections 1 and 5. 1856.

11 *United States Statutes at Large* 119.

Be it enacted . . . That when any citizen or citizens of the United States may have discovered, or shall hereafter discover, a deposit of guano on any island, rock, or key not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and shall take peaceable possession thereof, and occupy the same, said island, rock, or key may, at the discretion of the President of the United States, be considered as appertaining to the United States: Provided, however, That notice be given by such discoverer or discoverers, as soon as practicable, to the State Department of the United States, of such discovery, occupation, and possession, verified by affidavit, describing said island, rock, or key, and the latitude and longitude thereof, as near as may be, and showing that such possession was taken in the name of the United States, and that satisfactory evidence be furnished to the State Department that such island, rock, or key was not, at the time of the discovery thereof, or of the taking possession and occupation thereof by the claimants, in the possession or occupation of any other government or of the citizens of any other government.

Sec. 5. And be it further enacted, That the President of the United States is hereby authorized, at his discretion, to employ the land and naval forces of the United States to protect the rights of the said discoverer or discoverers or their assigns, as aforesaid.[3]

[2] *Cf.* Mitchel v. United States, 9 Pet. 711. See Martin v. Waddell, 16 Pet. 367, 409; Mortimer v. New York Elevated R. Co., 6 N. Y. Supp. 898; Shively v. Bowlby 152 U. S. 1, 50.

See Palmas Island Arbitration, Netherlands and United States, 22 Am. Jour. Int. L. 867; JESSUP, "Palmas Island Arbitration," 22 *ibid.* 735. And see FAUCHILLE, I, Pt. II, 680; GOEBEL, Struggle for the Falkland Islands, ch. 2; HALL, 8th ed., 125; HYDE, I, §§99–104; JÈZE, L'Occupation comme Mode d'Acquérir les Territoires en Droit International; MOORE, Dig. Int. L., I, 258; OPPENHEIM, 4th ed., I, §§220–228.

See BALCH, "Arctic and Antarctic Regions and the Law of Nations," 4 Am. Jour. Int. L. 265; MILLER, "Political Rights in the Arctic," 4 Foreign Affairs 47; MILLER, "National Rights in the Antarctic," 5 *ibid.* 508; SCOTT, "Arctic Exploration and International Law," 3 Am. Jour. Int. L. 928.

[3] See U. S. Rev. Stat., §§5570–5578; Johnson's Islands, 9 Op. Atty. Gen. 364; American Guano Co. v. U. S. Guano Co., 44 Barb. 23; Whiton v. Albany and Narra-

The Foltina

Great Britain. High Court of Admiralty. 1814.

1 *Dodson's Reports* 450.

This was the case of a ship and cargo seized on the 15th of December, 1811, whilst lying at anchor in the roadstead of Heligoland, which island had been surrendered to his Majesty's forces on the 5th of September, 1807. The question was, whether the ship and cargo should be condemned as droits of admiralty or otherwise.[4]

Sir W. Scott. This is the case of a vessel which was taken in the roadstead of Heligoland, not at the time of the surrender of the island, but afterwards, and the seizure is represented to have taken place within the harbor. The locality of the transaction is, I think, sufficiently described by the term made use of by the witnesses, who must be understood to mean that portion of the sea to which vessels are carried for the purpose of landing their cargoes at Heligoland; and whether the same portion of the sea is more or less enclosed, whether it is completely land-locked or not, does not appear to be material to the issue in the present case. The Gazette, too, describes the place as a haven, a compliment to which it is certainly not, in strictness, entitled; but it is used as a haven, and may, therefore, fairly be considered as such, at least, for the purposes of the present question. There is certainly no reason for saying that the property is not within the grant of the crown to the Lord High Admiral, so far as the locality of the seizure is concerned;

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gansett Insurance Companies, 109 Mass. 24; Jones v. United States, 137 U. S. 202; Duncan v. Navassa Phosphate Co., 137 U. S. 647; Moore, Dig. Int. L., I, 556.

See Digest, XLI, i, 7, 3; Institutes, II, i, 22; Selden, Mare Clausum, I, c. 21.

"Whatever may be true of the sea, the land under the sea may be regarded as vacant land subject to title by occupation on the part of any sovereign who is in a position legally to occupy it. Thus the sovereign of the shore may occupy the land under the sea adjoining the coast by opening a mine in the land, and in such a case the mine becomes part of his territory; and the same thing would doubtless be true of a tunnel extended below the sea." Beale, "Jurisdiction of a Sovereign State," 36 Harv. L. Rev. 241, 259. See Colombos, Le Tunnel sous la Manche et le Droit International; Fauchille, I, Pt. II, 61; Oppenheim, 4th ed., I, §§287c–287d; Robin, "Le tunnel sous la Manche et le droit des gens," 15 Rev. Gén. de Dr. Int. Pub. 50.

On the occupation of sedentary fisheries outside the limits of territorial waters, see Great Britain, Sea Fisheries Act, 1868, §67, 31 & 32 Vict. c. 45; United States, Act of 1914, c. 253, 38 U. S. Stat. L. 692; Hurst, "Whose is the Bed of the Sea?" B. Y. B. Int. L. (1923–24) 34.

On the occupation of wreck, see The Tubantia [1924] P. 78.

[4] An Order in Council of 1665–6 provided, in part, "That all ships and goods belonging to enemies coming into any port, creek, or road of this his Majesty's Kingdom of England or of Ireland, by stress of weather or other accident, or by mistake of port, or by ignorance, not knowing of the war, do belong to the Lord High Admiral." 1 Hay & M. 50. See The Rebeckah, 1 C. Rob. 227; The Marie Francoise, 6 C. Rob. 282, Colombos, Law of Prize, 294.

for it is the ordinary rule, that ships, taken in such places during the existence of hostilities, become droits of admiralty.

But the chief point to be considered is, whether, at the time this seizure was made, Heligoland formed part of the dominions of the crown of Great Britain or not. The island, it appears, had been conquered and taken possession of by British forces, but the conquest had not been confirmed to this country by a treaty of peace. It was a firm capture in war, but was still subject to a kind of latent title in the enemy, by which he might have recovered it at the conclusion of the war, provided this country would have consented to its restitution.

It is somewhat extraordinary that, in the course of the numerous and long wars in which this country has been engaged, no case should have been determined which might serve as a guide to the court in the decision of the present question. It does not appear that any case of the kind has hitherto occurred, with the solitary exception of that which has been mentioned in the argument, (The Esperanza,) and that is admitted to have passed with very little notice, and without opposition. A cause thus passing *sub silentio* cannot be considered of great weight in point of authority. I observe that the grant from the crown to the Lord High Admiral applies to the king's dominions generally, and that there is nothing which points to a distinction between those parts of the king's dominions over which the crown has *plenum dominium* or otherwise. No point is more clearly settled in courts of common law than that a conquered country forms immediately part of the king's dominions. (Campbell v. Hall, Cowper's Rep. 208.) In a late instance, we know that an island so acquired (Guadaloupe) was transferred to a third power, subject, undoubtedly, to the shadowy right of the former proprietor. It is said, that a conquest of this kind may be re-acquired *flagranti bello* by the state from which it was taken; but so may any other possession, though forming part of the original and established dominions of the crown of this country, if the enemy has it in his power to make the conquest. The same observation is applicable to the Isle of Wight, as well as to Heligoland, for the enemy has the same right to make a conquest of the one as the other. It is said that the enemy may recover back the island of Heligoland when peace takes place; but it is equally true that the conqueror may retain it if he can; and, if nothing is said about it in the treaty, it remains with the possessor, whose title cannot afterwards be called in question. The distinction between the two species of territories is, in fact, rather more formal than real and substantial, at least I must profess my inability to see any distinction between them that can materially affect the present question. The power of the British government was full and complete; and, though the Lords Commissioners of the Admiralty might not have interposed the particular authority with which they are invested, yet the crown had

exercised its authority, and the admiralty, as the grantee of the crown, would succeed to its rights. It might have erected a court there, for the exercise of admiralty jurisdiction; and, if it did not, I presume that it only refrained from so doing because it was not thought that public convenience required it. The enemy certainly had no right to say that a court of that kind should not be there erected. Under the circumstances, I think there is no solid ground for the distinction that has been taken; and though I am by no means disposed, at this time of day, to enlarge the bounds of the ancient grant from the crown to the Lord High Admiral, which is now become of less consequence, yet it is the duty of the court to maintain ancient landmarks. I shall pronounce for the claim of the admiralty, and condemn this ship as droits of admiralty.

Van Deventer v. Hancke and Mossop

South Africa. Supreme Court of the Transvaal. 1903.

Transvaal Law Reports [1903] *T. S.* 401.

[The statement of the case and the arguments of counsel are omitted. The facts are stated sufficiently in the opinion of Innes, C. J.]

Innes, C. J.: This is an action brought to obtain delivery from the defendants of certain thirty bales of wool or payment of the sum of £ 218 sterling, its value, together with damages for its detention.

The parties were all burghers of the late Republic, and the wool in question was shorn in March, 1901, on the farm Cliffdale in the district of Vryheid, from flocks belonging to the two defendants and to Mossop senior, the father of the second defendant; it was owned in the proportion of one-half by Hancke and one-quarter each by the two Mossops. No bags were available for baling the clip, and it was allowed to remain unpacked upon the farm. At that time the two defendants were residing at Cliffdale; they were both unfit for active service in the ordinary sense of the term. Mossop suffered from rupture, and Hancke was recovering from a severe attack of fever. Under these circumstances they had been excused from duty in the field; but they were entrusted by General Emmett with the care of certain cattle belonging to the Republican forces. These cattle were in the actual custody of a native chief resident at a considerable distance from Cliffdale, but the defendants were ordered from time to time to visit the locality and inspect the animals. I shall assume that in rendering these services Hancke and Mossop were acting under military orders and subject to military authority to the same extent as ordinary burghers then in the field.

Shortly after the wool had been shorn a British column arrived in the neighbourhood. The defendants were ordered by General Dartnell

to proceed to Vryheid, under circumstances which in the view I take of this case it is not necessary to detail, and from Vryheid they were sent down to Natal. Thereafter one Field-Cornet Scholtz, purporting to act under instructions which proceeded from the Commandant-General of the Transvaal forces, confiscated this wool as being movable property belonging to burghers who had wrongfully and without due permission or justification surrendered to the British troops. It was sold by public auction under the directions of Scholtz, and the plaintiff purchased it for the sum of £68, 4s., which was duly paid to Scholtz and accounted for by him to General Emmett, under whose command he was. The plaintiff could not remove the wool from Cliffdale; but he collected it and placed it in an outbuilding, the door of which he nailed up. Before leaving the farm and returning to the field he asked the wife of one Martin to look after it. The wool was still on Cliffdale when the defendants came up from Natal at the conclusion of hostilities, and they took possession of it. The plaintiff, who surrendered in June, 1902, thereafter claimed the property which he had bought, and this action is instituted to settle the rights of the parties.

The case was fully and ably argued on both sides, and many legal questions of interest and difficulty were discussed; but in the view which I take of the matter it will not be necessary to refer to all of them. The plaintiff bases his claim upon two grounds. In the first place, he says that the wool in question was confiscated in accordance with the laws and military usages of the late South African Republic, and that it thereby became the property of the Republic. In the second place, he says that even if the confiscation was not in accordance with the laws of the late Republic, still it was done in good faith and under martial law by the officers of the Boer forces, and should on that account be upheld. On one or other of the above grounds he contends that the confiscation was valid, and that his title by purchase from the confiscating authority is a good title.

The first of these grounds assumes the existence of the late Republic in March, 1901; it is based upon certain proceedings of officials of that State acting in their capacity as such, and carrying out its laws. Moreover, the Law upon which reliance is chiefly placed is one passed by the Republican Executive in the month of December, 1900—after the date of the British annexation. Such a position cannot, in my opinion, be maintained in this Court. On the 1st September, 1900, and therefore six months before the transactions now in issue took place, the territories known as the South African Republic were by Proclamation No. 15 of 1900 annexed to, and declared to form part of, Her Majesty's dominions; and power was given to Lord Roberts, then Commander-in-chief in South Africa, to take such measures and make such laws as he might deem necessary for the peace, order, and good government of the said

territories. In March, 1901, therefore, this country, including the district of Vryheid, formed part of the British dominions; and this Court cannot recognise any government or any legislative authority within its limits, after that date, other than the government and the authority of the British Crown.

It was argued for the plaintiff that the Annexation Proclamation was premature; that at the time when this wool was confiscated the district of Vryheid was subject to the *de facto* control and administration of the Boer forces; that although the Proclamation purported to annex the territory of the Transvaal to the empire, there had, at the time of the annexation, been no effectual occupation of it as a country, and no subjugation of its people; and that therefore the Republic continued to exist as a State, and its Government was entitled to exercise legislative and administrative functions. It is no doubt correct as a general rule of international law that two circumstances are necessary to create a complete title by conquest: the conqueror must express in some clear manner his intention of adding the territory in question to his dominions, and he must by the exercise of military force demonstrate his power to hold it as part of his own possessions. It is also true that in March, 1901, large portions of the Transvaal, including the district of Vryheid, were neither occupied nor dominated by British troops; but on the contrary were under the *de facto* control of the Boer forces. And if this were a foreign Court engaged in trying a cause in regard to which the question of when the conquest of the Transvaal was complete became relevant to the inquiry, it is possible that points of considerable intricacy and difficulty would present themselves. But those considerations are not present here. This is a Court constituted by the British Crown, exercising powers and discharging functions derived from the Crown. In its dealings with other States the Crown acts for the whole nation, and such dealings cannot be questioned or set aside by its Courts. They are acts of State into the validity or invalidity, the wisdom or unwisdom, of which domestic Courts of law have no jurisdiction to inquire. . . .

[In an omitted part of the opinion Chief Justice Innes referred to Secretary of State v. Kamachee Boye Sahaba, 13 Moo. P. C. 22.]

Mr. Smuts argued, however, that the British Government had recognised the continued existence of the South African Republic, or at any rate of its Government, by concluding a treaty of peace with it on the 31st May, 1902; and that this Court, therefore, should also recognise it. I do not so read the Articles of Peace signed at Pretoria. On the contrary, it seems to me that scrupulous care was taken by those who represented the British Government to refrain from any recognition of the South African Republic or its Government, while at the same time they fully recognised the position of certain leaders of a force entitled to all the privileges of belligerents, as being persons with whom it was

proper and necessary to treat in regard to the terms upon which that force should lay down its arms. This is clear to my mind from the language used in describing the capacities of the several signatories and the persons they represented, and the body of the document, while referring to the burgher forces and to the burghers in the field, makes no reference whatever to the Governments of either of the two Republics.

For the reasons I have indicated, I am of opinion that this Court cannot recognise the existence of the Government of the South African Republic, or the validity of any laws purporting to be passed by that Government after the 1st September, 1900. This conclusion is fatal to the plaintiff's claim as founded upon the first count of the declaration. For in it the plaintiff's title is based upon purchase from the late South African Republic, or its Government; and if the Court cannot recognise their existence at the date of the alleged purchase, it follows that the plaintiff cannot establish his right to the wool he claims upon the grounds set out in his first count.

Strictly speaking, it would be possible to dispose of the second count upon the same considerations; because the persons who are stated to have confiscated this wool under martial law are described as officers of the late Republic, and the confiscation relied upon would seem to be a confiscation to the Republican Government under an enactment passed after the date of annexation. But I prefer to consider the alternative claim not from that standpoint, but upon the broad grounds on which it was argued at the trial. Briefly stated, the contention of the plaintiff on this part of his case was as follows: Assuming that the confiscation was not in accordance with such Transvaal law as this Court can recognise, still it was the act of the military officers of a force entitled to belligerent rights, and therefore entitled to enforce martial law—at any rate in respect of the persons and property of its own members. The act was done in good faith, and in furtherance of the prosecution of hostilities in which the defendants as well as the plaintiff were engaged; it was done under martial law, and neither the act itself nor its consequences should now be questioned by this Court.

It is not easy to define the exact position which the burgher forces of the Transvaal should be held by a British Court to have occupied after the issue of the Annexation Proclamation. At first sight it would seem that considerable assistance might be derived by resort to American precedent. The Southern Confederacy was not during the Civil War recognised as a Government either by the President or by the Courts of the United States. But there is this fundamental distinction between the two cases: the Confederacy, in spite of its power and its strength, in spite of the fact that it dominated vast tracts of country and controlled and governed a very large population, was nevertheless essentially an illegal organisation, formed for the purpose of rebelling against the

constituted authority of the Union. And the attitude taken up by the Supreme Court of the United States towards the Confederacy and towards all acts done in furtherance of the rebellion was due to that consideration. The position of the burgher forces, on the other hand, was not affected by any such taint of illegality. And yet, from the point of view of a British Court, they were a community or body of men possessing no territory as a State and under no form of government which such a Court could recognise as a legal government. But, as between the two contending armies they enjoyed full belligerent rights. The recognition of such rights is quite consistent with a denial of any claim to sovereignty (see Rose v. Himley, 4 Cranch, U. S. Reps. at p. 271), and certainly does not imply that the armed organisation to which such recognition was accorded could legally make any regulations affecting the rights of British subjects.

The question is whether the leaders of that community could, in furtherance of the common purpose for which it was striving, deal with the property of its members without their consent, and whether this Court should recognise such dealing or give effect to its consequences. Without deciding the point, I shall for the purposes of this case assume that they could so deal with the property of those over whom they exercised control. But clearly they could exercise such power to no greater extent than would have been possible if there had been no annexation and if the Republican Government had still been in existence at Pretoria. The fact that a hostile power had issued a Proclamation annexing their territory could not give them more power over the burghers than they possessed before. Consequently we must look to those enactments which, whether they all of them were valid laws or not, were regarded by all members of the burgher forces as having the force of law, in order to see whether the military officers of these forces acted within their rights in confiscating this particular wool—bearing in mind that it was not commandeered for warlike purposes, but was taken from the defendants as a penalty for their alleged offence in having voluntarily surrendered without sufficient cause. . . .

[In an omitted part of the opinion Chief Justice Innes examined relevant enactments of the South African Republic and concluded that they did not authorize the confiscation of defendants' wool by the Boer military authorities.]

I come, therefore, to the conclusion that Field-Cornet Scholtz had no jurisdiction to deal with the charge against the defendants in the way in which he did. Assuming that the military authorities of the burgher forces had the same power over the defendants and their property that they would have had in case no Annexation Proclamation had been issued, I still consider that the confiscation was not justified by the martial law under which action purports to have been taken.

That being the result at which I have arrived, I am relieved from the necessity of considering the facts of the charge brought against the defendants. Were it necessary and right to do so, I should hold that their surrender was not voluntary; that they were obliged to act as they did, and that under the circumstances there was no other course reasonably open to them.

The plaintiff having failed on every ground in showing that the *dominium* in this wool was taken out of the defendants in favour either of the Government of the late Republic or the military authorities of the burgher forces, it is clear that his own title derived by purchase from one or other of those bodies must fail. Judgment should, therefore, be for the defendants with costs.

[The opinion of Mason, J., is omitted.]

Bristowe, J.: This is an action to recover certain bales of wool or the value of them. The wool is lying on the defendant Mossop's farm Cliffdale, situate about fifteen miles east of Vryheid.

Both the defendants were burghers of the late South African Republic. In March, 1901, they surrendered to the British. As a penalty for such surrender the Boer military authorities purported to confiscate the wool, and sold it by auction to the plaintiff. At the time of the sale the wool was lying on the farm where it now is, but I am satisfied from the evidence that the plaintiff took delivery of it and that the *dominium* passed to him.

The question at issue in the action is whether the sale of the wool was a valid sale, and this depends on whether the confiscation was a valid confiscation.

In September, 1900, Lord Roberts' Proclamation annexing the Transvaal was issued. Mr. Smuts admitted very frankly that the effect of this was to incorporate the territory of the South African Republic in the British dominions. And I think it is necessary to go a step farther and to say, that inasmuch as, according to modern notions at all events, the possession of territory is essential to the existence of a State, the Proclamation taken in connection with the events which subsequently occurred put an end from the moment of its issue to the existence of the Republic as a political unit. We are then brought face to face with the difficult question of what was the legal position of the burgher forces still remaining in the field. Upon this question there is, so far as I know, no authority; and it may be that the position in which the Boer forces were placed by the Annexation Proclamation was one unexampled in history.

Now, in the first place, these forces were the remains of the fighting force of the South African Republic. There was, as it seems to me, no question of according to them belligerent rights. They were enemies who still remained unconquered. In the second place, they were a

community of persons, bound together by ties of blood, actuated by a common purpose, and capable of contracting. So much was admitted by the treaty of Vereeniging, which on the face of it was an agreement between the British Government, on the one hand, and the outstanding burghers acting through their representatives on the other. Moreover, the treaty of Vereeniging recognised them as having a *de facto* Government, for their representatives were described as "acting as the Government of the South African Republic." Indeed, the recognition of their existence as a community involves, as it seems to me, an admission that they had some form of organisation or constitution, and that there were certain laws by which they were bound *inter se.*

What, then, was this constitution and what were these laws? Two views were suggested. One is that the outstanding burgher forces carried with them into their exile (if I may be allowed the expression) the laws of their late State, so far as such laws were necessary or applicable to their existence as a military community. The other is, that by some sort of implied agreement or by common consent they became subject to martial law, namely, the expression of the will of their military commanders.

Of these two views the former appears to be the sounder, and I hold that the laws by which the remnant of the Boer forces were bound *inter se* were those of their old State, so far as they were applicable to the military organisation, which was all that then remained. Now the military organisation of the South African Republic in time of war was contained in Law No. 20 of 1898, and I think one or two amending statutes. Mr. Smuts said that this was a mere commando law, but that seems to me to be rather a question-begging epithet. It was no doubt a commando law in the sense that it provided for the calling out of the commandos; but it was nevertheless a law by virtue of which the country could be transformed into a camp and the nation into an army, and which, since *inter arma silent leges,* provided for the suspension, in the presence of the common enemy, of the civil courts.

These laws contained no provision authorising such a confiscation of private property as occurred in the present case. But it is said that, assuming this to be so, the power of confiscation was created by the Krijgsraad resolution of the 24th May, 1900, confirmed and legalised by Resolution of the Executive Council on the 24th December, 1900.

Now I am not prepared to say that the burghers still in the field, being, as I think, an organised military community, had no power of enacting new laws binding on them *inter se.* But I am relieved from the necessity of considering whether such a power, if it existed, was exercised in the present case, because it seems to me that even if the Krijgsraad resolution acquired for the burghers the force of law, it did not authorise the confiscation of the defendants' property. . . .

It appears to me, therefore, that the confiscation of the defendants' goods was *ultra vires*, and that the plaintiff's claim must fail.

I may add that the same conclusion seems to me to be reached if we adopt the alternative that the only law to which the Boer forces remained subject after the annexation was martial law represented by the will of their military commanders. It seems clear that General Botha's circular of the 3rd December, 1900, did not apply to such a case as the present. General Emmett, however, says that acting under orders received from his superior officers, he gave general instructions for the confiscation of the goods of burghers "voluntarily surrendering." It was in pursuance of these instructions that the confiscation is alleged to have taken place, and it is not suggested that the confiscation of the property of burghers who did not voluntarily surrender was ever authorised or intended to be authorised. If, therefore, I am right in thinking that the defendants' surrender was not voluntary, the confiscation was outside the instructions of the military commanders and was accordingly invalid.

From every point of view, therefore, it seems to me that this action fails and must be dismissed, with costs.[5]

The United States v. Rice

United States. Supreme Court. 1819.

4 *Wheaton's Reports* 246.

Error to the Circuit Court of Massachusetts.

[Part of the statement of the case is omitted.]

This was an action of debt, brought by the United States against the defendant, upon a bond for the penal sum of 15,000 dollars, dated the 17th of April, 1815. . . .

The cause was argued by the Attorney General, for the United States, and by Mr. Webster, for the defendant.

Mr. Justice Story delivered the opinion of the Court.

The single question arising on the pleadings in this case is, whether goods imported into Castine during its occupation by the enemy are liable to the duties imposed by the revenue laws upon goods imported into the United States. It appears, by the pleadings, that on the first day of September, 1814, Castine was captured by the enemy, and remained in his exclusive possession, under the command and control of his military and naval forces, until after the ratification of the treaty of peace in February, 1815. During this period the British government exercised all civil and military authority over the place; and established

[5] *Cf.* Lemkuhl v. Kock, Transvaal L. R. [1903] T. S. 451.

a custom-house, and admitted goods to be imported, according to regulations prescribed by itself, and, among others, admitted the goods upon which duties are now demanded. These goods remained at Castine until after it was evacuated by the enemy; and, upon the re-establishment of the American government, the collector of the customs, claiming a right to American duties on the goods, took the bond in question from the defendant, for the security of them.

Under these circumstances, we are all of opinion, that the claim for duties cannot be sustained. By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognise and impose. From the nature of the case, no other laws could be obligatory upon them, for where there is no protection or allegiance or sovereignty, there can be no claim to obedience. Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port; and goods imported into it by the inhabitants, were subject to such duties only as the British government chose to require. Such goods were in no correct sense imported into the United States. The subsequent evacuation by the enemy, and resumption of authority by the United States, did not, and could not, change the character of the previous transactions. The doctrines respecting the *jus postliminii* are wholly inapplicable to the case. The goods were liable to American duties, when imported, or not at all. That they are so liable at the time of importation is clear from what has been already stated; and when, upon the return of peace, the jurisdiction of the United States was re-assumed, they were in the same predicament as they would have been if Castine had been a foreign territory ceded by treaty to the United States, and the goods had been previously imported there. In the latter case, there would be no pretence to say that American duties could be demanded; and, upon principles of public or municipal law, the cases are not distinguishable. The authorities cited at the bar would, if there were any doubt, be decisive of the question. But we think it too clear to require any aid from authority.

Judgment affirmed, with costs.[6]

[6] *Cf.* Shanks v. Dupont, 3 Pet. 242, 245–6; De Jager v. Attorney-General of Natal [1907] A. C. 326, *infra*, 848.

See Thirty Hogsheads of Sugar v. Boyle, 9 Cr. 191; The Gerasimo, 11 Moo. P. C. 88.

Joseph Fleming and William A. Marshall, Trading under the Firm of Fleming & Marshall, v. James Page, Collector of the United States

United States. Supreme Court. 1850.

9 *Howard's Reports* 603.

This case came up from the Circuit Court of the United States for the Eastern District of Pennsylvania, on a certificate of division in opinion between the judges thereof.

[Part of the statement of the case and the arguments of counsel are omitted.]

It was an action brought by Fleming and Marshall against Page, collector of the port of Philadelphia, in one of the State courts of Pennsylvania, in 1847, to recover back certain duties on goods, wares, and merchandise, imported into the port of Philadelphia from Tampico, in Mexico, in March and June of that year. The case was afterwards, in 1848, taken into the Circuit Court of the United States for the Eastern District of Pennsylvania. . . .

The cause having come on to be argued on the case stated, the judges of the Circuit Court were opposed in opinion on the following point:—

"Whether Tampico, in the year 1847, while in the military occupation of the forces of the United States, ceased to be a foreign country, within the meaning of the first section of the act of Congress passed 30th July, 1846, entitled, 'An act reducing the duty on imports, and for other purposes'; so that goods, wares, and merchandise of the produce, growth, and manufacture of Mexico, or any part thereof, imported into the port of Philadelphia from Tampico, during said military occupation, were not subject to the payment of the duties prescribed by the said act, but entitled to be entered free of duty as from a domestic port." . . .

Upon the above certificate of division in opinion, the case came up to this court. . . .

Mr. Chief Justice Taney delivered the opinion of the court.

The question certified by the Circuit Court turns upon the construction of the act of Congress of July 30, 1846. The duties levied upon the cargo of the schooner Catharine were the duties imposed by this law upon goods imported from a foreign country. And if at the time of this shipment Tampico was not a foreign port within the meaning of the act of Congress, then the duties were illegally charged, and, having been paid under protest, the plaintiffs would be entitled to recover in this action the amount exacted by the collector.

The port of Tampico, at which the goods were shipped, and the Mexican State of Tamaulipas, in which it is situated, were undoubtedly at the time of the shipment subject to the sovereignty and dominion of the United States. The Mexican authorities had been driven out, or

had submitted to our army and navy; and the country was in the exclusive and firm possession of the United States, and governed by its military authorities, acting under the orders of the President. But it does not follow that it was a part of the United States, or that it ceased to be a foreign country, in the sense in which these words are used in the acts of Congress.

The country in question had been conquered in war. But the genius and character of our institutions are peaceful, and the power to declare war was not conferred upon Congress for the purposes of aggression or aggrandizement, but to enable the general government to vindicate by arms, if it should become necessary, its own rights and the rights of its citizens.

A war, therefore, declared by Congress, can never be presumed to be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's country. The United States, it is true, may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered, or to reimburse the government for the expenses of the war. But this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. His duty and his power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.

It is true, that, when Tampico had been captured, and the State of Tamaulipas subjugated, other nations were bound to regard the country, while our possession continued, as the territory of the United States, and to respect it as such. For, by the laws and usages of nations, conquest is a valid title, while the victor maintains the exclusive possession of the conquered country. The citizens of no other nation, therefore, had a right to enter it without the permission of the American authorities, nor to hold intercourse with its inhabitants, nor to trade with them. As regarded all other nations, it was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries.

But yet it was not a part of this Union. For every nation which acquires territory by treaty or conquest holds it according to its own

institutions and laws. And the relation in which the port of Tampico stood to the United States while it was occupied by their arms did not depend upon the laws of nations, but upon our own Constitution and acts of Congress. The power of the President under which Tampico and the State of Tamaulipas were conquered and held in subjection was simply that of a military commander prosecuting a war waged against a public enemy by the authority of his government. And the country from which these goods were imported was invaded and subdued, and occupied as the territory of a foreign hostile nation, as a portion of Mexico, and was held in possession in order to distress and harass the enemy. While it was occupied by our troops, they were in an enemy's country, and not in their own; the inhabitants were still foreigners and enemies, and owed to the United States nothing more than the submission and obedience, sometimes called temporary allegiance, which is due from a conquered enemy, when he surrenders to a force which he is unable to resist. But the boundaries of the United States, as they existed when war was declared against Mexico, were not extended by the conquest; nor could they be regulated by the varying incidents of war, and be enlarged or diminished as the armies on either side advanced or retreated. They remained unchanged. And every place which was out of the limits of the United States, as previously established by the political authorities of the government, was still foreign; nor did our laws extend over it. Tampico was, therefore, a foreign port when this shipment was made.

Again, there was no act of Congress establishing a custom-house at Tampico, nor authorizing the appointment of a collector; and, consequently, there was no officer of the United States authorized by law to grant the clearance and authenticate the coasting manifest of the cargo, in the manner directed by law, where the voyage is from one port of the United States to another. The person who acted in the character of collector in this instance, acted as such under the authority of the military commander, and in obedience to his orders; and the duties he exacted, and the regulations he adopted, were not those prescribed by law, but by the President in his character of commander-in-chief. The custom-house was established in an enemy's country, as one of the weapons of war. It was established, not for the purpose of giving to the people of Tamaulipas the benefits of commerce with the United States, or with other countries, but as a measure of hostility, and as a part of the military operations in Mexico; it was a mode of exacting contributions from the enemy to support our army, and intended also to cripple the resources of Mexico, and make it feel the evils and burdens of the war. The duties required to be paid were regulated with this view, and were nothing more than contributions levied upon the enemy, which the usages of war justify when an army is operating in the enemy's country. The permit and coasting manifest granted by an officer thus appointed,

and thus controlled by military authority, could not be recognized in any port of the United States, as the documents required by the act of Congress when the vessel is engaged in the coasting trade, nor could they exempt the cargo from the payment of duties.

This construction of the revenue laws has been uniformly given by the administrative department of the government in every case that has come before it. And it has, indeed, been given in cases where there appears to have been stronger ground for regarding the place of shipment as a domestic port. For after Florida had been ceded to the United States, and the forces of the United States had taken possession of Pensacola, it was decided by the Treasury Department, that goods imported from Pensacola before an act of Congress was passed erecting it into a collection district, and authorizing the appointment of a collector, were liable to duty. That is, that although Florida had, by cession, actually become a part of the United States, and was in our possession, yet, under our revenue laws, its ports must be regarded as foreign until they were established as domestic, by act of Congress; and it appears that this decision was sanctioned at the time by the Attorney-General of the United States, the law officer of the government.[7] And although not so directly applicable to the case before us, yet the decisions of the Treasury Department in relation to Amelia Island, and certain ports in Louisiana, after that province had been ceded to the United States, were both made upon the same grounds. And in the latter case, after a custom-house had been established by law at New Orleans, the collector at that place was instructed to regard as foreign ports Baton Rouge and other settlements still in the possession of Spain, whether on the Mississippi, Iberville, or the sea-coast. The Department in no instance that we are aware of, since the establishment of the government, has ever recognized a place in a newly acquired country as a domestic port, from which the coasting trade might be carried on, unless it had been previously made so by act of Congress.

The principle thus adopted and acted upon by the executive department of the government has been sanctioned by the decisions in this court and the Circuit Courts whenever the question came before them. We do not propose to comment upon the different cases cited in the argument. It is sufficient to say, that there is no discrepancy between them. And all of them, so far as they apply, maintain, that under our revenue laws every port is regarded as a foreign one, unless the custom-house from which the vessel clears is within a collection district established by act of Congress, and the officers granting the clearance exercise their functions under the authority and control of the laws of the United States.

In the view we have taken of this question, it is unnecessary to notice particularly the passages from eminent writers on the laws of nations

[7] 1 Op. Atty. Gen. 483.

which were brought forward in the argument. They speak altogether of the rights which a sovereign acquires, and the powers he may exercise in a conquered country, and they do not bear upon the question we are considering. For in this country the sovereignty of the United States resides in the people of the several States, and they act through their representatives, according to the delegation and distribution of powers contained in the Constitution. And the constituted authorities to whom the power of making war and concluding peace is confided, and of determining whether a conquered country shall be permanently retained or not, neither claimed nor exercised any rights or powers in relation to the territory in question but the rights of war. After it was subdued, it was uniformly treated as an enemy's country, and restored to the possession of the Mexican authorities when peace was concluded. And certainly its subjugation did not compel the United States, while they held it, to regard it as a part of their dominions, nor to give to it any form of civil government, nor to extend to it our laws.

Neither is it necessary to examine the English decisions which have been referred to by counsel. It is true that most of the States have adopted the principles of English jurisprudence, so far as it concerns private and individual rights. And when such rights are in question, we habitually refer to the English decisions, not only with respect, but in many cases as authoritative. But in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belong to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers of the executive arm of the government are brought into question. Our own Constitution and form of government must be our only guide. And we are entirely satisfied that, under the Constitution and laws of the United States, Tampico was a foreign port, within the meaning of the act of 1846, when these goods were shipped, and that the cargoes were liable to the duty charged upon them. And we shall certify accordingly to the Circuit Court.

Mr. Justice McLean dissented.[8]

[8] See Fauchille, I, Pt. II, 763; Hyde, I, §106; Oppenheim, 4th ed., I, §§236–241; Westlake, "Nature and Extent of the Title by Conquest," Collected Papers, 475.

For proposals intended to deprive conquest of important legal consequences, see Moore, Dig. Int. L., I, 292; American Institute of International Law, Project No. 30, 20 Am. Jour. Int. L. Spec. Suppl. 384; Oppenheim, 4th ed., I, §§167m, 241a.

"International law is still primitive; we do the world no service if we seek to deny it. Conquest is often, though not always, a moral wrong. But it is not illegal and it produces legal results. We shall not advance the cause of peace and international order by seeking to deny that war produces results—such as the acquisition of terri-

The Fama, Butler

Great Britain. High Court of Admiralty. 1804.

5 *C. Robinson's Reports* 106.

This was a question respecting the national character of Louisiana, whether it was, at the time of capture, May 1803, to be considered as a Spanish settlement, or as belonging to France, by reason of the treaty of Idelfonso, 1796, by which it was ceded to that country. The question arose on the claim of Mr.——, a merchant, resident at New Orleans, for property taken, May 1803, on a voyage from New Orleans to Havre le Grace.

[The arguments of counsel and part of the opinion are omitted.]

Sir W. Scott.—The present question is a general one, respecting the situation, in which the people of a distant settlement are placed, by a Treaty of the State to which they undoubtedly belong, and by which they are stipulated to be transferred to another power. The case proceeded for a considerable time without dispute as to principle, on a mere enquiry into the fact of possession; under an understanding, as I apprehended, that if possession had not been taken by France, the French character could not be deemed to have attached. The question has however now been fully argued as to the principle of law, whether the Treaty did not in itself confer full sovereignty and right of dominion, and whether the inhabitants were not so ceded by that Treaty, as to become immediately French subjects. . . .

It is to be observed then, that all corporeal property depends very much upon occupancy. With respect to the origin of property, this is the Sole foundation, *Quod nullius est ratione naturali occupanti conceditur.* So with regard to transfer also, it is universally held in all systems of jurisprudence, that to consummate the right of property, a person must unite the right of the thing with possession. A question has been made indeed by some writers, whether this necessity proceeds from what they call the natural law of nations, or from that which is only conventional. Grotius seems to consider it as proceeding only from civil institutions. Puffendorf and Pothier go farther. All concur, however, in holding it to be a necessary principle of jurisprudence, that to complete the right

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tory—which it does in fact produce. If we want to stop the forcible acquisition of territory, we must stop private war. An effective prohibition of forcible entry—as by a rigorously enforced Article 10 of the Covenant—will prevent a case of disseisin arising. But disseisin, once it happens, produces legal results, and we have at present no rules for the trial of an international action originated by a 'writ of right.'" Williams, "Sovereignty, Seisin, and the League," B. Y. B. Int. L. (1926) 24, 41.

On the mandate system, inaugurated at the conclusion of war in 1919–20, see *supra*, 135.

of property, the right to the thing, and the possession of the thing itself, should be united; or, according to the technical expression, borrowed either from the civil law, or as Barbeyrac explains it, from the commentators on the Canon Law, that there should be both the *jus in rem*, and the *jus in re*.—This is the general law of property, and applies, I conceive, no less to the right of territory than to other rights. Even in newly discovered countries, where a title is meant to be established, for the first time, some act of possession is usually done and proclaimed as a notification of the fact. In transfer, surely, where the former rights of others are to be superseded, and extinguished, it cannot be less necessary that such a change should be indicated by some public acts, that all who are deeply interested in the event, as the inhabitants of such settlements, may be informed under whose dominion, and under what laws they are to live. This I conceive to be the general propriety of principle on the subject, and no less applicable to cases of territory, than to property of every other description.

It will be only necessary to enquire then, whether the practice has been conformable to what we might conceive to be the true principle of law. On this point no doubt can be entertained. The *Corps Diplomatique*[9] is full of instances of this kind: Where stipulations of Treaties for ceding particular countries are to be carried into execution, solemn instruments of cession are drawn up, and adequate powers are formally given to the persons, by whom the actual delivery is to be made. In modern times, more especially, such a proceeding is become almost a matter of necessity, with regard to the colonial establishments of the States of Europe in the new world. The Treaties by which they are affected may not be known to them for months after they are made. Many articles must remain executory only, and not executed, till carried into effect; and until that is done by some public act, the former sovereignty must remain. Amongst the instances that might be cited to shew what the practice has been on this subject, I will mention only a few. On the cession of Nova Scotia to France by Treaty, 21st July, 1667, the act of cession, which purports to be made in consequence of the Treaty, was not drawn up till February 1668, when full powers were sent out to deliver up the settlement to the person who should be empowered to take possession, under the great seal of France.—Another instance, which comes nearer to the present question, is to be found in the proceedings which took place when this very settlement of Louisiana was ceded by France to Spain in 1762. It passed by act of cession drawn up in solemn form, and dated more than a year after the Treaty itself. Indeed modern history abounds in such instances. If to these it were necessary to add the authority of a judicial recognition of the principle, I think the case of Wroughton against Mann, to which I

[9] DUMONT, Corps Universel Diplomatique du Droit des Gens.

alluded on the former day, is strongly in point. That was a case before the delegates on appeal in a revenue cause. The Act of Court pleaded, "that East Florida was ceded to Spain by Treaty of 1803, and that eighteen months were allowed for emigration. 2dly. That notwithstanding the Treaty, the English laws continued till the Spanish Government arrived and received delivery from General Tonin; and the formal instruments, under which possession was afterwards taken, were exhibited." The offence charged was an act of importation contrary to the British Revenue Laws, long after the ratification of the Treaty, but before the arrival of the Spanish Governor, and the actual delivery. Objections were taken to the allegation, similar to the arguments which have been urged in the present case, *viz.* "That the country had passed to Spain by virtue of the Treaty; that the continuance of British possession was but an usurpation; and that the offence was no longer amenable to the British laws. If that could have been sustained, the plea must have been bad; but it was not so held. The Court of Delegates were of opinion, that the contract was merely executory, and till it was carried into execution, the British possession, and the British laws," continued in full force. On this ground the allegation was admitted. The cause proceeded, and went off afterwards on failure of proof as to the fact; but the opinion of the Court, as to the law, was fully declared by the admission of such a plea. I am of opinion, therefore, that on all the several grounds of reason or practice, and judicial recognition, until possession was actually taken, the inhabitants of New Orleans continued under the former sovereignty of Spain. . . .

[In an omitted part of the opinion the court considered the evidence and concluded that the French government had not taken possession at the time of the capture.]

. . . In this situation of things, it appears to me, upon the grounds before stated, that the colony must be considered as continuing, at the time of capture, under the dominion of Spain, and consequently that these persons, as Spanish subjects, are entitled to restitution.[10]

[10] "I understand that possession of East Florida was not delivered to the United States until the 17th of last month: whereas the Olive Branch, as appears by her papers, cleared out from the port of St. Augustine on the 14th of the month. Now, according to the doctrine laid down in the case of the Fama, Butler master, and reported in 5 Robinson, 97, the jurisdiction and authority of the former sovereign continued in full force until possession of the ceded territory had actually passed. If I am right, then, as to the time of delivery, the cargo of the Olive Branch was imported into Philadelphia from a foreign port or place, and the case falls completely within the control of the act of the United States to regulate the collection of duties on imports and tonnage; subjecting the vessel, cargo, the master, and owners, to all the penalties and forfeitures prescribed by that act for a breach of its several regulations." Opinion of Attorney-General Wirt, 1 Op. Atty. Gen. 483. See also Keene v. M'Donough, 8 Pet. 308. *Cf.* Davis v. Police Jury of Concordia, 9 How. 280.

De Lima v. Bidwell

United States. Supreme Court. 1901.

182 *United States Reports* 1.

This was an action originally instituted in the Supreme Court of the State of New York by the firm of D. A. De Lima & Co. against the collector of the port of New York, to recover back duties alleged to have been illegally exacted and paid under protest, upon certain importations of sugar from San Juan in the island of Porto Rico, during the autumn of 1899, and subsequent to the cession of the island to the United States.

Upon the petition of the collector, and pursuant to Rev. Stat. sec. 643, the case was removed by *certiorari* to the Circuit Court of the United States, in which the defendant appeared and demurred to the complaint upon the ground that it did not state a cause of action, and also that the court had no jurisdiction of the case. The demurrer was sustained upon both grounds, and the action dismissed. Hence this writ of error. . . .

[Part of the statement of the case, the arguments of counsel, and part of the opinion are omitted.]

Mr. Justice Brown delivered the opinion of the court.

This case raises the single question whether territory acquired by the United States by cession from a foreign power remains a "foreign country" within the meaning of the tariff laws. . . .

[In an omitted part of the opinion the court considered the question of jurisdiction and concluded that the action was properly brought.]

Whether these cargoes of sugar were subject to duty depends solely upon the question whether Porto Rico was a "foreign country" at the time the sugars were shipped, since the tariff act of July 24, 1897, c. 11, 30 Stat. 151, commonly known as the Dingley act, declares that "there shall be levied, collected and paid upon all articles imported from foreign countries" certain duties therein specified. A foreign country was defined by Mr. Chief Justice Marshall and Mr. Justice Story to be one exclusively within the sovereignty of a foreign nation, and without the sovereignty of the United States. The Boat Eliza, 2 Gall. 4; Taber v. United States, 1 Story, 1; The Ship Adventure, 1 Brock. 235, 241.

The status of Porto Rico was this: The island had been for some months under military occupation by the United States as a conquered country, when, by the second article of the treaty of peace between the United States and Spain, signed December 10, 1898, and ratified April 11, 1899, Spain ceded to the United States the island of Porto Rico, which has ever since remained in our possession, and has been governed and administered by us. If the case depended solely upon these facts, and the question were broadly presented whether a country which had been

ceded to us, the cession accepted, possession delivered, and the island occupied and administered without interference by Spain or any other power, was a foreign country or domestic territory, it would seem that there could be as little hesitation in answering this question as there would be in determining the ownership of a house deeded in fee simple to a purchaser, who had accepted the deed, gone into possession, paid taxes and made improvements without let or hindrance from his vendor. But it is earnestly insisted by the Government that it never could have been the intention of Congress to admit Porto Rico into a customs union with the United States, and that, while the island may be to a certain extent domestic territory, it still remains a "foreign country" under the tariff laws, until Congress has embraced it within the general revenue system.

We shall consider this subject more at length hereafter, but for the present call attention to certain cases in this court and certain regulations of the executive departments which are supposed to favor this contention.

. . .

[In an omitted part of the opinion the court referred to United States v. Rice, 4 Wh. 246; Fleming v. Page, 9 How. 603; Cross v. Harrison, 16 How. 164; the rulings of the executive departments with respect to the status of newly acquired territories; and the Foraker Act, §2, 31 U. S. Stat. L. 77.]

From this résumé of the decisions of this court, the instructions of the executive departments, and the above act of Congress, it is evident that, from 1803, the date of Mr. Gallatin's letter, to the present time, there is not a shred of authority, except the dictum in Fleming v. Page, (practically overruled in Cross v. Harrison,) for holding that a district ceded to and in the possession of the United States remains for any purpose a foreign country. Both these conditions must exist to produce a change of nationality for revenue purposes. Possession is not alone sufficient, as was held in Fleming v. Page; nor is a treaty ceding such territory sufficient without a surrender of possession. Keene v. McDonough, 8 Pet. 308; Pollard's Heirs v. Kibbe, 14 Pet. 353, 406; Hallett v. Hunt, 7 Ala. 882, 899; The Fama, 5 Ch. Rob. 97. The practice of the executive departments, thus continued for more than half a century, is entitled to great weight, and should not be disregarded nor overturned except for cogent reasons, and unless it be clear that such construction be erroneous. United States v. Johnston, 124 U. S. 236, and other cases cited.

But were this presented as an original question we should be impelled irresistibly to the same conclusion.

By Article II, section 2, of the Constitution, the President is given power, "by and with the advice and consent of the Senate, to make treaties, provided that two-thirds of the senators present concur;" and by Art. VI, "this Constitution and the laws of the United States, which

shall be made in pursuance thereof; and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land." It will be observed that no distinction is made as to the question of supremacy between laws and treaties, except that both are controlled by the Constitution. A law requires the assent of both houses of Congress, and, except in certain specified cases, the signature of the President. A treaty is negotiated and made by the President, with the concurrence of two thirds of the Senators present, but each of them is the supreme law of the land.

As was said by Chief Justice Marshall in The Peggy, 1 Cranch, 103, 110: "Where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court as an act of Congress." And in Foster v. Neilson, 2 Pet. 253, 314, he repeated this in substance: "Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision." So in Whitney v. Robertson, 124 U. S. 190: "By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always that the stipulation of the treaty on the subject is self-executing." To the same effect are the Cherokee Tobacco, 11 Wall. 616, and the Head Money Cases, 112 U. S. 580.

One of the ordinary incidents of a treaty is the cession of territory. It is not too much to say it is the rule, rather than the exception, that a treaty of peace, following upon a war, provides for a cession of territory to the victorious party. It was said by Chief Justice Marshall in American Ins. Co. v. Canter, 1 Pet. 511, 542: "The Constitution confers absolutely upon the Government of the Union the powers of making war and of making treaties; consequently that Government possesses the power of acquiring territory either by conquest or by treaty." The territory thus acquired is acquired as absolutely as if the annexation were made, as in the case of Texas and Hawaii, by an act of Congress.

It follows from this that by the ratification of the treaty of Paris the island became territory of the United States—although not an organized territory in the technical sense of the word. . . .

[In an omitted part of the opinion the court referred to Dredd Scott v. Sandford, 19 How. 393; and National Bank v. County of Yankton, 101 U. S. 129.]

Territory thus acquired can remain a foreign country under the tariff laws only upon one of two theories: either that the word "foreign" applies to such countries as were foreign at the time the statute was enacted, notwithstanding any subsequent change in their condition, or that they remain foreign under the tariff laws until Congress has formally embraced them within the customs union of the States. The first theory is obviously untenable. While a statute is presumed to speak from the time of its enactment, it embraces all such persons or things as subsequently fall within its scope, and ceases to apply to such as thereafter fall without its scope. Thus, a statute forbidding the sale of liquors to minors applies not only to minors in existence at the time the statute was enacted, but to all who are subsequently born; and ceases to apply to such as thereafter reach their majority. So, when the Constitution of the United States declares in Art. I, sec. 10, that the States shall not do certain things, this declaration operates not only upon the thirteen original States, but upon all who subsequently become such; and when Congress places certain restrictions upon the powers of a territorial legislature, such restrictions cease to operate the moment such Territory is admitted as a State. By parity of reasoning a country ceases to be foreign the instant it becomes domestic. So, too, if Congress saw fit to cede one of its newly acquired territories (even assuming that it had the right to do so) to a foreign power, there could be no doubt that from the day of such cession and the delivery of possession, such territory would become a foreign country, and be reinstated as such under the tariff laws. Certainly no act of Congress would be necessary in such case to declare that the laws of the United States had ceased to apply to it.

The theory that a country remains foreign with respect to the tariff laws until Congress has acted by embracing it within the Customs Union, presupposes that a country may be domestic for one purpose and foreign for another. It may undoubtedly become necessary for the adequate administration of a domestic territory to pass a special act providing the proper machinery and officers, as the President would have no authority, except under the war power, to administer it himself; but no act is necessary to make it domestic territory if once it has been ceded to the United States. We express no opinion as to whether Congress is bound to appropriate the money to pay for it. This has been much discussed by writers upon constitutional law, but it is not necessary to consider it in this case, as Congress made prompt appropriation of the money stipulated in the treaty. This theory also presupposes that territory may be held indefinitely by the United States; that it may be treated in every particular, except for tariff purposes, as domestic territory; that laws may be enacted and enforced by officers of the United States sent there for that purpose; that insurrections may be suppressed, wars

carried on, revenues collected, taxes imposed; in short, that everything may be done which a government can do within its own boundaries, and yet that the territory may still remain a foreign country. That this state of things may continue for years, for a century even, but that until Congress enacts otherwise, it still remains a foreign country. To hold that this can be done as matter of law we deem to be pure judicial legislation. We find no warrant for it in the Constitution or in the powers conferred upon this court. It is true the nonaction of Congress may occasion a temporary inconvenience; but it does not follow that courts of justice are authorized to remedy it by inverting the ordinary meaning of words.

If an act of Congress be necessary to convert a foreign country into domestic territory, the question at once suggests itself, what is the character of the legislation demanded for this purpose? Will an act appropriating money for its purchase be sufficient? Apparently not. Will an act appropriating the duties collected upon imports to and from such country for the benefit of its government be sufficient? Apparently not. Will acts making appropriations for its postal service, for the establishment of lighthouses, for the maintenance of quarantine stations, for erecting public buildings, have that effect? Will an act establishing a complete local government, but with the reservation of a right to collect duties upon commerce, be adequate for that purpose? None of these, nor all together, will be sufficient, if the contention of the Government be sound, since acts embracing all these provisions have been passed in connection with Porto Rico, and it is insisted that it is still a foreign country within the meaning of the tariff laws. We are unable to acquiesce in this assumption that a territory may be at the same time both foreign and domestic. . . .

We are therefore of opinion that at the time these duties were levied Porto Rico was not a foreign country within the meaning of the tariff laws but a territory of the United States, that the duties were illegally exacted and that the plaintiffs are entitled to recover them back.

The judgment of the Circuit Court for the Southern District of New York is therefore reversed and the case remanded to that court for further proceedings in consonance with this opinion.[11]

Mr. Justice McKenna, (with whom concurred Mr. Justice Shiras and Mr. Justice White,) dissenting.

[The dissenting opinions of Mr. Justice McKenna and Mr. Justice Gray are omitted.]

[11] On acquisition by cession, in general, see Fauchille, I, Pt. II, 751; Hyde, I, §§107–114; Moore, Dig. Int. L., I, 273; Oppenheim, 4th ed., I, §§213–219.

On international leases, see Cobbett, Cases, 4th ed., I, 113; Lauterpacht, Private Law Sources and Analogies of International Law, 181; Westlake, 2d ed., I, 135.

OPPENHEIM, INTERNATIONAL LAW

Third Edition, Volume I, pages 400–403, sections 242, 243. 1920.

§242. Since the existence of a science of the Law of Nations, there has always been opposition to prescription as a mode of acquiring territory. Grotius rejected the usucaption of the Roman Law, yet adopted from the same law immemorial prescription for the Law of Nations. But whereas a good many writers still defend that standpoint, others reject prescription altogether. Again, others go beyond Grotius and his followers, and do not require possession from time immemorial, but teach that an undisturbed continuous possession can under certain conditions produce a title for the possessor, if the possession has lasted for some length of time.

This opinion would indeed seem to be correct, because it recognises theoretically what actually goes on in practice. There is no doubt that, in the practice of the members of the Family of Nations, a State is considered to be the lawful owner even of those parts of its territory of which originally it took possession wrongfully and unlawfully, provided that the possessor has been in undisturbed possession for such a length of time as is necessary to create the general conviction that the present condition of things is in conformity with international order. Such prescription cannot be compared with the usucaption of Roman Law, because the latter required *bona-fide* possession, whereas the Law of Nations recognises prescription both in cases where the State is in *bona-fide* possession and in cases where it is not. The basis of prescription in International Law is nothing else than general recognition of a fact, however unlawful in its origin, on the part of the members of the Family of Nations. And prescription in International Law may therefore be defined as the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order. Thus, prescription in International Law has the same rational basis as prescription in Municipal Law—namely, the creation of stability of order.

§243. From the conception of prescription, as above defined, it becomes apparent that no general rule can be laid down as regards the length of time and other circumstances which are necessary to create a title by prescription. Everything depends upon the merits of the individual case. As long as other Powers keep up protests and claims, the actual exercise of sovereignty is not undisturbed, nor is there the required general conviction that the present condition of things is in conformity with international order. But after such protests and claims, if any, cease to be repeated, the actual possession ceases to be disturbed, and thus under certain circumstances matters may gradually

ripen into that condition which is in conformity with international order. The question, at what time and under what circumstances such a condition of things arises, is not one of law, but of fact. When, to give an example, a State which originally held an island *mala fide* under a title by occupation, knowing well that this land had already been occupied by another State, has succeeded in keeping up its possession undisturbed for so long a time that the former possessor has ceased to protest, and has silently dropped the claim, the conviction will be prevalent among the members of the Family of Nations that the present condition of things is in conformity with international order. Or, to give another example, when an incorrectly drawn boundary line, which wrongly allots to one of the States concerned a tract of territory, has for a long time been regarded as correct, the conviction will prevail that the present condition of things is in conformity with international order, even if afterwards the wronged State raises a protest, and demands that the boundary line should be redrawn. These examples show why a certain number of years cannot, once for all, be fixed to create the title by prescription. There are indeed immeasurable and imponderable circumstances and influences besides the mere lapse of time at work to create the conviction that in the interest of stability of order the present possessor should be considered the rightful owner of a territory. And these circumstances and influences, which are of a political and historical character, differ so much in the different cases that the length of time necessary for prescription must likewise differ.[12]

THE ANNA, LA PORTE

Great Britain. High Court of Admiralty. 1805.

5 *C. Robinson's Reports* 373.

This was the case of a ship under American colours, with a cargo of logwood, and about 13,000 dollars on board, bound from the Spanish

[12] *Cf.* HOLTZENDORFF, II, 255; KLÜBER, §§6, 125; MARTENS, I, §71; ULLMANN, §92.

See British Guiana and Venezuela Boundary Arbitration, Great Britain and Venezuela, 29 Martens, Nouv. Rec. Gén., 2 sér., 581; Brazil and British Guiana Boundary Arbitration, Brazil and Great Britain, 99 Br. & For. S. P. 930; Grisbadarna Arbitration, Norway and Sweden, Scott, Hague Court Reports, 121; Walfisch Bay Arbitration, Germany and Great Britain, 104 Br. & For. S. P. 50; Chamizal Boundary Arbitration, Mexico and United States, 5 Am. Jour. Int. L. 785; Palmas Island Arbitration, Netherlands and United States, 22 Am. Jour. Int. L. 867; AUDINET, "De la prescription acquisitive," 3 Rev. Gén. de Dr. Int. Pub. 313; FAUCHILLE, I, Pt. II, 754; HYDE, I, §116; LAUTERPACHT, Private Law Sources and Analogies of International Law, 116, 223, 229, 233, 264, 275; MOORE, Dig. Int. L., I, 293; PHILLIMORE, 3d ed., I, 353; VATTEL, II, §§140–151.

See also Virginia v. Tennessee, 148 U. S. 503, 522; Louisiana v. Mississippi, 202 U. S. 1, 53, *infra*, 351, 357; Maryland v. West Virginia, 217 U. S. 1, 41; Arkansas v. Tennessee, 246 U. S. 158, 172; New Mexico v. Colorado 267 U. S. 30.

main to New Orleans, and captured by the Minerva privateer near the mouth of the River Mississippi. A claim was given under the direction of the American Ambassador for the ship and cargo, "as taken within the territory of the United States, at the distance of a mile and a half from the western shore of the principal entrance of the Mississippi, and within view of a post protected by a gun, and where is stationed an officer of the United States."

[The arguments of counsel and part of the opinion are omitted.]

Sir William Scott.—I certainly shall not think proper to detain this ship and cargo any longer; because, setting aside the question of territory, the objections to the property are so very slender, that I may be excused from making any particular observations upon them. . . . As to the question of costs and damages, I shall take a little time to deliberate upon it.

[Judgment on the question of costs and damages was given five days later.]

Sir William Scott.— . . .

When the ship was brought into this country, a claim was given of a grave nature, alledging a violation of the territory of the United States of America. This great leading fact has very properly been made a matter of much discussion, and charts have been laid before the Court to shew the place of capture, though with different representations from the adverse parties. The capture was made, it seems, at the mouth of the River Mississippi, and, as it is contended in the claim, within the boundaries of the United States. We all know that the rule of law on this subject is "*terræ dominium finitur, ubi finitur armorum vis,*"[13] and since the introduction of fire arms, that distance has usually been recognized to be about three miles from the shore. But it so happens in this case, that a question arises as to what is to be deemed the shore, since there are a number of little mud islands composed of earth and trees drifted down by the River, which form a kind of portico to the main land. It is contended that these are not to be considered as any part of the territory of America, that they are a sort of "no mans land," not of consistency enough to support the purposes of life, uninhabited, and resorted to, only, for shooting and taking birds nests. It is argued that the line of territory is to be taken only from the Balise, which is a fort raised on made land by the former Spanish possessors. I am of a different opinion; I think that the protection of territory is to be reckoned from these islands; and that they are the natural appendages of the coast on which they border, and from which indeed they are formed. Their elements are derived immediately from the territory, and on the principle of alluvium and increment, on which so much is to be found in the books of law, *Quod vis fluminis de tuo prædio detraxerit, & vicino*

[13] Bynkershoek, De Dominio Maris, ch. 2, *infra*, 346.

prædio attulerit, palam tuum remanet, even if it had been carried over to an adjoining territory. Consider what the consequence would be if lands of this description were not considered as appendant to the main land, and as comprized within the bounds of territory. If they do not belong to the United States of America, any other power might occupy them; they might be embanked and fortified. What a thorn would this be in the side of America! It is physically possible at least that they might be so occupied by European nations, and then the command of the River would be no longer in America, but in such settlements. The possibility of such a consequence is enough to expose the fallacy of any arguments that are addressed to shew, that these islands are not to be considered as part of the territory of America. Whether they are composed of earth or solid rock, will not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil.

I am of opinion that the right of territory is to be reckoned from those islands. That being established, it is not denied that the actual capture took place within the distance of three miles from the islands, and at the very threshold of the river. . . .

. . . The conduct of the captors has on all points been highly reprehensible. Looking to all the circumstances of previous misconduct, I feel myself bound to pronounce, that there has been a violation of territory, and that as to the question of property, there was not sufficient ground of seizure; and that these acts of misconduct have been further aggravated, by bringing the vessel to England, without any necessity that can justify such a measure. In such a case it would be falling short of the justice due to the violated rights of America, and to the individuals who have sustained injury by such misconduct, if I did not follow up the restitution which has passed on the former day, with a decree of costs and damages.[14]

SECTION 2. BOUNDARIES OF TERRITORIAL AUTHORITY

Iowa v. Illinois

United States. Supreme Court. 1893.

147 *United States Reports* 1.

The case is stated in the opinion.

[The names of counsel and part of the opinion are omitted.]

Mr. Justice Field delivered the opinion of the court.

[14] See also Secretary of State for India v. Chelikani Rama Rao [1916] Indian App. 192; Fauchille, I, Pt. II, 670; Moore, Dig. Int. L., I, 269; Oppenheim, 4th ed., I, §§229–235.

On the question whether accretion to the shore belongs to the owner of the shore or to the public domain, see King v. Yarborough, 2 Bligh's N. R. 147; Attorney General of Southern Nigeria v. Holt & Co. [1915] A. C. 599; Ker v. Couden, 223 U. S. 268.

The Mississippi River flows between the States of Iowa and Illinois. It is a navigable stream and constitutes the boundary between the two States; and the controversy between them is as to the position of the line between its banks or shores which separates the jurisdiction of the two States for the purposes of taxation and other purposes of government.

The complainant, the State of Iowa, contends that, for taxation, and for all other purposes, the boundary line is the middle of the main body of the river, taking the middle line between its banks or shores without regard to the "steamboat channel," as it is termed, or deepest part of the stream, and that, to determine the banks or shores, the measurements must be taken when the water is in its natural or ordinary stage, neither swollen by floods nor shrunk by droughts.

On the other hand, the defendant, the State of Illinois, claims that, for taxation and all other purposes, its jurisdiction extends to the middle of "the steamboat channel" of the river, wherever that may be, whether on its east or west bank—the channel upon which commerce on the river by steamboats or other vessels is usually conducted, and which for that reason is sometimes designated as "the channel of commerce."

The State of Iowa in its bill alleges: That prior to and at the time of the treaty between England, France and Spain, in 1763, 3 Jenkinson's Treaties, 177, the territory now comprising the State of Iowa was under the dominion of France, and the territory now comprising the State of Illinois was under the dominion of Great Britain, and that, by the treaty named, the middle of the river Mississippi was made the boundary line between the British and French possessions in North America.

That by the treaty of Paris between Great Britain and the United States, which was concluded September 3, 1783, 3 Jenkinson's Treaties, 410, Art. II, and 8 Stat. 80, the territory comprising the State of Illinois passed to the United States; and that by the purchase of Louisiana from France, under the treaty of April 30, 1803, 8 Stat. 200, the territory comprising the State of Iowa passed to the United States.

That the boundary between the territory comprising the States of Illinois and Iowa remained the middle of the river Mississippi, as fixed by the treaty of 1763.

That by the act of Congress of April 18, 1818, known as the act enabling the people of Illinois to form a State constitution, (3 Stat. 428, c. 67,) the northern and western boundaries of Illinois were defined as follows: Starting in the middle of Lake Michigan, at north latitude forty-two degrees and thirty minutes, "thence west to the middle of the Mississippi River, and thence down along the middle of that river to its confluence with the Ohio River," and that the constitutions of Illinois of 1818, 1848 and 1870 defined the boundaries in the same way.

. . .

[Further allegations of the bill, cross-bill, and answer are set forth in an omitted part of the opinion.]

When a navigable river constitutes the boundary between two independent States, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream. The interest of each State in the navigation of the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. It is, therefore, laid down in all the recognized treatises on international law of modern times that the middle of the channel of the stream marks the true boundary between the adjoining States up to which each State will on its side exercise jurisdiction. In international law, therefore, and by the usage of European nations, the term "middle of the stream," as applied to a navigable river, is the same as the middle of the channel of such stream, and in that sense the terms are used in the treaty of peace between Great Britain, France and Spain, concluded at Paris in 1763. By the language, "a line drawn along the middle of the river Mississippi from its source to the river Iberville," as there used, is meant along the middle of the channel of the river Mississippi. Thus Wheaton, in his Elements of International Law, (8th ed. §192,) says:

"Where a navigable river forms the boundary of conterminous States, the middle of the channel, or *Thalweg*, is generally taken as the line of separation between the two States, the presumption of law being that the right of navigation is common to both; but this presumption may be destroyed by actual proof of prior occupancy and long undisturbed possession, giving to one of the riparian proprietors the exclusive title to the entire river."

And in §202, whilst thus stating the rule as to the boundary line of the Mississippi River being the middle of the channel, he states that the channel is remarkably winding, "crossing and recrossing perpetually from one side to the other of the general bed of the river."

Mr. Creasy, in his First Platform on International Law, §231, p. 222, expresses the same doctrine. He says:

"It has been stated that, where a navigable river separates neighboring States, the *Thalweg*, or middle of the navigable channel, forms the line of separation. Formerly a line drawn along the middle of the water, the *medium filum aquæ*, was regarded as the boundary line; and still will be regarded *prima facie* as the boundary line, except as to those parts of the river as to which it can be proved that the vessels which navigate those parts keep their course habitually along some channel different from the *medium filum*. When this is the case, the middle of the channel of traffic is now considered to be the line of demarcation."

Mr. Creasy also refers to the language of Dr. Twiss on the same subject, who observes that "Grotius and Vattel speak of the middle of

the river as the line of demarcation between two jurisdictions, but modern publicists and statesmen prefer the more accurate and more equitable boundary of the navigable Midchannel. If there be more than one channel of a river, the deepest channel is the Midchannel for the purposes of territorial demarcation; and the boundary line will be the line drawn along the surface of the stream corresponding to the line of deepest depression in its bed. . . . The islands on either side of the Midchannel are regarded as appendages to either bank; and if they have once been taken possession of by the nation to whose bank they are appendant, a change in the Midchannel of the river will not operate to deprive that nation of its possession, although the water-frontier line will follow the change of the Midchannel."

Halleck in his Treatise on International Law, c. 6, §23, is to the same effect. He says: "Where the river not only separates the conterminous States, but also their territorial jurisdictions, the *thalweg*, or middle channel, forms the line of separation through the bays and estuaries through which the waters of the river flow into the sea. As a general rule, this line runs through the middle of the deepest channel, although it may divide the river and its estuaries into two very unequal parts. But the deeper channel may be less suited, or totally unfit for the purposes of navigation, in which case the dividing line would be in the middle of the one which is best suited and ordinarily used for that object."

Woolsey in his International Law, §58, repeats the same doctrine and says: "Where a navigable river forms the boundary between two States, both are presumed to have free use of it, and the dividing line will run in the middle of the channel, unless the contrary is shown by long occupancy or agreement of the parties. If a river changes its bed, the line through the old channel continues, but the equitable right to the free use of the stream seems to belong, as before, to the State whose territory the river has forsaken."

The middle of the channel of a navigable river between independent States is taken as the true boundary line from the obvious reason that the right of navigation is presumed to be common to both in the absence of a special convention between the neighboring States, or long use of a different line equivalent to such a convention.

Phillimore, in his Commentaries on International Law, in the chapter upon acquisitions, (c. xii,) speaks of decisions upon the law of property as incident to neighborhood proceeding upon the principle that "midchannel" is the line of demarcation between the neighbors. (Vol. 1, 239.)

The reason and necessity of the rule of international law as to the midchannel being the true boundary line of a navigable river separating independent States may not be as cogent in this country, where neighboring States are under the same general government, as in Europe, yet

the same rule will be held to obtain unless changed by statute or usage of so great a length of time as to have acquired the force of law.

As we have stated, in international law and by the usage of European nations, the terms "middle of the stream" and "midchannel" of a navigable river are synonymous and interchangeably used. The enabling act of April 18, 1818, (3 Stat. 428, c. 67,) under which Illinois adopted a constitution and became a State and was admitted into the Union, made the middle of the Mississippi River the western boundary of the State. The enabling act of March 6, 1820, (3 Stat. c. 22, §2, p. 545,) under which Missouri became a State and was admitted into the Union, made the middle of the main channel of the Mississippi River the eastern boundary, so far as its boundary was conterminous with the western boundary of Illinois. The enabling act of August 6, 1846, (9 Stat. 56, c. 89,) under which Wisconsin adopted a constitution and became a State and was admitted into the Union, gives the western boundary of that State, after reaching the river St. Croix, as follows: "Thence down the main channel of said river to the Mississippi, thence down the centre of the main channel of that" (Mississippi) "river to the northwest corner of the State of Illinois." The northwest corner of the State of Illinois must therefore be in the middle of the main channel of the river which forms a portion of its western boundary. It is very evident that these terms, "middle of the Mississippi River," and "middle of the main channel of the Mississippi River," and "the centre of the main channel of that river," as thus used, are synonymous. It is not at all likely that the Congress of the United States intended that those terms, as applied to the Mississippi River separating Illinois and Iowa, should have a different meaning when applied to the Mississippi River separating Illinois from Missouri or a different meaning when used as descriptive of a portion of the western boundary of Wisconsin. They were evidently used as signifying the same thing. . . .

[In an omitted part of the opinion the court referred to Dunlieth & Dubuque Bridge Co. v. County of Dubuque, 55 Ia. 558; and Buttenuth v. St. Louis Bridge Co., 123 Ill. 535.]

The opinions in both of these cases are able and present, in the strongest terms, the different views as to the line of jurisdiction between neighboring States, separated by a navigable stream; but we are of opinion that the controlling consideration in this matter is that which preserves to each State equality in the right of navigation in the river. We therefore hold, in accordance with this view, that the true line in navigable rivers between the States of the Union which separates the jurisdiction of one from the other is the middle of the main channel of the river. Thus the jurisdiction of each State extends to the thread of the stream, that is, to the "midchannel," and, if there be several channels, to the middle of the principal one, or, rather, the one usually followed.

It is therefore ordered, adjudged and declared that the boundary line between the State of Iowa and the State of Illinois is the middle of the main navigable channel of the Mississippi River. And, as the counsel of the two States both desire that this boundary line be established at the places where the several bridges mentioned in the pleadings —nine in number—cross the Mississippi River, it is further ordered that a commission be appointed to ascertain and designate at said places the boundary line between the two States, such commission, consisting of three competent persons, to be named by the court upon suggestion of counsel, and be required to make the proper examination and to delineate on maps prepared for that purpose the true line as determined by this court, and report the same to the court for its further action.[15]

The Rio Bravo Boundary

United States. Opinion of Attorney General Cushing. 1856.

8 *Opinions of Attorneys General* 175.

[The following opinion was in response to a request from the Secretary of the Interior.]

Your note of this date, communicating a clause in the draft of the proposed report of the Commissioners for determining the boundary between the Mexican Republic and the United States, presents the following question of public law.

A portion of the boundary is formed by the Rio Bravo, which is subject to change its course in two ways: first, by gradual accretion of

[15] See Minnesota v. Wisconsin, 252 U. S. 273 (navigable boundary river having no well-defined channel); Washington v. Oregon, 211 U. S. 127, 214 U. S. 205 (navigable boundary river having several channels); Whiteside v. Norton, 205 Fed. 5 (effect of artificial changes in channel); State v. Young, 46 Vt. 565 (*ditto*); State v. Bowen, 149 Wis. 203 (*ditto*); Georgia v. South Carolina, 257 U. S. 516 (thalweg doctrine inapplicable to boundary river by necessary implication); Handly's Lessee v. Anthony, 5 Wh. 374 (river reserved to one riparian state); United States v. Texas, 162 U. S. 1 (boundary marked by bank of river); Oklahoma v. Texas, 256 U. S. 70, 260 U. S. 606 (*ditto*).

The Treaty of Versailles with Germany, June 28, 1919, art. 30, provides: "In the case of boundaries which are defined by a waterway, the terms 'course' and 'channel' used in the present Treaty signify: in the case of non-navigable rivers, the median line of the waterway or of its principal arm, and, in the case of navigable rivers, the median line of the principal channel of navigation. It will rest with the Boundary Commissions provided by the present Treaty to specify in each case whether the frontier line shall follow any changes of the course or channel which may take place or whether it shall be definitely fixed by the position of the course or channel at the time when the present Treaty comes into force." 13 Am. Jour. Int. L. Suppl. 151, 161. Similar articles were incorporated in the contemporary treaties of peace with other countries.

one of its banks, followed, in many cases, by correspondent degradation of the opposite bank; and, secondly, by the more violent action of the water, leaving its actual bed and forcing for itself a new one in another direction. In case of any such changes in the bed of the river, does the boundary line shift with them, or does that line remain constant where the main course of the river ran as represented by the maps accompanying the report of the Commissioners?

The response to this inquiry depends, in part, on the terms of the treaty between the two republics prescribing the boundary line, the material part of which, in so far as regards the present question, is to the effect, that the line "beginning in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande," shall proceed thence "up the middle of that river" to a certain point. The treaty further provides that commissioners appointed by the two governments shall survey and mark out upon the land the stipulated line, which, as agreed upon and established by them, shall in all time be faithfully respected, without any variation therein, unless by express and free consent of both republics. (Treaty of December 30, 1853, x Stat. at Large, p. 1032.)

If the question here were of certain other parts of the boundary which are to run on parallels of latitude or by straight line from point to point, in that case the monuments placed by the Commissioners, or the line as otherwise fixed by descriptive words referring to natural objects, or by the drawings and maps of the Commissioners, would, it is plain, be conclusive, in all time, by force of the stipulations of the treaty. It would be the line agreed upon and established, even although it should afterwards prove that, by reason of error of astronomical observations or of calculation, it varied from the parallel of latitude where that was the line, or in the other part did not make exactly a straight line. So, if, in another portion of the boundary, which calls for the rivers Gila and Colorado, there were controversy concerning the identity of either as upon the northeastern boundary of the United States, as there once was in regard to the true St. Croix, then, also, by force of the treaty, the determination of that point, by the Commissioners, would be conclusive in all time. But the present question is a different one, and depends in part for its solution upon other considerations.

In this case the boundary is not an astronomical or geographical line, but a natural object, defined by the treaty. And there is no equivocation here between two distinct natural objects, each of them answering to the descriptive language of a stipulation. It is the Rio Bravo, with a course as definite, and almost as destitute of tributaries and embranchments, in its main course, as the Nile. That is a fact which cannot be modified by surveys or reports.

However, the established principles of public law come in here to settle the question in all its relations.

The respective territories of the United States and of the Mexican Republic, are arcifinious; that is to say, territories separated not by a mathematical line, but by natural objects of indeterminate natural extension which of themselves serve to keep off the public enemy. Such are mountains and rivers. (Barbeyrac's Grotius, liv. ii, chap. 3, s. 16 and note; *Cocceii Grotius Illustratus, ibid.*)

When a river is the dividing limit of arcifinious territories, the natural changes to which itself is liable, or which its action may produce on the face of the country, give rise to various questions, according to the physical events which occur, and the previous relation of the river to the respective territories. The most simple of all the original conditions of the inquiry is where the river appertains by convention equally to both countries, their rights being on either side to the *filum aquæ*, or middle of the channel of the stream. That is the present fact.

With such conditions, whatever changes happen to either bank of the river by accretion on the one or degradation of the other, that is, by the gradual, and as it were, insensible accession or abstraction of mere particles, the river as it runs continues to be the boundary. One country may, in process of time, lose a little of its territory, and the other gain a little, but the territorial relations cannot be reversed by such imperceptible mutations in the course of the river. The general aspect of things remains unchanged. And the convenience of allowing the river to retain its previous function, notwithstanding such insensible changes in its course, or in either of its banks, outweighs the inconveniences, even to the injured party, involved in a detriment, which, happening gradually, is inappreciable in the successive moments of its progression.

But, on the other hand, if, deserting its original bed, the river forces for itself a new channel in another direction, then the nation, through whose territory the river thus breaks its way, suffers injury by the loss of territory greater than the benefit of retaining the natural river boundary, and that boundary remains in the middle of the deserted river bed. For, in truth, just as a stone pillar constitutes a boundary, not because it is a stone, but because of the place in which it stands, so a river is made the limit of nations, not because it is running water bearing a certain geographical name, but because it is water flowing in a given channel, and within given banks, which are the real international boundary.

Such is the received rule of the law of nations on this point, as laid down by all the writers of authority. (See ex. gr. Puffend. *Jus Nat. lib.* iv, *cap.* 7, s. ii; Gundling, *Jus Nat.* p. 248; Wolff, *Jus Gentium*, s. 106–109; Vattel, *Droit des Gens, liv.* i, *chap.* 22, s. 268, 270; Stypmanni, *Jus Marit. cap.* v, n. 476–552; Rayneval, *Droit de la Nature, tom.* i, p. 307; Merlin, *Répertoire, ss. voc. alluv.*)

I might multiply citations to this point from the books of public law. But, in order that either the United States or the Mexican Repub-

lic, whichever in the lapse of time shall happen to be inconveniently affected by the application of this rule, may be fully reconciled thereto, it seems well to show that it is conformable to the common law of both countries.

I subjoin, before doing this, as authority for Mexican jurists and statesmen, citation from the works on international law of the highest authority in Spain and Spanish America.

Don Antonio Riquelme states the doctrine as follows:

"When a river changes its course, directing its currents through the territory of one of the two coterminous states, the bed which it leaves dry remains the property of the state (or states) to which the river belonged, that being retained as the limit between the two nations, and the river enters so far into the exclusive dominion of the nation through whose territory it takes the new course. Nations must, of necessity, submit their rights to these great alterations which nature predisposes and consummates. . . .

"But, when the change is not total, but progressive only, that is to say, when the river does not abandon either state, but only gradually shifts its course by accretions, then it continues still to be the boundary, and the augmentation of territory, which one country gains at the expense of the other, is to be held by it as a new acquisition of property." (*Derecho Internacional, tom.* i, p. 83.)

Don Andres Bello and Don José Maria de Pando both enunciate the doctrine in exactly the same words, namely:

"When a river or lake divides two territories, whether it belong in common to the conterminous riparian states, or they possess it by halves, or one of them occupies it exclusively, the rights, which either has in the lake or river, do not undergo any change by reason of alluvion. The lands insensibly invaded by the water are lost by one of the riparian states, and those which the water abandons on the opposite bank increase the domain of the other state. But if, by any natural accident, the water, which separated the two states, enters of a sudden into the territory of the other, it will thenceforth belong to the state whose soil it occupies, and the land, including the abandoned river-channel or bed, will incur no change of master." (Bello, *Derecho Internacional* p. 38; Pando, *Derecho Internacional,* p. 99.)

Almeda refers to the same point, briefly, but in decisive terms. He says:

"As the river belongs to the two nations, so, also, the river-bed, if by chance it become dry, is divided between them as proprietors. When the river changes its course, throwing itself on one of two conterminous states, it then comes to belong to the state through whose territory it runs, all community of right in it so far ceasing." (*Derecho Publico, tom.* i, p. 199.)

Leaving authorities of this class, then, let us come to those, which discuss the question in its relation to private rights, and as a doctrine of municipal jurisprudence.

The doctrine is transmitted to us from the laws of Rome. (Justinian. *Inst. lib.* ii, *tit.* i, s. 20–24; *Dig. lib.* xii, *tit.* i, 1. 7. See J. Voet *ad Pandect. tom.* i, p. 606, 607. Heinec. *Recit. lib.* ii, *tit.* 2, s. 358–369; Struvii *Syntag. ex.* 41, c. 33–25; Bowyers' Civil Law, ch. 14.)

Don Alfonso transferred it from the civil law to the Partidas. (*Partida* iii, *tit.* 28, l. 31.) Thus it came to be, as it still remains, an established element of the laws of Spain and of Mexico. (Alvarez, *Instituciones, lib.* ii, *tit.* i, s. 6; Asso, *Instituciones*, p. 101; Gomez de la Serna, *Elementos, lib.* ii, *tit.* 4, sec. 3, no. 2; Escriche, *Dic. s. vocc. accesion natural, aluvion, avulsion*; *Febrero Mexicano, tom.* i, p. 161; *Sala Mexicano*, ed. 1845, *tom.* ii, p. 62.)

The same doctrine, starting from the same point of departure, made its way, through the channel of Bracton, into the laws of England, and thence to the United States. (Bracton *de Legg. Angliæ, lib.* ii, *cap.* 2, *fol.* 9; Blacks. Comm. vol. ii. p. 262; Woolrych on Waters, p. 34; Angell on Water Courses, ch, 2; Lynch v. Allen, iv De. & Bat. N. C. R. p. 62; Murry v. Sermon, i Hawk's N. C. R. p. 56; The King v. Lord Scarborough, iii B. & C. p. 91, S. C. ii Bligh N. S. p. 147.)

Such, beyond all possible controversy, is the public law of modern Europe and America, and such, also, is the municipal law both of the Mexican Republic and the United States. In my judgment, therefore, the tenor of the report of the Commissioners, in the clause submitted to me for consideration, is in substance correct; and, if it need modification to give to it absolute exactness, that result will be accomplished by the insertion of some word or phrase, which shall recognise the distinction, which exists in law, between gradual changes of a river-course by insensible accretion, and changes happening through the absolute diversion of its course, effecting avulsion of land from one or the other territory, or striking out a partially new channel through the territory of one or the other, which, it is suggested, is subject to occur in some part of the course of the Rio Bravo.[16]

[16] See Chamizal Boundary Arbitration, Mexico and United States, 5 Am. Jour. Int. L. 785; Cordova v. Grant, 248 U. S. 413. *Cf.* Adami, National Frontiers in Relation to International Law, 24.

"It is settled beyond the possibility of dispute that where running streams are the boundaries between States, the same rule applies as between private proprietors, namely, that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream; while if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent

BYNKERSHOEK, DE DOMINIO MARIS

Second Edition. Chapter 2. 1744.

I should think, therefore, that the possession of a maritime belt ought to be regarded as extending just as far as it can be held in subjection to the mainland; for in that way, although it is not navigated perpetually, still the possession acquired by law is properly defended and maintained; for there can be no question that he possesses a thing continuously who so holds it that another can not hold it against his will. Hence we do not concede ownership of a maritime belt any farther out than it can be ruled from the land, and yet we do concede it that far; for there can be no reason for saying that the sea which is under some one man's command and control is any less his than a ditch in his territory. . . .

Wherefore on the whole it seems a better rule that the control of the land (over the sea) extends as far as cannon will carry; for that is as far as we seem to have both command and possession. I am speaking, however, of our own times, in which we use those engines of war; otherwise I should have to say in general terms that the control from the land ends where the power of men's weapons ends [*potestatem terrae finiri, ubi finitur armorum vis*]; for it is this, as we have said, that guarantees possession.[17] [MAGOFFIN's transl.]

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changes in the new channel." Arkansas v. Tennessee, 246 U. S. 158, 173. *Accord:* Nebraska v. Iowa, 143 U. S. 359; Missouri v. Nebraska, 196 U. S. 23; Rober v. Michelsen, 82 Neb. 48; Arkansas v. Mississippi, 250 U. S. 39; Veatch v. White, 23 F. (2d) 69. See 15 L. R. A. 187; 39 L. R. A., N. S., 200.

On concurrent jurisdiction over boundary rivers in the United States, see Wedding v. Meyler, 192 U. S. 573; Nielsen v. Oregon, 212 U. S. 315; Beale, "Jurisdiction of a Sovereign State," 36 Harv. L. Rev. 241, 247; 65 L. R. A. 953; 41 L. R. A., N. S., 366. See The Pilot, 48 Fed. 319.

On bridges over boundary rivers, see Declaration between Baden and France, Jan. 10, 1861, 17 (1) Martens, Nouv. Rec. Gén., 305; Convention between Mexico and United States, Nov. 12, 1884, art. 4, 24 U. S. Stat. L. 1011, 1013; HYDE, I, §140.

On international water boundaries, in general, see HYDE, I, §§137–140, 149–150; MOORE, Dig. Int. L., I, 616; OPPENHEIM, 4th ed., I, §199.

[17] "The authority of a nation within its own territory is absolute and exclusive. The seizure of a vessel within the range of its cannon by a foreign force is an invasion of that territory, and is a hostile act which it is its duty to repel." MARSHALL, C. J., in Church v. Hubbart, 2 Cr. 187, 234.

See also MARTENS, Arbitrator, in Case of the Costa Rica Packet, Moore, Int. Arb., V, 4948, 4952.

See Treaty between France and Great Britain, Sept. 26, 1786, art. 41, 4 Martens, Rec., 155, 178; Treaty between France and Russia, Jan. 11, 1787, art. 28, 4 *ibid.* 196, 210; Treaty between Great Britain and United States, Nov. 19, 1794, art. 25, 8 U. S. Stat. L. 116, 128.

JEFFERSON, SECRETARY OF STATE, TO HAMMOND, BRITISH MINISTER

Philadelphia, November 8, 1793.

Moore, Digest of International Law, Volume I, page 702.

The President of the United States, thinking that, before it shall be finally decided to what distance from our seashores the territorial protection of the United States shall be exercised, it will be proper to enter into friendly conferences and explanations with the powers chiefly interested in the navigation of the seas on our coasts, and relying that convenient occasions may be taken for these hereafter, finds it necessary in the meantime to fix provisionally on some distance for the present government of these questions. You are sensible that very different opinions and claims have been heretofore advanced on this subject. The greatest distance to which any respectable assent among nations has been at any time given, has been the extent of the human sight, estimated at upwards of twenty miles, and the smallest distance, I believe, claimed by any nation whatever, is the utmost range of a cannon ball, usually stated at one sea league. Some intermediate distances have also been insisted on, and that of three sea leagues has some authority in its favor. The character of our coast, remarkable in considerable parts of it for admitting no vessels of size to pass near the shores, would entitle us, in reason, to as broad a margin of protected navigation as any nation whatever. Reserving, however, the ultimate extent of this for future deliberation, the President gives instructions to the officers acting under his authority to consider those heretofore given them as restrained for the present to the distance of one sea league or three geographical miles from the seashores. This distance can admit of no opposition, as it is recognized by treaties between some of the powers with whom we are connected in commerce and navigation, and is as little, or less, than is claimed by any of them on their own coasts.[18]

[18] See The Twee Gebroeders, 3 C. Rob. 162, *infra*, 778; The Anna, 5 C. Rob. 373, *supra*, 334; The Leda, Sw. Adm. 40; The Actif, Sw. Adm. 237; General Iron Screw Colliery Co. v. Schurmanns, 1 J. & H. 180; Queen v. Keyn, 2 Ex. D. 63, *infra*, 462; Rhodes v. Fairweather, Newf. (1884–96) 321; The Ship Frederick Gerring, 27 Can. S. C. 271; The Brig Ann, 1 Gall. 62; Dunham v. Lamphere, 3 Gray 268; United States v. Smiley, 6 Sawy. 640; Manchester v. Massachusetts, 139 U. S. 240; In re Humboldt Lumber Manuf'rs' Ass'n, 60 Fed. 428; Humboldt Lumber Manufacturers' Ass'n v. Christopherson, 73 Fed. 239; United States v. Newark Meadows Imp. Co., 173 Fed. 426; In re Marincovich, 48 Calif. App. 474; Cunard Steamship Co. v. Mellon, 262 U. S. 100, *infra*, 449; 46 L. R. A. 264, 267.

See also Convention between Great Britain and United States, Oct. 20, 1818, art. 1, 8 U. S. Stat. L. 248; North Sea Fisheries Convention, May 6, 1882, art. 2, 9 Martens, Nouv. Rec. Gén., 2 sér., 556, 557, U. S. For. Rel. (1887) 438, 439; Suez Canal Convention, Oct. 29, 1888, art. 4, 15 Martens, Nouv. Rec. Gén., 2 sér., 557, 560; Convention between Panama and United States, Nov. 18, 1903, art. 2, 33 U. S. Stat. L. 2234;

The Elida

Germany. Imperial Supreme Prize Court in Berlin. 1915.

10 *American Journal of International Law* 916.

[The case is stated in the opinion. Part of the opinion is omitted.]

On October 13, 1914, the Swedish S. S. Elida, with a cargo of wood (rafters), bound from Kago to Hull, was captured by a German torpedo boat near Trelleborg and taken into Swinemünde. The bill of lading read "to order"; the wood is said to have been sold by V. Svensson & Co. A. G. of Stockholm to Roberts, Cooper & Co. in Hull. The owner of the steamer, J. Ingmarssen of Stensnäs, avers that the seizure of the ship and cargo was illegal and claims damages. The Prize Court at Kiel decided that the steamer and cargo should be released, but that sufficient reasons existed to justify the seizure and that the claim for compensation should be dismissed.

The appeal from this decision is sustained.

The illegality of the seizure is first of all based on the fact that it took place within the zone of neutrality claimed by Sweden, *i. e.*, within four miles of the Swedish coast. Whether this was really the case is disputed, whilst it is certain that the seizure took place outside the three mile limit. In any event this is of no importance, since this objection was properly dismissed by the judge.

It is true that a considerable number of states have extended by national law their territorial jurisdiction beyond the three mile limit, either generally or with regard to certain legal rights. This particularly applies to Sweden and Norway, which extended their national waters to a distance of four miles. A number of other states even went much further in this respect. But a special international title, valid in relation to the German Empire, and therefore to be taken into account by the prize

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Convention Relating to the Non-Fortification and Neutralisation of the Aaland Islands, Oct. 20, 1921, art. 2, 9 L. of N. T. S. 211, 217.

"All the writers upon public law agree that every nation has exclusive jurisdiction to the distance of a cannon shot, or marine league, over the waters adjacent to its shores; and this doctrine has been recognised by the Supreme Court of the United States. Indeed such waters are considered as a part of the territory of the sovereign." Story, J., in The Brig Ann, 1 Gall. 62, 63. See Baty, "The Three-Mile Limit," 22 Am. Jour. Int. L. 503; Fenn, "Origins of the Theory of Territorial Waters," 20 Am. Jour. Int. L. 465; Fraser, "Extent and Delimitation of Territorial Waters," 11 Cornell L. Quart. 455; Fulton, Sovereignty of the Sea, 1–22, 537–603, 650–692; Jessup, Territorial Waters, chs. 1, 3; Moore, Dig. Int. L., I, 698.

Cf. Queen v. Keyn, 2 Ex. D. 63, *infra*, 462; Crocker, Extent of the Marginal Sea; Fauchille, I, Pt. II, 126; de Lapradelle, "Le droit de l'état sur la mer territoriale," 5 Rev. Gén. de Dr. Int. Pub. 264, 309; Imbart de Latour, La Mer Territoriale, Pt. I, chs. 1, 2; Oppenheim, 4th ed., I, §§185–190c; Paulus, "La mer territoriale," 5 Rev. de Dr. Int., 3 sér., 397; Ræstad, La Mer Territoriale; Schücking, Das Küstenmeer im internationalen Rechte.

court, does not exist, for up to the present time the Swedish claim has been recognized only by the Norwegian Government. According to official information from the German Foreign Office, Germany especially in the course of the discussions concerning this matter which took place in 1874, did not accept Sweden's point of view but treated the question of national waters as an open one, while England insisted upon the three mile limit. Similarly in 1897, when the Swedish Government addressed a communication to the German Legation at Stockholm concerning the fishery jurisdiction, the German Government restricted itself to raising no objection against Sweden's claim to a four mile boundary for the fishery and the question of the neutralization of this marine area in case of war was not thereby affected.

Therefore, under these circumstances, the decision must rest upon the basis of the German Prize Regulations, which in No. 3a forbids the application of prize law within a zone of only three nautical miles from the low water mark of neutral coasts. The Prize Regulations contain the principles laid down by the Kaiser as Commander in Chief within his Imperial jurisdiction for the practice of prize law pertaining to naval warfare, and are, therefore, primarily law not only for the Navy, but also for the inland authorities, particularly the prize courts, in so far as they have to pass upon the legality of the actions of commanders at sea falling within the prize law. International law only lays down rights and duties as between different states. The prize courts, when judging of the legality of prize actions, can take general international principles only into account when the Prize Regulations contain no instructions and, therefore, tacitly refer to the principles of international law. Therefore, the question whether an instruction of the Prize Regulations agrees with general international law is not for the prize court to decide. If a contradiction in this connection is asserted, the point in controversy is to be settled in another manner. Thus far this conception also agrees with the legal opinion of Professor D. von Liszt, produced by the claimants.

Contrary to this opinion, however, the Supreme Prize Court further is of the opinion that the instruction in question of the German Prize Regulations in no way violates the general principles of international law. Heretofore, the maritime boundary of states has been generally recognized in theory and practice as being three nautical miles distant from the coast. Originally, it was based on the carrying distance, corresponding to the gunnery technique of those times, of ships' and coast guns. It is true that now-a-days this reason is no longer applicable.[19]

[19] "The limits of territorial waters, in relation to national and international rights and privileges, have of recent years been subject to much discussion. It may well be that the old marine league, which for long determined the boundaries of territorial waters, ought to be extended by reason of the enlarged range of guns used for shore protection." Sir Samuel Evans, in The Bangor [1916] P. 181, 184. See also United States v. Smiley, 6 Sawy. 640, 645.

Here however the axiom *cessante ratione non cessat lex ipsa* applies, and although numerous proposals and opinions have been put forward with regard to a different delimitation of the national waters, it cannot be asserted that any other method has in practice met with the general concurrence of the maritime states. This is also true of the view put forward in the above mentioned opinion, according to which each individual state is entitled to extend, by means of independent regulations, the boundary of its national waters beyond the three mile zone as far as gun range, the former limit nevertheless to be regarded as a subsidiary international boundary. With the range of present day guns this would lead to quite intolerable conditions, and give to single states the possibility of including within their national territory extensive tracts of the open sea the freedom of which is in the interest of all maritime states. To a certain extent this is also acknowledged by Liszt in his opinion, for according thereto the regulation of the individual state is not alone sufficient; the absence of objection on the part of other states is also required. Thereby in reality the permissibility of an extension of the territorial waters is founded not so much upon the independent regulation by the single state, as upon the supposition of a tacit acknowledgment of such an extension by the other states. A mere failure to object, however, is not identical with a positive concurrence of the nations. Furthermore it must be remembered that even if the exercise by a maritime nation of certain official functions, such as those of the health and customs authorities, is tolerated beyond the three mile zone, this by no means represents a concession to the effect that in all other respects the waters in question are included within the territorial jurisdiction. Accordingly, in more recent international agreements to which a number of maritime states were parties, as, for instance, in the agreement of May 6, 1882, for the police regulation of the North Sea fisheries, and in the convention of October 29, 1888, for the neutralization of the Suez Canal, the three mile boundary was recognized as the standard. Likewise, according to official information from the Foreign Office, in the second session of the International Congress for the Protection of Submarine Cables, held at Paris on October 18, 1882, Germany's representative explicitly declared, without meeting with opposition, that by the term "coastal waters" a zone of three miles was to be understood. Furthermore, according to the same official information, the British Government during the negotiations in the year 1911 with regard to the holding of an international congress for the regulation of the question of coastal waters, decidedly adhered to the three mile zone; and, accordingly, even in the present war, it had Admiral Craddock inform the Government of Uruguay that it would not recognize the claims of Uruguay and Argentina to an extension of the territorial waters beyond the three mile zone. It can, therefore, be still less assumed that this

boundary has been supplanted by another generally acknowledged international regulation.[20]

In the case under consideration, however, the legality of the seizure should have been denied for another reason. . . .

[In an omitted part of the opinion it was held that the claim to compensation was justified because the cargo of The Elida was not contraband.]

Wherefore, the petitioner's claim, in so far as he, in his capacity of owner of the Elida, has suffered loss, appears fundamentally justified, and it need not be inquired into whether, as claimant asserts, these or other presumptions for seizure were also wanting.

Treaty between Great Britain and the United States

Article 1. Washington, January 23, 1924.

43 *United States Statutes at Large* 1761.

Art. 1. The High Contracting Parties declare that it is their firm intention to uphold the principle that 3 marine miles extending from the coastline outwards and measured from low-water mark constitute the proper limits of territorial waters.[21]

Louisiana v. Mississippi

United States. Supreme Court. 1906.

202 *United States Reports* 1.

The State of Louisiana by leave of court filed her bill against the State of Mississippi, October 27, 1902, to obtain a decree determining a boundary line between the two States and requiring the State of Mississippi to recognize and observe the line so determined. . . .

[20] See The Rossia, 2 Russ. & Jap. P. C. 39, 41; The Michael, 2 *ibid.*, 80, 82.

[21] The identical article appears in treaties with Cuba (44 U. S. Stat. L. 2395), Germany (43 *ibid.* 1815), Panama (43 *ibid.* 1875), The Netherlands (44 *ibid.* 2013) and Japan (70 Congressional Record 2374). But in treaties with Belgium (U. S. Treaty Series, No. 759), Denmark (43 U. S. Stat. L. 1809), France (U. S. Treaty Series, No. 755), Greece (*ibid.*, No. 772), Italy (43 U. S. Stat. L. 1844), Norway (43 *ibid.* 1772), Spain (44 *ibid.* 2465), and Sweden (43 *ibid.* 1830), the corresponding article simply stipulates that "the High Contracting Parties respectively retain their rights and claims, without prejudice by reason of this agreement, with respect to the extent of their territorial jurisdiction." See 20 Am. Jour. Int. L. 340.

"As elsewhere stated, this general use of the one marine league is in large measure owing to the example, or the pressure, of Great Britain and the United States of America, and perhaps chiefly, if indirectly, to the influence of the latter." Fulton, Sovereignty of the Sea, 650. See also Jessup, Territorial Waters, 10, 49.

[Part of the statement of the case, including maps and diagrams, part of the arguments of counsel, and part of the opinion are omitted.]

Mr. John Dymond, Jr., Mr. Francis C. Zacharie and Mr. Walter Guion, Attorney General of the State of Louisiana, with whom Mr. Alexander Porter Morse and Mr. Albert Estopinal, Jr. were on the brief, for complainant: . . .

The State of Louisiana by the words of the law owns the peninsula of St. Bernard in its entirety and the islands in dispute, together composing the disputed area. Act of April 6, 1812, and act of April 14, 1812. The act grants all islands within three leagues of the coast and Louisiana therefore owns the islands and waters lying north of the St. Bernard peninsula and within nine miles from its coast. Mississippi's claim to islands and territory eighteen miles from her shore is based on a later act approved December 10, 1817. Congress could not take away territory previously ceded to Louisiana and grant it to Mississippi. . . .

Louisiana's title to the disputed area is also established by the fact that the said area is south of and on the Louisiana side of the deep water channel boundary line and as this deep water channel sailing line is the correct water boundary between the States at this point all land and water south of it is the property of the State of Louisiana. . . .

The deep water sailing channel line is the boundary that was recognized by England, France and Spain in their ancient treaties affecting their separate interests in this country. . . .

Louisiana's title to the disputed territory is confirmed by prescription, usucaption, acquiescence, and specific acknowledgment by the State of Mississippi. . . .

Mr. Hannis Taylor, Mr. J. N. Flowers and Mr. Monroe McClurg, with whom Mr. William Williams, Attorney General of the State of Mississippi, was on the brief, for defendant:

The action of Congress from 1812 to 1819 in carving out of the Louisiana Purchase and the Mississippi Territory the States of Louisiana, Mississippi and Alabama, giving each a portion of the sea front shows the execution of a common design. The different acts so far as they may be in apparent conflict, must be construed together. . . .

There is a well defined international rule which provides that where there is more than one channel in a river dividing coterminous States, the deepest channel is the mid-channel or *thalweg* for the purposes of territorial demarcation. Grotius, *De Jure Belli ac Pacis*, II, c. 3, sec. 17; Vattel, *Droit des Gens*, Bk. I, c. XXII, sec. 26. This general rule has no application to a case governed by a special rule established by convention, or by a special right based on prior possession. Twiss, Int. Law, p. 127; 1 Halleck, Int. Law (Baker's ed.), p. 171. It appears from these authorities that the rule in question is confined to the mid-

channel or *thalweg* of rivers, or to a mid-channel which forms the line of separation through the bays and estuaries through which the waters of the river flow into the sea. The moment the sea is reached, or a body of water which is a part of the sea, the rule is at end.

The attempt to extend the rule beyond the estuaries of the river into the open sea, that is, into the open waters of the Gulf of Mexico, cannot be supported either by reason or authority. Not by reason, because the wide expanse of water, unconfined between banks, utterly fails to serve as a boundary; not by authority, because there is no precedent for such an extension of the rule in any work on international law.

Whenever it is necessary for two contiguous States to run a water boundary through an archipelago of islands off their coasts it is only possible to do so by convention, as international law provides no rule upon the subject. . . .

The doctrine of acquiescence does not apply to wild and unsettled lands such as were those in dispute. The assertion of sovereignty by Louisiana practically dates from the act of its legislature of 1902 relating to the dredging of oysters. Mississippi has never acquiesced in the claims of Louisiana but on the contrary has exercised sovereignty over the disputed territory in many ways, *e.g.*, its courts in 1821 convicted for robbery; an inquest was held upon a body found in the waters of Isle à Pitre in 1886; in 1893 an arrest was made for violations of oyster laws in these waters. The legislature in 1857 passed an oyster and game law covering the territory in question, which was embodied in the Revised Statutes of the State for 1871, 1880 and 1892.

Mr. Chief Justice Fuller, after making the foregoing statement, delivered the opinion of the court. . . .

[In an omitted part of the opinion the court reviewed the history of the conflict with respect to oyster fisheries in the disputed area.]

The facts that the act of Congress admitting the State of Louisiana gave that State all islands within three leagues or nine miles of her coast, and that the subsequent act of Congress admitting the State of Mississippi purported to give that State all islands within six leagues or eighteen miles of her shore, and that some islands within nine miles of the Louisiana coast were also within eighteen miles of the Mississippi shore, furnished the basis for a boundary controversy, although, in our judgment, the apparent inconsistency is reconcilable, as hereinafter explained. And that controversy involved to each State pecuniary values of magnitude, as is shown by the evidence on both sides. We think that there existed between the two States, in their sovereign capacity as States, a controversy affecting the boundary line separating them in the locality in question of a character to justify the exercise of our original jurisdiction within the rules laid down in Missouri v. Illinois, 200 U. S. 496; S. C., 180 U. S. 208; Pennsylvania v. Wheeling Bridge

Company, 13 How. 518, 589; Louisiana v. Texas, 176 U. S. 1; Kansas v. Colorado, 185 U. S. 125. . . .

[In an omitted part of the opinion the court considered the acts providing for the admission of Louisiana, Mississippi, and Alabama.]

The islands, marsh or otherwise, claimed by Louisiana in this case were all within three leagues of her coast. The act admitting Mississippi was passed five years after the Louisiana act, yet Mississippi claims thereunder the disputed territory, as being islands within eighteen miles of her shore. If it were true that this repugnancy between the two acts existed, it is enough to say that Congress, after the admission of Louisiana, could not take away any portion of that State and give it to the State of Mississippi. The rule, *Qui prior est tempore, potior in jure*, applied, and section three of article IV of the Constitution does not permit the claims of any particular State to be prejudiced by the exercise of the power of Congress therein conferred.

But it is said that the act admitting Louisiana, the act admitting Mississippi, and the act admitting Alabama must be construed as *in pari materia;* and, being so construed, that Congress must be held to have had in view in the three acts a division of the coast along the Gulf of Mexico so as to equalize the water frontage of Mississippi, Louisiana, and Alabama.

We do not regard these acts as *in pari materia* in any proper sense. They provided for the admission of three separate States, and the subject of each was not only not identical with, but not even similar to, that of the others. They did not form part of a homogeneous whole, of a common system, so as to allow a claimant under the later act to successfully contend that it changed the earlier act by construction or effected such change because declaratory of the meaning of the prior act. . . .

[In an omitted part of the opinion the court considered treaties of boundary and cession, from 1716 to 1803, the acts organizing and defining the boundaries of the Louisiana and Mississippi territories, and the location of the deep water sailing channel emerging from the mouth of the Pearl River.]

Now to repeat, the boundary of Louisiana separating her from the State of Mississippi to the east is the thread of the channel of the Mississippi river, and this extends south until it reaches the thirty-first degree of north latitude and then runs directly east along that degree until Pearl river is reached; thence south along the channel of that river to Lake Borgne. Pearl river flows into Lake Borgne, Lake Borgne into Mississippi Sound and Mississippi Sound into the open Gulf of Mexico, through, among other outlets, South Pass, separating Cat Island from Isle à Pitre.

If the doctrine of the *thalweg* is applicable, the correct boundary line separating Louisiana from Mississippi in these waters is the deep water channel.

The term "*thalweg*" is commonly used by writers on international law in definition of water boundaries between States, meaning the middle or deepest or most navigable channel. And while often styled "fairway" or "midway" or "main channel," the word itself has been taken over into various languages. Thus in the treaty of Luneville, February 9, 1801, we find "*le Thalweg de l'Adige*," "*le Thalweg du Rhin*," and it is similarly used in English treaties and decisions, and the books of publicists in every tongue.

In Iowa v. Illinois, 147 U. S. 1, the rule of the *thalweg* was stated and applied. The controversy between the States of Iowa and Illinois on the Mississippi river, which flowed between them, was as to the line which separated "the jurisdiction of the two States for the purposes of taxation and other purposes of government." Iowa contended that the boundary line was the middle of the main body of the river, without regard to the "steamboat channel" or deepest part of the stream. Illinois claimed that its jurisdiction extended to the channel upon which commerce on the river by steamboats or other vessels was usually conducted. This court held that the true line in a navigable river between States is the middle of the main channel of the river. . . .

This judgment related to navigable rivers. But we are of opinion that, on occasion, the principle of the *thalweg* is applicable, in respect of water boundaries, to sounds, bays, straits, gulfs, estuaries and other arms of the sea.

As to boundary lakes and landlocked seas, where there is no necessary track of navigation, the line of demarcation is drawn in the middle, and this is true of narrow straits separating the lands of two different States; but whenever there is a deep water sailing channel therein, it is thought by the publicists that the rule of the *thalweg* applies. 1 Martens (F. de), 2d ed. 134; Hall, §38; Bluntschli, 5th ed. §§298, 299; 1 Oppenheim, 254, 255.

Thus Martens writes: "What we have said in regard to rivers and lakes is equally applicable to the straits or gulfs of the sea, especially those which do not exceed the ordinary width of rivers or double the distance that a cannon can carry."

So Pradier Fodéré says (Vol. II, p. 202), that as to lakes, "in communication with or connected with the sea, they ought to be considered under the same rules as international rivers."

The same view is confirmed by decisions of this court and of many arbitral tribunals.

In Devoe Manufacturing Company, 108 U. S. 401, the question at issue was in regard to the boundary line between New York and New Jersey under an agreement between the two States. The jurisdiction of the State of New Jersey was claimed "to extend down to the bay of New York, and to the channel midway of said bay," and this court

sustained the claim. See Hamburg American Steamship Company v. Grube, 196 U. S. 407.

In the San Juan Water Boundary controversy between the United States and Great Britain, Emperor William I gave the award in favor of the United States, October 21, 1871, by deciding "that the boundary line between the territory of Her Brittanic Majesty and the United States should be drawn through the Haro Channel;" and it is apparent that the decision was based on the deep channel theory as applicable to sounds and arms of the sea, such as the straits of San Juan de Fuca; indeed in a subsequent definition of the boundary, signed by the Secretary of State, the British Minister, and the British representative, the boundary line was said to be prolonged until "it reaches the center of the fairway of the Straits of San Juan de Fuca." The fairway was the equivalent of the *thalweg*.

Again, in fixing the boundary line of the Detroit river, under the sixth and seventh articles of the treaty of Ghent, the deep water channel was adopted, giving Belle Isle to the United States as lying north of that channel.

So in the Alaskan Boundary case, the majority of the arbitration tribunal, made up of Baron Alverstone, Lord Chief Justice of England, Mr. Secretary Root, and Senators Lodge and Turner, held that the middle of the Portland Channel was the proper boundary line and included Wales Island, to the north of which the channel passed. This sustained the American contention in regard to the *thalweg* and the island lying south of it.

But counsel contend that the rule "as to the flow of the midchannel or *thalweg* of the river Iberville (now known as Manchac) through the east, through Lakes Maurepas and Pontchartrain expires by its own limitation when such midchannel reaches Lake Borgne, which in contemplation of the rule is the open sea, and part of the waters of the Gulf of Mexico." This contention is inconsistent, as matter of fact, with the allegation of the cross bill that "the Mississippi Sound was recognized as a body of water six leagues wide, wholly within the State of Mississippi from Lake Borgne to the Alabama line, separate and distinct from the Gulf of Mexico," and with Mississippi's Exhibit Map A presenting her claim, while the record shows that the strip of water, part of Lake Borgne and Mississippi Sound, is not an open sea but a very shallow arm of the sea, having outside of the deep water channel an inconsiderable depth.

The maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian States, which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls, or amber, or other products of the sea. See Manchester v. Massachusetts, 139 U. S. 240; McCready v. Virginia, 94 U. S. 391.

In Manchester v. Massachusetts, the court said: "We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide waters is a marine league from its coast; that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit; and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free swimming fish, or free moving fish, or fish attached to or embedded in the soil. The open sea within this limit is, of course, subject to the common right of navigation; and all governments, for the purpose of self protection in time of war or for the prevention of frauds on its revenue, exercise an authority beyond this limit."

Questions as to the breadth of the maritime belt or the extent of the sway of the riparian States require no special consideration here. The facts render such discussion unnecessary.

Islands formed by alluvion were held by Lord Stowell, in respect of certain mud islands at the mouth of the Mississippi, to be "natural appendages of the coast on which they border, and from which indeed they are formed." The Anna (1805), 5 C. Rob. 373.

As to these particular waters, the observations of Mr. Hall, 4th ed. p. 129, are in point: "Off the coast of Florida, among the Bahamas, along the shores of Cuba, and in the Pacific, are to be found groups of numerous islands and islets rising out of vast banks, which are covered with very shoal water, and either form a line more or less parallel with land or compose systems of their own, in both cases enclosing considerable sheets of water, which are sometimes also shoal and sometimes relatively deep. The entrance to these interior bays or lagoons may be wide in breadth of surface water, but it is narrow in navigable water."

He then states the specific case of the *Archipiélago de los Canarios* on the coast of Cuba, and says: "In cases of this sort the question whether the interior waters are, or are not, lakes enclosed within the territory, must always depend upon the depth upon the banks, and the width of the entrances. Each must be judged upon its own merits. But in the instance cited, there can be little doubt that the whole *Archipiélago de los Canarios* is a mere salt water lake, and that the boundary of the land of Cuba runs along the exterior edge of the bank."

In such circumstances as exist in the present case, we perceive no reason for declining to apply the rule of the *thalweg* in determining the boundary.

Moreover, it appears from the record that the various departments of the United States Government have recognized Louisiana's ownership of the disputed area; that Louisiana has always asserted it; and that Mississippi has repeatedly recognized it, and not until recently has disputed it.

The question is one of boundary, and this court has many times held that, as between the States of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive, whatever the international rule might be in respect of the acquisition by prescription of large tracts of country claimed by both. Virginia v. Tennessee, 148 U. S. 503; Indiana v. Kentucky, 136 U. S. 479; Missouri v. Kentucky, 11 Wall. 395; Rhode Island v. Massachusetts, 4 How 591. . . .

[In an omitted part of the opinion the court considered evidence of acquiescence in the boundary as asserted by Louisiana.]

Our conclusion is that complainant is entitled to the relief sought.

Decree accordingly.[22]

THE DIRECT UNITED STATES CABLE CO., LTD., v. ANGLO-AMERICAN TELEGRAPH CO., LTD., ET AL

Great Britain. Judicial Committee of the Privy Council. 1877.

Law Reports, 2 *Appeal Cases* 394.

Appeal from an interlocutory order (April 5, 1875) of the Supreme Court of Newfoundland, and in effect from two prior interlocutory orders of the said Court (August 28, 1874, and January 15, 1875). Under the said orders the Appellants were restrained by injunction until the hearing of the cause, or until further order, from constructing, laying, or extending any telegraphic cable in or to the Island of Newfoundland, or any place within the jurisdiction of the government of the colony of Newfoundland. . . .

[Part of the statement of the case, the arguments of counsel, and part of the opinion are omitted. The facts are stated sufficiently in the opinion.]

The judgment of their Lordships was delivered by LORD BLACKBURN:—

. . .

The injunction granted prevents the Appellants from using, for the purpose of telegraphic communication, either the dry land of the island of Newfoundland, or a cable already moored to a buoy in a portion of Conception Bay, where the soil is permanently under water, and which buoy was more than three miles from the dry land which forms the shore of the bay. . . . two main questions are raised:—

First: Whether the rights vested in the Respondents by the Legislature of Newfoundland are such as to entitle them to an injunction preventing any other person from laying a telegraphic wire across a portion of the island of Newfoundland between two termini out of the

[22] See Grisbadarna Arbitration, Norway and Sweden, SCOTT, Hague Court Reports, 121.

island, and then using that wire for the conveyance of messages from the one terminus to the other. . . .

The second question, which does not arise unless the first is decided in favour of the Respondents, is whether they are entitled to an injunction to prevent the use of the spot in Conception Bay, to the same extent as if it were a spot on the dry land of the island of Newfoundland. . . .

The first question as to the extent of the rights given on what is not disputed to be the island depends entirely on the construction of the Act of the Legislature of Newfoundland (17 Vict. c. 1), for there can be no doubt that the Legislature had full power to grant such a right as is claimed, and what has to be determined is whether an intention to grant such a right is sufficiently expressed in the Act. . . .

[In an omitted part of the opinion the court considered the legislative purpose and the text of the act and concluded that the intention of the Legislature was, for the benefit of the company, to prohibit the use of any part of the territory of Newfoundland by any other person for telegraphic communication, whether within the island, or as a mere means of transit between places outside the territory.]

Before proceeding to discuss the second question, it is desirable to state the facts which raise it.

Conception Bay lies on the eastern side of Newfoundland, between two promontories, the southern ending at Cape St. Francis, and the northern promontory at Split Point. No evidence has been given, nor was any required, as to the configuration and dimensions of the bay, as that was a matter of which the Court could take judicial notice.

On inspection of the Admiralty chart, the following statement, though not precisely accurate, seems to their Lordships sufficiently so to enable them to decide the question:—

The bay is a well-marked bay, the distance from the head of the bay to Cape St. Francis being about forty miles, and the distance from the head of the bay to Split Point being about fifty miles. The average width of the bay is about fifteen miles, but the distance from Cape St. Francis to Split Point is rather more than twenty miles.

The Appellants have brought and laid a telegraph cable to a buoy more than thirty miles within this bay. The buoy is more than three miles from the shore of the bay, and in laying the cable, care has been taken not at any point to come within three miles of the shore, so as to avoid raising any question as to the territorial dominion over the ocean within three miles of the shore. Their Lordships therefore are not called upon to express any opinion on the questions which were recently so much discussed in the case of Reg. v. Keyn (the Franconia case).

The question raised in this case, and to which their Lordships confine their judgment, is as to the territorial dominion over a bay of configuration and dimensions such as those of Conception Bay above described.

The few English common law authorities on this point relate to the question as to where the boundary of counties ends, and the exclusive jurisdiction at common law of the Court of Admiralty begins, which is not precisely the same question as that under consideration; but this much is obvious, that when it is decided that any bay or estuary of any particular dimensions is or may be a part of an English county, and so completely within the realm of England, it is decided that a similar bay or estuary is or may be part of the territorial dominions of the country possessing the adjacent shore.

The earliest authority on the subject is to be found in the grand abridgment of Fitzherbert "*Corone*," 399, whence it appears that in the 8 Edw. 2, in a case in Chancery (the nature and subject-matter of which does not appear), Staunton, J., expressed an opinion on the subject. There are one or two words in the common printed edition of Fitzherbert which it is not easy to decipher or translate, but subject to that remark this is a translation of the passage: "*Nota per* Staunton, J., that that is not (*sañce* which Lord Coke translates 'part') of the sea where a man can see what is done from one part of the water and the other, so as to see from one land to the other; that the coroner shall come in such case and perform his office, as well as coming and going in an arm of the sea, there where a man can see from one part to the other of the (a word not deciphered), that in such a place the country can have conusance, &c."

That is by no means definite, but it is clear Staunton thought some portions of the sea might be in a county, and within the jurisdiction of the jury of that county, and at that early time, before cannon were in use, he can have had in his mind no reference to cannon shot.

Lord Coke recognises this authority, 4th Institute, 140, and so does Lord Hale. The latter, in his treatise, *De Jure Maris*, p. 1, c. 4, uses this language: "That arm or branch of the sea which lies within the *fauces terræ*, where a man may reasonably discerne between shore, is, or at least may be, within the body of a county, and therefore within the jurisdiction of the sheriff or coroner. Edward II., *Corone*, 399."

Neither of these great authorities had occasion to apply this doctrine to any particular place, nor to define what was meant by seeing or discerning. If it means to see what men are doing, so, for instance, that eye-witnesses on shore could say who was to blame in a fray on the waters resulting in death, the distance would be very limited; if to discern what great ships were about, so as to be able to see their manœuvres, it would be very much more extensive; in either sense it is indefinite. But in Reg. v. Cunningham [Bell's Cr. C. 72] it did become necessary to determine whether a particular spot in the Bristol Channel, on which three foreigners on board a foreign ship had committed a crime, was within the county of Glamorgan, the indictment having, whether neces-

sarily or not, charged the offence as having been committed in that county.

The Bristol Channel, it is to be remembered, is an arm of the sea dividing England from Wales. Into the upper end of this arm of the sea the River Severn flows. Then the arm of the sea lies between Somersetshire and Glamorganshire, and afterwards between Devonshire and the counties of Glamorgan, Carmarthen, and Pembroke. It widens as it descends, and between Port Eynon Head, the lowest point of Glamorganshire, and the opposite shore of Devon it is wider than Conception Bay; between Hartland Point, in Devonshire, and Pembrokeshire it is much wider. The case reserved was carefully prepared. It describes the spot where the crime was committed as being in the Bristol Channel, between the Glamorganshire and Somersetshire coasts, and about ten miles or more from that of Somerset. It negatived the spot being in the River Severn, the mouth of which, it is stated, was proved to be at King's Road, higher up the Channel, and was to be taken as the finding of the jury. It also shewed that the spot in question was outside Penarth Head, and could not therefore be treated as within the smaller bay formed by Penarth Head and Lavernock Point. And it set out what evidence was given to prove that the spot had been treated as part of the county of Glamorgan, and the question was stated to be whether the prisoners were properly convicted of an offence within the county of Glamorgan. The case was much considered, being twice argued, and Chief Justice Cockburn delivered judgment, saying: "The only question with which it becomes necessary for us to deal is whether the part of the sea on which the vessel was at the time when the offence was committed, forms part of the body of the county of Glamorgan, and we are of opinion that it does. The sea in question is part of the Bristol Channel, both shores of which form part of England and Wales, of the county of Somerset on the one side and the county of Glamorgan on the other. We are of opinion that looking at the local situation of this sea it must be taken to belong to the counties respectively by the shores of which it is bounded; and the fact of the Holms between which and the shore of the county of Glamorgan the place in question is situated, having always been treated as part of the parish of Cardiff, and as part of the county of Glamorgan, is a strong illustration of the principle on which we proceed, namely, that the whole of this inland sea between the counties of Somerset and Glamorgan, is to be considered as within the counties by the shores of which its several parts are respectively bounded. We are therefore of opinion that the place in question is within the body of the county of Glamorgan." The case reserved in Cunningham's Case, incidentally states that it was about ninety miles from Penarth Roads (where the crime was committed) to the mouth of the Channel, which points to the headlands in Pembroke and Hartland Point in Devonshire,

as being the *fauces* of that arm of the sea. It was not, however, necessary for the decision of Cunningham's Case to determine what was the entrance of the Bristol Channel, further than that it was below the place where the crime was committed, and though the language used in the judgment is such as to shew that the impression of the Court was that at least the whole of that part of the Channel between the counties of Somerset and Glamorgan was within those counties perhaps that was not determined. But this much was determined, that a place in the sea, out of any river, and where the sea was more than ten miles wide, was within the county of Glamorgan, and consequently, in every sense of the words within the territory of Great Britain. It also shews that usage and the manner in which that portion of the sea had been treated as being part of the county was material, and this was clearly Lord Hale's opinion, as he says not that a bay is part of the county, but only that it may be.

Passing from the Common Law of England to the general law of nations, as indicated by the text writers on international jurisprudence, we find an universal agreement that harbours, estuaries, and bays landlocked belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is "bay" for this purpose.

It seems generally agreed that where the configuration and dimensions of the bay are such as to shew that the nation occupying the adjoining coasts also occupies the bay it is part of the territory; and with this idea most of the writers on the subject refer to defensibility from the shore as the test of occupation; some suggesting therefore a width of one cannon shot from shore to shore, or three miles; some a cannon shot from each shore, or six miles; some an arbitrary distance of ten miles. All of these are rules which, if adopted, would exclude Conception Bay from the territory of Newfoundland, but also would have excluded from the territory of Great Britain that part of the Bristol Channel which in Reg. v. Cunningham was decided to be in the county of Glamorgan. On the other hand, the diplomatists of the United States in 1793 claimed a territorial jurisdiction over much more extensive bays, and Chancellor Kent, in his Commentaries, though by no means giving the weight of his authority to this claim, gives some reasons for not considering it altogether unreasonable.

It does not appear to their Lordships that jurists and text writers are agreed what are the rules as to dimensions and configuration, which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the state possessing the adjoining coasts; and it has never, that they can find, been made the ground of any judicial determination. If it were necessary in this case to lay down a rule the difficulty of the task would not deter their Lordships from

attempting to fulfil it. But in their opinion it is not necessary so to do. It seems to them that, in point of fact, the British Government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other nations, so as to shew that the bay has been for a long time occupied exclusively by Great Britain, a circumstance which in the tribunals of any country would be very important. And moreover (which in a British tribunal is conclusive) the British Legislature has by Acts of Parliament declared it to be part of the British territory, and part of the country made subject to the Legislature of Newfoundland.

To establish this proposition it is not necessary to go further back than to the 59 Geo. 3, c. 38, passed in 1819, now nearly sixty years ago.

There was a Convention made in 1818 between the United States and Great Britain relating to the fisheries of Labrador, Newfoundland, and His Majesty's other possessions in North America, by which it was agreed that the fishermen of the United States should have the right to fish on part of the coasts (not including the part of the island of Newfoundland on which Conception Bay lies), and should not enter any "bays" in any part of the coast except for the purposes of shelter and repairing damages, and purchasing wood, and obtaining water, and no other purposes whatever. It seems impossible to doubt that this Convention applied to all bays, whether large or small, on that coast, and consequently to Conception Bay. It is true that the Convention would only bind the two nations who were parties to it, and consequently that, though a strong assertion of ownership on the part of Great Britain, acquiesced in by so powerful a state as the United States, the Convention, though weighty, is not decisive. But the Act already referred to, 59 Geo. 3, c. 38, though passed chiefly for the purpose of giving effect to the Convention of 1818, goes further.

It enacts not merely that subjects of the United States shall observe the restrictions agreed on by the Convention, but that all persons, not being natural-born subjects of the King of Great Britain shall observe them under penalties. And in particular, by sect. 4, it enacts that if "any person" upon being required by the governor, or any officer acting under such governor, in the execution of any order or instructions from His Majesty in Council, shall *inter alia* refuse to depart from such bays, he shall be subject to a penalty of £200.

No stronger assertion of exclusive dominion over these bays could well be framed. As has been already observed, Conception Bay is in every sense of the words a bay within Newfoundland, though of considerable width; and as there is nothing to justify a construction of the Act limiting it to bays not exceeding any particular width, this is an unequivocal assertion of the British Legislature of exclusive dominion

over this bay as part of the British territory. And as this assertion of dominion has not been questioned by any nation from 1819 down to 1872, when a fresh Convention was made, this would be very strong in the tribunals of any nation to shew that this bay is by prescription part of the exclusive territory of Great Britain. As already observed, in a British tribunal it is decisive.

By the treaty of Washington it was agreed by the 32nd article that certain provisions should extend to "the colony of Newfoundland so far as they are applicable. But if the Imperial Parliament, the Legislature of Newfoundland, or the Congress of the United States should not embrace Newfoundland in their laws for carrying the foregoing articles into effect, then this article shall be of no effect."

The Act 35 & 36 Vict. c. 45, of the Imperial Legislature, suspended all Acts of Parliament which operated to prevent the carrying the articles into effect, and by sect. 2 enacted that so soon as the necessary laws had been passed by the Legislature of Newfoundland that Act should extend to Newfoundland.

The Act 59 Geo. 3, c. 38, is one of the Acts which would operate to prevent the carrying of articles into effect. In the opinion of their Lordships the above treaty and Act are sufficient to shew that, in the opinion both of the executive and of the Legislature, the right to legislate over the bays of Newfoundland, to which that Act applied, of which Conception Bay is one, had been conferred on the Legislature of Newfoundland. . . .

Their Lordships, therefore will humbly recommend to Her Majesty that the order of the Supreme Court of Newfoundland be affirmed and that this appeal be dismissed with costs.[23]

[23] "The rule is one of universal recognition, that a bay, strait, sound or arm of the sea, lying wholly within the domain of a sovereign, and admitting no ingress from the ocean, except by a channel between contiguous headlands which he can command with his cannon on either side, is the subject of territorial dominion." PORTER, J., in Mahler v. Transportation Co., 35 N. Y. 352, 355.

"We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide-waters is a marine league from its coast; that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit; and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish, or free-moving fish, or fish attached to or embedded in the soil." BLATCHFORD, J., in Manchester v. Massachusetts, 139 U. S. 240, 258.

The North Sea Fisheries Convention, May 6, 1882, art. 2, provided: "The fishermen of each country shall enjoy the exclusive right of fishery within the distance of 3 miles from low-water mark along the whole extent of the coasts of their respective countries, as well as of the dependent islands and banks. As regards bays, the distance of 3 miles shall be measured from a straight line drawn across the bay in the part nearest the entrance, at the first point where the width does not exceed 10 miles." 9 Martens, Nouv. Rec. Gén., 2 sér., 556, 557, U. S. For. Rel. (1887) 438, 439.

The Case of the Washington

Great Britain and the United States. Mixed Claims Commission. 1853.

Moore, History and Digest of the International Arbitrations to Which the United States has been a Party, Volume IV, page 4342.

The American schooner Washington, while engaged in fishing in the Bay of Fundy, ten miles distant from the shore, was seized by one of Her Britannic Majesty's cruisers and taken to Yarmouth, in Nova Scotia, and condemned, on the ground that she was engaged in fishing in British waters in violation of the provisions of the convention relative to the fisheries, entered into between the United States and Great Britain, on October 20, 1818.[24] A claim for damages was made before the commission under the claims convention between the United States

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And see North Atlantic Coast Fisheries Arbitration, Great Britain and United States, Proceedings, U. S. Sen. Doc., No. 870, 61st Congress, 3d Session, I, 64, 92.

"It is quite certain that there is at present no such agreement in the practice of civilized States as to afford a definite rule to regulate territorial claims to the waters of gulfs and bays for the future; still less to determine what has been in fact the territorial jurisdiction in the past. It is also clear that whenever a rule can in the future be recognized as a principle of international law, it will have to admit exceptions where territorial jurisdiction has been effectively exercised beyond the limits of the general rule, whatever it may be; and in determining the existence of those exceptions, I do not know a better statement of the considerations that must be taken into account than is to be found in the Award of the Permanent Court of Arbitration at The Hague, in the North Atlantic Coast Fisheries Arbitration, in 1910: 'The interpretation must take into account all the individual circumstances which, for any of the different bays are to be appreciated; the relation of its width to the length of penetration inland; the possibility and the necessity of its being defended by the State in whose territory it is indented; the special value which it has for the industry of the inhabitants of its shores; the distance which it is secluded from the highways of nations on the open sea and other circumstances not possible to enumerate in general.' " Atkin, L. J., in The Fagernes [1927] P. 311, 325.

Bays within the territory of a single state, but exceeding two marine leagues in width at the entrance, have been considered territorial in a number of instances: Regina v. Cunningham, Bell's C. C. 72 (Bristol Channel) (but *cf.* The Fagernes, *supra*); Mowat v. McFee, 5 Can. S. C. 66 (Bay of Chaleurs); The Grange, 1 Op. Atty. Gen. 32 (Delaware Bay); The Alleganean, Moore, Int. Arb., IV, 4332 (Chesapeake Bay); Salvador v. Nicaragua, Central American Court of Justice, 11 Am. Jour. Int. L. 674, 693 (Gulf of Fonseca); Ocean Industries, Inc., v. Greene, 15 F. (2d) 862, Ocean Industries, Inc., v. Superior Court of Santa Cruz County, 200 Cal. 235 (Bay of Monterey). And see Jessup, Territorial Waters, 383 *et seq.*

On the boundaries of territorial authority in the Great Lakes, see The Grace, 4 Can. Exch. 283; Thorson v. Peterson, 10 Biss. 530; Dunlap v. Commonwealth, 108 Pa. 607; Ex parte Byers, 32 Fed. 404; United States v. Rodgers, 150 U. S. 249; United States v. Peterson, 64 Fed. 145; Hunt, "How the Great Lakes Became 'High Seas,' and Their Status Viewed from the Standpoint of International Law," 4 Am. Jour. Int. L. 285.

[24] 8 U. S. Stat. L. 248.

and Great Britain of February 8, 1853,[25] on the ground that the seizure was in violation of the provisions of the convention of 1818 and of the law of nations.

Hornby, British commissioner, maintained that the seizure was justified, both on the ground that the Bay of Fundy was an indentation of the sea, over which Great Britain might by virtue of the law of nations claim exclusive jurisdiction, and also on the ground that, by a fair construction of the convention of 1818, the Bay of Fundy was one of the "bays" in which, by that convention, the United States had renounced the right to take fish.

Upham, the American commissioner, denied both these contentions, citing Vattel, I. ch. 20, ss. 282, 283; Grotius, II. ch. 2, sec. 3; 1 Kent's Comm. 462; Sabine's Report on the Fisheries, 282, 294.

THE UMPIRE rendered the following decision:

"The schooner Washington was seized by the revenue schooner Julia, Captain Darby, while fishing in the Bay of Fundy ten miles from the shore, on the 10th of May 1843, on the charge of violating the treaty of 1818. She was carried to Yarmouth, Nova Scotia, and there decreed to be forfeited to the Crown by the judge of the vice admiralty court, and with her stores ordered to be sold. The owners of the Washington claim for the value of the vessel and appurtenances, outfits, and damages, $2,483, and for eleven years' interest, $1,638, amounting together to $4,121. By the recent reciprocity treaty, happily concluded between the United States and Great Britain, there seems no chance for any future disputes in regard to the fisheries. It is to be regretted that in that treaty provision was not made for settling a few small claims, of no importance in a pecuniary sense, which were then existing, but as they have not been settled they are now brought before this commission.

"The Washington, fishing schooner, was seized, as before stated, in the Bay of Fundy, ten miles from the shore, off Annapolis, Nova Scotia.

"It will be seen by the treaty of 1783, between Great Britain and the United States, that the citizens of the latter, in common with the subjects of the former, enjoyed the right to take and cure fish on the shores of all parts of Her Majesty's dominions in America used by British fishermen; but not to dry fish on the island of Newfoundland, which latter privilege was confined to the shores of Nova Scotia in the following words: 'And American fishermen shall have liberty to dry and cure fish on any of the unsettled bays, harbours, and creeks of Nova Scotia, but so soon as said shores shall become settled it shall not be lawful to dry or cure fish at such settlements without a previous agreement for that purpose with the inhabitants, proprietors, or possessors of the ground.'

"The treaty of 1818 contains the following stipulations in relation to the fishery: 'Whereas differences have arisen respecting the liberty

[25] 10 U. S. Stat. L. 988.

claimed by the United States to take, dry, and cure fish on certain coasts, bays, harbors, and creeks of His Britannic Majesty's dominions in America, it is agreed that the inhabitants of the United States shall have, in common with the subjects of His Britannic Majesty, the liberty to fish on certain portions of the southern, western, and northern coast of Newfoundland, and also on the coasts, bays, harbors, and creeks from Mount Joly, on the southern coast of Labrador, to and through the Straits of Belle Isle, and thence northwardly indefinitely along the coast, and that American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbors, and creeks of said described coasts until the same become settled and the United States renounce the liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbors of His Britannic Majesty's dominions in America not included in the above-mentioned limits: Provided, however, That the American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.'

"The question turns, so far as relates to the treaty stipulations, on the meaning given to the word 'bays' in the treaty of 1783. By that treaty the Americans had no right to dry and cure fish on the shores and bays of Newfoundland, but they had that right on the coasts, bays, harbors, and creeks of Nova Scotia; and as they must land to cure fish on the shores, bays, and creeks, they were evidently admitted to the shores of the bays, etc. By the treaty of 1818 the same right is granted to cure fish on the coasts, bays, etc., of Newfoundland, but the Americans relinquished that right and the right to fish within three miles of the coasts, bays, etc., of Nova Scotia. Taking it for granted that the framers of the treaty intended that the word 'bay' or 'bays' should have the same meaning in all cases, and no mention being made of headlands, there appears no doubt that the Washington, in fishing ten miles from the shore, violated no stipulations of the treaty.

"It was urged on behalf of the British Government that by coasts, bays, etc., is understood an imaginary line, drawn along the coast from headland to headland, and that the jurisdiction of Her Majesty extends three marine miles outside of this line; thus closing all the bays on the coast or shore, and that great body of water called the Bay of Fundy against Americans and others, making the latter a British bay. This doctrine of headlands is new, and has received a proper limit in the convention between France and Great Britain of 2d August 1839, in

which 'it is agreed that the distance of three miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries shall, with respect to bays the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland.'

"The Bay of Fundy is from 65 to 75 miles wide and 130 to 140 miles long. It has several bays on its coasts. Thus the word bay, as applied to this great body of water, has the same meaning as that applied to the Bay of Biscay, the Bay of Bengal, over which no nation can have the right to assume the sovereignty. One of the headlands of the Bay of Fundy is in the United States, and ships bound to Passamaquoddy must sail through a large space of it. The island of Grand Menan (British) and Little Menan (American) are situated nearly on a line from headland to headland. These islands, as represented in all geographies, are situate in the Atlantic Ocean. The conclusion is, therefore, in my mind irresistible that the Bay of Fundy is not a British bay, nor a bay within the meaning of the word as used in the treaties of 1783 and 1818.

"The owners of the Washington, or their legal representatives, are therefore entitled to compensation, and are hereby awarded not the amount of their claim, which is excessive, but the sum of three thousand dollars, due on the 15th January 1855."[26]

SECTION 3. AUTHORITY IN THE AIR

Bury v. Pope

Great Britain. Exchequer Chamber. 1687.

1 *Croke's Reports* 118.

Case for stopping of his light.—It was agreed by all the Justices, that if two men be owners of two parcels of land adjoining, and one of them doth build a house upon his land, and makes windows and lights looking into the other's lands, and this house and the lights have con-

[26] See Fauchille, I, Pt. II, 371; Hyde, I, §§146–148; Imbart de Latour, La Mer Territoriale, Pt. I, ch. 3; Jessup, Territorial Waters, ch. 8; Oppenheim, 4th ed., I, §§191–193.

See Fur Seal Arbitration, Great Britain and United States, Proceedings of the Tribunal (Washington, 1895); Cobbett, Cases, 4th ed., I, 127; Moore, Int. Arb., I, 755. See also The James G. Swan, 50 Fed. 108; The Kodiak, 53 Fed. 126; The Alexander, 60 Fed. 914; In re Cooper, 143 U. S. 472; La Ninfa, 75 Fed. 513. And see Convention of Washington, July 7, 1911, 37 U. S. Stat. L. 1542; Act of 1924, c. 308, 43 U. S. Stat. L. 595.

On territorial waters, in general, see 23 Am. Jour. Int. L. Suppl., Special Number, 241. On boundaries, in general, see Adami, National Frontiers in Relation to International Law.

tinued by the space of thirty or forty years, yet the other may upon his own land and soil lawfully erect an house or other thing against the said lights and windows, and the other can have no action; for it was his folly to build his house so near to the other's land: and it was adjudged accordingly.

Nota. Cujus est solum, ejus est summitas usque ad cœlum.[27] Temp. Ed. I.

Pickering v. Rudd

Great Britain. Court of King's Bench. 1815.

4 *Campbell's Reports* 219.

Trespass for breaking and entering the plaintiff's close, and placing a board over it, and cutting a tree, &c.

Plea, not guilty as to the *clausum fregit;* and as to cutting the tree, a justification that it was wrongfully growing against the wall of the defendant, and that he therefore removed it, as he lawfully might. New assignment of excess, and issue thereupon.

The defendant's house adjoins to the plaintiff's garden, the *locus in quo;* and to prove the breaking and entering of this, the evidence was, that the defendant had nailed upon his house a board, which projected several inches from the wall, and so far overhung the garden.

Garrow, A. G., and Richardson for the plaintiff contended that this was a trespass for which he had a right to maintain the present action. *Cujus est solum, ejus est usque ad cœlum.* The space over the soil of the garden is the plaintiff's, like the minerals below, and an invasion of either is, in contemplation of law, a breaking of his close. A mere temporary projection of a body through the air across the garden may not be actionable: but where a board is caused permanently to overhang the garden, this is a clear invasion of the plaintiff's possession. If this be not a trespass, it is easy to conceive that the whole garden may be overshadowed and excluded from the sun and air without a trespass being committed.

Lord Ellenborough.—I do not think it is a trespass to interfere with the column of air superincumbent on the close. I once had occasion to rule upon the circuit, that a man who, from the outside of a field,

[27] "Land hath also, in it's legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad cœlum,* is the maxim of the law, upwards; therefore no man may erect any building, or the like, to overhang another's land: and, downwards, whatever is in a direct line between the surface of any land, and the center of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries. So that the word 'land' includes not only the face of the earth, but every thing under it, or over it." Blackstone, Commentaries, Book II, ch. 2, p. 18.

discharged a gun into it, so as that the shot must have struck the soil, was guilty of breaking and entering it. A very learned judge who went the circuit with me, at first doubted the decision, but I believe he afterwards approved of it, and that it met with the general concurrence of those to whom it was mentioned. But I am by no means prepared to say, that firing across a field *in vacuo*, no part of the contents touching it, amounts to a *clausum fregit*. Nay, if this board overhanging the plaintiff's garden be a trespass, it would follow that an æronaut is liable to an action of trespass *quare clausum fregit* at the suit of the occupier of every field over which his balloon passes in the course of his voyage.[28] Whether the action may be maintained cannot depend upon the length of time for which the superincumbent air is invaded. If any damage arises from the object which overhangs the close, the remedy is by an action on the case.[29] Here the verdict depends upon the new assignment of excess in cutting down the tree.

The jury found for the defendant.

Corbett v. Hill

Great Britain. Court of Chancery. 1870.

39 *Law Journal Reports, Chancery, New Series*, 547.

This was the motion for a decree in a suit instituted to restrain the defendants from building over the roof of a room of the plaintiff which projected over the defendants' premises. . . .

James, V. C.—In this case the plaintiff seeks an injunction to prevent the continuance of a building which has been erected over a part of the plaintiff's house which projects over the site of the defendant's house, 34, Eastcheap. The plaintiff conveyed that house, 34, Eastcheap, to the defendants. He conveyed it by a plan which carefully delineates the site of the house, 34, Eastcheap. The ordinary rule of law is, that whoever has got the *solum*, whoever has got the site, is the owner of everything up to the sky and down to the centre of the earth; but that ordinary presumption of law, no doubt, is frequently rebutted, particularly with regard to property in towns, by the fact that other adjoining tenements, in consequence of a joint ownership, or from other circum-

[28] See Kenyon v. Hart, 6 B. & S. 249, 252; Clifton v. Bury, 4 T. L. R. 8.

[29] "Later decisions in England and in this country found no difficulty in justifying the action of trespass in all cases of encroaching signs, buildings, trees, overhanging telegraph and telephone wires and the like where the attachment to the soil was upon defendant's land, though entirely clear of the complainant's. Such interference constitutes not only a trespass, but also a nuisance under the laws of some of our States." Kuhn, in 4 Am. Jour. Int. L. 109, 124. See Pollock, Torts, 12th ed , 351; 48 Am. L. Rev. 914; 32 Harv. L. Rev. 569.

stances, protrude themselves over the freehold, and the question then is, whether the protrusion is a diminution of so much of the soil and freehold, including the right upwards and downwards, or whether the protrusion is not merely the right to that horizontal stratum limited by the ceiling on one side, and the floor on the other—that is to say, a flat. In my opinion, this protruding room here was simply a protrusion of that extent and that limited character. It was a protrusion which the plaintiff has retained as part of his freehold in Philpot Lane. According to those cases to which Mr. Amphlett referred, a man may have a *solum* or soil which may be apparently in another man's house. My opinion is as clear as anything can be, that this room remains part of the house in Philpot Lane; but that, being part of the house in Philpot Lane, it does not carry with it anything above or anything below. That is, subject to the exception which has been obtained or made by reason of the protrusion, the owner of the house in Eastcheap still remains the owner of everything, including the column of air, over which the supposed trespass has been made. That being so, the plaintiff has failed, and his bill must be dismissed with costs. His Honour directed the minutes of decree to be as follows:—"The Court, being of opinion that the plaintiff is not entitled to the column of air over so much of the projecting room as projects over the site described in the plan, dismiss the bill with costs, the decree to be without prejudice to any question as to the ownership of the room."[30]

BRINQUANT, MAUGE, VALET AND BERTRAND v. LA SOCIÉTÉ FARMAN AND OTHERS

France. Civil Tribunal of the Seine. 1912.

Revue Juridique Internationale de la Locomotion Aérienne, Volume III, page 282.

[Part of the opinion is omitted.]

THE COURT:

Considering that, by process dated January 7, 1911, Brinquant, Mauge, Valet and Bertrand have cited the Henry and Maurice Farman Company, Henry, Maurice and Dick Farman and Neubauer in the capacity of managers of the said company, for the payment of 5,000 francs as damages and for the cessation of the maneuvering of airplanes above their properties at a height of less than two hundred meters, under an obligation of five hundred francs in case of proven violation;

Considering that, by motions dated June 6, 1911, the Committee of the Aeronautic Industries has declared its intervention in the suit

[30] On interference with rights of the subjacent owner by telephone or telegraph wires, see Butler v. Frontier Telephone Co., 186 N. Y. 486; Schmoll, "L'aviation devant la justice," 3 Rev. Jur. Int. Loc. Aér. 33, 40.

in order to safeguard corporate interests, and to support the contention that aerial communication is free, and that in consequence there is no cause for fixing the height below which airplanes may not fly, nor for deciding that the passage of airplanes causes the disappearance of game;

Considering that Brinquant, Mauge and Bertrand have moved the inadmissibility of the intervention of the Committee of the Aeronautic Industries;

Considering that by additional demands dated June 12 and 13, 1912, Brinquant, Mauge and Bertrand have asked leave to contend that all airplanes coming from the Farman Company, before being used for instruction of pilots or for flying, should be equipped with a silencing apparatus, under penalty of fifty francs in case of proven violation; that the said company should be forbidden to give lessons or to continue trials, by rule and order as regards every airplane, and to continue speed or duration tests above these premises, under penalty of 200 francs for proven violation. . . .

Concerning the demand of intervention: . . .

[In an omitted part of the opinion the court stated reasons for refusing to allow intervention.]

Concerning the demand for damages and cessation of disturbance:

Considering that the Farman Company has established at Toussus-le-Noble an aviation school, and devotes itself daily at the aerodrome of Buc, where that school is established, to aviation exercises, experiments, or tests of apparatus, and gives lessons in piloting;

Considering that complainants maintain that in the course of these trials and lessons the airplanes, passing the limits of the aerodrome belonging to the Company, frequently maneuver above their property at various heights, but generally rather low, varying from five to fifteen meters; that these maneuverings, performed under these conditions, are of a nature to disturb them in the enjoyment of their property: on the one hand, either by fright caused to animals by the presence of the machine and the noise of the motor, or by the landings which frequently damage their crops, or by the crowd of spectators who overrun their cultivated lands, or by the disturbance caused among the field-laborers whom they employ, who think their safety threatened; and, on the other hand, by the driving away of game frightened by the noisy apparition of the machines; that these annoyances render farming dangerous, threatening, and injurious, and cause them substantial disturbance exceeding the limit imposed by obligations of neighborhood; . . .

In general:

Considering that it is established by the papers and documents submitted in the argument that the airplanes of the aviation school directed by the Farman Company come out frequently, if not daily,

from the aerodrome in order to maneuver at low heights above the lands belonging to or leased to the complainants, under such conditions that the owners or tenants are disturbed in the enjoyment or the cultivation of their property by the insecurity with which they feel themselves constantly threatened in the course of their work, and by the noises of the machines of a nature to frighten animals and game;

Considering that this situation is proved by numerous landings of airplanes occurring in 1910 and 1911, which have given occasion either to suits or to amicable settlements arranged between the parties;

Considering that the complaints and the records of proof (*procès-verbaux de constat*) executed after the citation show that this situation has continued and that the annoyances mentioned have been increased and are increasing daily, so to speak, because of the business conducted by the Farman Company;

Considering that although the records of proof (*procès-verbaux de constat*), when they have not been impeached, are sometimes deprived of probatory force, it is otherwise when they are supported, as in the present case, by circumstances which corroborate them, namely, the judgments rendered and the amicable settlements above mentioned;

Considering, consequently, that the disturbances of which the petitioners complain, aside from the acts of landing for which damages have been asked and obtained, are proved, and that reparation is due;

Considering damages:

As regards Brinquant:

Considering that Brinquant, owner of the lands above which the flights of airplanes have been proved, has leased his farm of Buc to Mauge, who cultivates the land; that the above mentioned acts have caused him no other damage than a disturbance of enjoyment in hunting; that it appears from the records of proof (*procès-verbaux de constat*) that a landing was made September 20, 1909, in the midst of a hunting party;

But considering that he has shown the driving away of game pursued in the hunt by no document . . . and that he has, moreover, sold his farm to M. Blériot; that there is ground only to allow him expenses of process (*les dépens sour tous dommages-intérêts*);

As regards Mauge:

Considering that Mauge, lessee of the lands of the farm of Buc, belonging to Brinquant, has been, by the above mentioned acts, disturbed in his farming; that the acts disturbing enjoyment have taken place during many years, and that the court has the elements necessary in order to fix the damage caused him at five hundred francs;

As regards Bertrand:

Considering that Bertrand has not produced, in support of his demand, any document other than the record (*procès-verbal de constat*)

made by the game-keeper of Villiers, dated May 3, 1912, showing that an airplane landing occurred on a piece of land belonging to him; that there is ground only to allow him expenses of process (*les dépens sour tous dommages-intérêts*);

Considering contingent injuries:

Considering that the threat of contingent injury is a legitimate cause of action only in so far as it constitutes by itself an actual disturbance in possession or in enjoyment;

Considering that the disturbance of which petitioner complains does not result from a permanent and continuous state of things, but rather from fortuitous and interrupted acts;

Considering, consequently, that the court is not competent to prejudge facts which are not submitted to it, nor to fix, without exceeding its powers, the height at which aviators should fly, nor the silencing apparatus with which airplanes should be equipped in order that they may not constitute a disturbance of complainants' enjoyment;

Considering that it will be competent for the latter, so long as a regulation of aerial navigation is not interposed, to prove, as they have done, fresh disturbance of which they may be the victims and to demand reparation therefor;

Considering, consequently, that there is ground for rejecting the contentions of the complainants relative to the future;

For these reasons:

Let it be declared that the Committee of the Aeronautic Industries is ill founded in its intervention; . . .

Let the action of Brinquant, Mauge and Bertrand be allowed;

Let Brinquant and Mauge be declared well founded in their demand for damages for disturbance of enjoyment;

Consequently, let the Farman Company and the Farman associates, Neubauer in his capacity, be ordered jointly and in solidarity to pay Mauge the sum of five hundred francs as damages; let Brinquant and Bertrand be allowed expenses of process (*les dépens pour tous dommages-intérêts*); let Mauge, Brinquant and Bertrand be declared ill founded in respect to the rest of their demands, conclusions, and contentions; let them be set aside.

Let the respondents be ordered to pay all costs.[31]

MM. Champetier de Ribes, Lacoin and Imbreco, advocates. [Editor's transl.]

[31] See 24 Jurid. Rev. 321; 3 Rev. Jur. Int. Loc. Aér. 285. See also Commonwealth v. Nevin, 2 D. & C. (Pa.) 241; Johnson v. Curtis Northwest Airplane Co., 1928 U. S. Av. 42. And see BALL, "Vertical Extent of Ownership in Land," 76 U. of Pa. L. Rev. 631.

GERMANY, CIVIL CODE

Article 905. 1896.

905. The right of the owner of a piece of land extends to the space above the surface and to the earth under the surface. However, the owner cannot prohibit interferences which take place at such height or depth that he has no interest in their exclusion.[32] [LOEWY's transl.]

MICHIGAN, AN ACT GOVERNING AERONAUTICS OVER LAND AND WATER, AND TO PUNISH UNLAWFUL ACTS OF AERONAUTS OR PASSENGERS

[Uniform Aircraft Act.][33]

Sections 3 and 4. 1923.

Michigan Public Acts, 1923, *No.* 224, *page* 362.

Sec. 3. The ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in section four.

Sec. 4. Flight in aircraft over the lands and waters of this state is lawful, unless at such low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath. The landing of an aircraft on the lands or waters of another, without his consent, is unlawful, except in the case of a forced landing. For damages caused by a forced landing, however, the owner or lessee of the aircraft or the aeronaut shall be liable, as provided in section five.

[32] See also Switzerland, Civil Code, Art. 667; Int. L. Assoc. Rep. (1913) 529, 532.

"No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of aircraft over any property at a height above the ground, which, having regard to wind, weather, and all the circumstances of the case is reasonable, or the ordinary incidents of such flight, so long as the provisions of this Act and any Order made thereunder and of the Convention are duly complied with; but where material damage or loss is caused by an aircraft in flight, taking off, or landing, or by any person in any such aircraft, or by any article falling from any such aircraft, to any person or property on land or water, damages shall be recoverable from the owner of the aircraft in respect of such damage or loss, without proof of negligence or intention or other cause of action, as though the same had been caused by his wilful act, neglect or default, except where the damage or loss was caused by or contributed to by the negligence of the person by whom the same was suffered." Great Britain, Air Navigation Act, 1920, §9, 10 & 11 Geo. V. c. 80.

[33] The Uniform Act has been adopted in Delaware, Hawaii, Idaho, Indiana, Maryland, Michigan, Nevada, North Dakota, South Dakota, Tennessee, Utah, and Vermont. U. S. Civil Aeronautics (1928) 132.

Resolution with Respect to the Legal Status of Aircraft in Time of Peace

Institute of International Law. Article 3. Madrid. 1911.

Annuaire de L'Institute de Droit International, Volume XXIV, page 346.

3. International aerial circulation is free, saving the right of subjacent States to take certain measures, to be determined, to ensure their own security and that of the persons and property of their inhabitants.[34] [Scott's transl.]

Resolutions with Respect to the Regulation of Aircraft

International Law Association. Madrid, 1913.

International Law Association, Report of the Twenty-eighth Conference (1913) *pages* 529, 533.

1. It is the right of every State to enact such prohibitions, restrictions, and regulations as it may think proper in regard to the passage of air craft through the air space above its territories and territorial waters.[35]

[34] See 24 Inst. de Dr. Int. 303; Scott, Resolutions, 170.

[35] "Comparatively slight consideration had been given to the legal questions which flight would involve before there arose the highly important problem of sovereignty of the airspace. Jurists disagreed on this fundamental question and two theories, supported by equally eminent students of international law, were quickly advanced in the disputation thus engendered. The advocates of the theory more popular at its inception, basing their arguments on the analogy of the high seas, contended that the airspace was free, that no sovereignty existed over the aerial domain; the opposing theorists maintained that a state was sovereign not only over the land and waters within its boundaries, including the territorial waters adjacent thereto, but also over the superjacent airspace. Between these extremes of absolute freedom and absolute sovereignty there ranged an illustrious group of jurists who advanced intermediary views based upon the one or the other theory. Thus while Meili, Fauchille, Oppenheim and others maintained that the air was free, that no sovereignty existed therein, yet they recognized the necessity of protection for the subjacent state and granted either a territorial zone variously defined wherein to exercise the rights of conservation or simply recognized the authority of the underlying state to enforce those rights when necessary; and while von Bar, Westlake and Meurer, among a list too long to enumerate, favored absolute sovereignty at least within a certain territorial zone, yet they recognized the need of unimpeded navigation and asserted this sovereignty subject to the right of free passage to aviators when such flight would not be prejudicial to the subjacent state." Williams, "Developments in Aerial Law," 75 U. of Pa. L. Rev. 139, 140.

See Hershey, "International Law of Aerial Space," 6 Am. Jour. Int. L. 381; Lee, "Sovereignty of the Air," 7 *ibid.* 470; Richards, "Law of Aviation," Int. L. Assoc. Rep. (1913) 522; Sperl, "Legal Side of Aviation," 23 Green Bag 398; Spurr, "Let the Air Remain Free," 18 Case and Comment 119. And see Franco-German Agreement, 1913, Woodhouse, 11; Recommendation of Pan-American Aeronautic Federation, 1916, *ibid.*, 12.

2. Subject to this right of subjacent States liberty of passage of aircraft ought to be accorded freely to the aircraft of every nation.

CONVENTION RELATING TO THE REGULATION OF AERIAL NAVIGATION[36]

Articles 1, 2, and 15. Paris, October 13, 1919.

11 *League of Nations Treaty Series* 174, 190.

Art. 1. The High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the air space above its territory.[37]

For the purpose of the present Convention, the territory of a State shall be understood as including the national territory, both that of the mother country and of the colonies, and the territorial waters adjacent thereto.

Art. 2. Each contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting States, provided that the conditions laid down in the present Convention are observed.

Regulations made by a contracting State as to the admission over its territory of the aircraft of the other contracting States shall be applied without distinction of nationality.

Art. 15. Every aircraft of a contracting State has the right to cross the air space of another State without landing. In this case it shall follow the route fixed by the State over which the flight takes place. However, for reasons of general security, it will be obliged to land if ordered to do so by means of the signals provided in Annex D.

Every aircraft which passes from one State into another shall, if the regulations of the latter State require it, land in one of the aerodromes fixed by the latter. Notification of these aerodromes shall be given by

[36] See KUHN, "International Aerial Navigation and the Peace Conference," 14 Am. Jour. Int. L. 369; LEE, "International Flying Convention and the Freedom of the Air," 33 Harv. L. Rev. 23. The Convention was signed by twenty-six states. It had been accepted in 1928, by accession, adherence, or ratification, by twenty-seven states. U. S. Civil Aeronautics (1928) 156.

[37] The British Air Navigation Act, 1920, enacted to give effect to the Air Navigation Convention, commences with an assertion that "the full and absolute sovereignty and rightful jurisdiction of His Majesty extends, and has always extended, over the air superincumbent on all parts of His Majesty's dominions and the territorial waters adjacent thereto." 10 & 11 Geo. V, c. 80, preamble. The United States Air Commerce Act, 1926, c. 344, §6 (a), declares that "the Government of the United States has, to the exclusion of all foreign nations, complete sovereignty of the airspace over the lands and waters of the United States, including the Canal Zone." 44 U. S. Stat. L. 568, 572.

the contracting States to the International Commission for Air Navigation[38] and by it transmitted to all the contracting States.

The establishment of international airways shall be subject to the consent of the States flown over.

Charles Guille v. Swan

United States. Supreme Court of Judicature of New York. 1822.

19 *Johnson's Reports* 381.

In error, on *certiorari*, to the Justices' Court in the city of New-York. Swan sued Guille in the Justices' Court, in an action of trespass, for entering his close, and treading down his roots and vegetables, &c. in a garden in the city of New-York. The facts were, that Guille ascended in a balloon in the vicinity of Swan's garden, and descended into his garden. When he descended, his body was hanging out of the car of the balloon in a very perilous situation, and he called to a person at work in Swan's field, to help him, in a voice audible to the pursuing crowd. After the balloon descended, it dragged along over potatoes and radishes, about thirty feet, when Guille was taken out. The balloon was carried to a barn at the farther end of the premises. When the balloon descended, more than two hundred persons broke into Swan's garden through the fences, and came on his premises, beating down his vegetables and flowers. The damage done by Guille, with his balloon, was about 15 dollars, but the crowd did much more. The plaintiff's damages, in all, amounted to 90 dollars. It was contended before the Justice, that Guille was answerable only for the damage done by himself, and not for the damage done by the crowd. The Justice was of the opinion, and so instructed the jury, that the defendant was answerable for all the damages done to the plaintiff. The jury, accordingly, found a verdict for him, for 90 dollars, on which the judgment was given, and for costs.

The cause was submitted to the Court on the return, with the briefs of the counsel, stating the points and authorities.

Spencer, Ch. J., delivered the opinion of the Court. The counsel for the plaintiff in error supposes, that the injury committed by his client was involuntary, and that done by the crowd was voluntary, and that, therefore, there was no union of intent; and that upon the same principle which would render Guille answerable for the acts of the crowd, in treading down and destroying the vegetables and flowers of S., he would be responsible for a battery, or a murder committed on the owner of the premises.

[38] See Convention Relating to the Regulation of Aerial Navigation, art. 34, 11 L. of N. T. S. 186, 195.

The intent with which an act is done, is by no means the test of the liability of a party to an action of trespass. If the act cause the immediate injury, whether it was intentional, or unintentional, trespass is the proper action to redress the wrong. It was so decided, upon a review of all the cases, in Percival v. Hickey. (18 Johns. Rep. 257.) Where an immediate act is done by the co-operation, or the joint act of several persons, they are all trespassers, and may be sued jointly or severally; and any one of them is liable for the injury done by all. To render one man liable in trespass for the acts of others, it must appear, either that they acted in concert, or that the act of the individual sought to be charged, ordinarily and naturally, produced the acts of the others. The case of Scott v. Shepard, (2 Black. Rep. 892,) is a strong instance of the responsibility of an individual who was the first, though not the immediate, agent in producing an injury. Shepard threw a lighted squib, composed of gunpowder, into a market house, where a large concourse of people were assembled; it fell on the standing of Y., and to prevent injury, it was thrown off his standing, across the market, when it fell on another standing; from thence, to save the goods of the owner, it was thrown to another part of the market house, and in so throwing it, it struck the plaintiff in the face, and, bursting, put out one of his eyes. It was decided, by the opinions of three Judges against one, that Shepard was answerable in an action of trespass, and assault and battery. De Grey, Ch. J., held, that throwing the squib was an unlawful act, and that whatever mischief followed, the person throwing it was the author of the mischief. All that was done subsequent to the original throwing, was a continuation of the first force and first act. Any innocent person removing the danger from himself was justifiable; the blame lights upon the first thrower; the new direction and new force, flow out of the first force. He laid it down as a principle, that every one who does an unlawful act, is considered as the doer of all that follows. A person breaking a horse in Lincolns-Inn-Fields, hurt a man, and it was held, that trespass would lie. In Leame v. Bray, (3 East Rep. 595,) Lord Ellenborough said, if I put in motion a dangerous thing, as if I let loose a dangerous animal, and leave to hazard what may happen, and mischief ensue, I am answerable in trespass; and if one (he says) put an animal or carriage in motion, which causes an immediate injury to another, he is the actor, the *causa causans*.

I will not say that ascending in a balloon is an unlawful act, for it is not so; but, it is certain, that the Æronaut has no control over its motion horizontally; he is at the sport of the winds, and is to descend when and how he can; his reaching the earth is a matter of hazard. He did descend on the premises of the plaintiff below, at a short distance from the place where he ascended. Now, if his descent, under such circumstances, would, ordinarily and naturally, draw a crowd of people

about him, either from curiosity, or for the purpose of rescuing him from a perilous situation; all this he ought to have foreseen, and must be responsible for. Whether the crowd heard him call for help or not, is immaterial; he had put himself in a situation to invite help, and they rushed forward, impelled, perhaps, by the double motive of rendering aid, and gratifying a curiosity which he had excited. Can it be doubted, that if the plaintiff in error had beckoned to the crowd to come to his assistance, that he would be liable for their trespass in entering the enclosure? I think not. In that case, they would have been co-trespassers, and we must consider the situation in which he placed himself, voluntarily and designedly, as equivalent to a direct request to the crowd to follow him. In the present case, he did call for help, and may have been heard by the crowd; he is, therefore, undoubtedly, liable for all the injury sustained.

Judgment affirmed.[39]

MICHIGAN, AN ACT GOVERNING AERONAUTICS OVER LAND AND WATER, AND TO PUNISH UNLAWFUL ACTS OF AERONAUTS OR PASSENGERS

[Uniform Aircraft Act.]

Section 5. 1923.

Michigan Public Acts, 1923, *No.* 224, *page* 362.

Sec. 5. The owner of every aircraft which is operated over the lands or waters of this state is absolutely liable for injuries to persons or property on the land or water beneath, caused by the ascent, descent or flight of the aircraft, or the dropping or falling of any object therefrom, whether such owner was negligent or not, unless the injury is caused in whole or in part by the negligence of the person injured, or of the owner or bailee of the property injured. If the aircraft is leased at the time of the injury to person or property, both owner and lessee shall be liable, and they may be sued jointly, or either or both of them may be sued separately. An aeronaut who is not the owner or lessee shall be liable only for the consequences of his own negligence. The injured

[39] The Connecticut Act, 1911, §11, provides as follows: "Every aeronaut shall be responsible for all damages suffered in this state by any person from injuries caused by any voyage in an air ship directed by such aeronaut; and if he be the agent or employee of another in making such voyage his principal or employer shall be responsible for such damage." Conn. Laws, 1911, p. 1348. The Massachusetts Act, 1913, §6, provides as follows: "When flying over buildings, persons or animals, an aviator shall fly at such altitude as will best conduce to the safety of those below him as well as to the safety of himself and his passengers, if he be carrying passengers. He shall be held liable for injuries resulting from his flying unless he can demonstrate that he had taken every reasonable precaution to prevent such injury." Mass. Acts, 1913, p. 609. See BALDWIN, "Liability for Accidents in Aerial Navigation," 9 Mich. L. Rev. 20; SPERL, "Legal Side of Aviation," 23 Green Bag 398, 400.

person, or owner or bailee of the injured property, shall have a lien on the aircraft causing the injury to the extent of the damage caused by the aircraft or objects falling from it.

Draft International Air Code

Comité Juridique International de l'Aviation. Articles 23, 24, 25, and 26. Prague, 1922.

Cinquième Congrès International de Législation Aérienne (1922) 241.

Art. 23.—The aircraft which is above the open sea or a territory which does not depend on the sovereignty of any state is submitted to the legislation and the jurisdiction of the country of which it has the nationality.

Art. 24.—When an aircraft is above the territory of a foreign state, deeds done and things which have happened on board, and which would be of a nature to compromise the security or public order of the subjacent state (state flown over), are governed by the legislation of the territorial state and judged by its tribunals.

Art. 25.—The reparation of damages caused to persons and property upon the territory of the subjacent state (state flown over) is governed by the law of that state. An action for reparation can be exercised either before the tribunals of that state or before the tribunals of the state of which the aircraft has the nationality.

Art. 26.—Acts done and things which have happened in space on board the aircraft, and which would not interest the security or public order of the subjacent state (state flown over), remain subject to the legislation and the jurisdiction of the country of which the aircraft has the nationality.[40] [Davis' transl.]

[40] See also Int. L. Assoc. Rep. (1924) 113, 117.

"As originally drafted the Convention [Relating to the Regulation of Aerial Navigation, 1919] provided that, while in flight, the law of the state of nationality of the craft should govern the legal relations between persons on board, though the state flown over was given jurisdiction of a breach of its police or military laws and of crimes and misdemeanors committed against one of its nationals when followed by a landing within that state; upon revision this article was deleted and no similar clause provided." Williams, "Developments in Aerial Law," 75 U. of Pa. L. Rev. 139, 147.

On other questions of air law not included in this section, see Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919, with Annexes, 11 L. of N. T. S. 174; Great Britain, Air Navigation Act, 1920, 10 & 11 Geo. V. c. 80; United States, Air Commerce Act, 1926, c. 344, 44 U. S. Stat. L. 568; Williams, "Federal Legislation Concerning Civil Aeronautics," 76 U. of Pa. L. Rev. 798; U. S. Aviation Reports; U. S. Civil Aeronautics (1928).

On international regulation of wireless telegraphy, see International Wireless Telegraph Convention, 1906, 37 U. S. Stat. L. 1565; International Radiotelegraph Convention, 1912, 38 *ibid.* 1672; International Radiotelegraph Convention, 1927,

SECTION 4. TERRITORIAL SERVITUDES

OPPENHEIM, INTERNATIONAL LAW

Third Edition, Volume I, pages 364, 367, 370, sections 203, 205, and 207. 1920.

§203. State servitudes are those exceptional restrictions made by treaty on the territorial supremacy of a State by which a part or the whole of its territory is in a limited way made perpetually to serve a certain purpose or interest of another State. Thus a State may by a convention be obliged to allow the passage of troops of a neighbouring State, or may in the interest of a neighbouring State be prevented from fortifying a certain town near the frontier.

Servitudes must not be confounded with those general restrictions upon territorial supremacy which, according to certain rules of the Law of Nations, concern all States alike. These restrictions are named 'natural' restrictions of territorial supremacy (*servitutes juris gentium naturales*), in contradistinction to the conventional restrictions (*servitutes juris gentium voluntariae*) which constitute the State servitudes in the technical sense of the term. Thus, for instance, it is not a State servitude, but a 'natural' restriction on territorial supremacy, that a State is obliged to admit the free passage of foreign merchantmen through its territorial maritime belt. . . .

[The omitted part of §203 is reproduced *infra*, 395.]

§205. The object of State servitudes is always the whole or a part of the territory of the State the territorial supremacy of which is restricted by any such servitude. Since the territory of a State includes not only the land, but also the rivers which water the land, the maritime belt, the territorial subsoil, and the territorial atmosphere, all these, as well as the service of the land itself, can be an object of State servitudes. Thus a State may have a perpetual right of admittance for its subjects to the fishery in the maritime belt of another State, or a right to lay telegraph cables through a foreign maritime belt, or a right to make and use a tunnel through a boundary mountain, and the like. Or again, a State servitude might be created through a State acquiring a perpetual right to send military aircraft through the territorial atmosphere of a

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U. S. Sen. Doc., Executive B, 70th Congress, 1st Session (1927); STEWART, "International Radiotelegraph Conference of Washington," 22 Am. Jour. Int. L. 28.

On air law, in general, see BALDWIN, "Law of the Airship," 4 Am. Jour. Int. L. 95; BOGERT, "Problems in Aviation Law," 6 Cornell L. Quart. 271; DE VISSCHER, "Le droit international de la navigation aérienne en temps de paix," 8 Rev. de Dr. Int., 3 sér., 182; FAUCHILLE, I, Pt. II, 581, 1127; HOTCHKISS, Aviation Law; HYDE, I, §§188–193; OPPENHEIM, 4th ed., I, §§197a–197f; SPAIGHT, Aircraft in Peace and the Law; WILLIAMS, "Developments in Aerial Law," 75 U. of Pa. L. Rev. 139; WINGFIELD and SPARKES, Law in Relation to Aircraft; WOODHOUSE, Textbook of Aerial Laws; ZOLLMANN, Law of the Air; 2 C. J. 299.

neighbouring State. It must, however, be emphasised that the open sea can never be the object of a State servitude, since it is no State's territory.

Since the object of State servitudes is the territory of a State, all such restrictions upon the territorial supremacy of a State as do not make a part or the whole of its territory itself serve a purpose or an interest of another State are not State servitudes. The territory as the object is the mark of distinction between State servitudes and other restrictions on the territorial supremacy. Thus the perpetual restriction imposed upon a State by a treaty not to keep military, naval, or air forces, or not to keep an army, navy, or air force beyond a certain size, is certainly a restriction on territorial supremacy, but is not, as some writers maintain, a State servitude, because it does not make the territory of one State serve an interest of another. On the other hand, when a State submits to a perpetual right enjoyed by another State of passage of troops, or to the duty not to fortify a certain town, region, place, or island, or to the claim of another State for its subjects to be allowed the fishery within the former's territorial belt,—in all these and the like cases the territorial supremacy of a State is in such a way restricted that a part or the whole of its territory is made to serve the interest of another State, and such restrictions are therefore State servitudes.

§207. Since State servitudes, in contradistinction to personal rights (rights *in personam*), are rights inherent to the object with which they are connected (rights *in rem*), they remain valid and may be exercised however the ownership of the territory to which they apply may change. Therefore, if, after the creation of a State servitude, the part of the territory affected comes by subjugation or cession under the territorial supremacy of another State, such servitude remains in force. Thus, when the Alsatian town of Hüningen became German in 1871, and again, when it became French in 1918, the State servitude created by the Peace Treaty of Paris, 1815, that Hüningen should, in the interest of the Swiss canton of Basle, never be fortified, was not extinguished. . . .

PIÉDELIÈVRE, PRÉCIS DE DROIT INTERNATIONAL PUBLIC

Volume I, page 259, section 288. 1894.

International servitudes are analysed as certain rights stipulated by treaty for the benefit of one state over the territory of another state. Such a state, for example, is one that undertakes to maintain on its soil only limited military forces, to have only a certain number of fortified places or ships of war, or, again, to suffer that a foreign power may perform on a determined part of its territory any political or administrative acts whatever, as to administer justice there, to establish customs,

post and telegraph services, etc. In all these cases, it is said, the state burdened with a servitude submits to a manifest restriction in the exercise of its territorial sovereignty.

We doubt, however, whether this notion of restriction is in its proper place here. For, at that rate, all the obligations to which a state submits voluntarily would have the same character and produce the same effect. Now, if one goes to the bottom of things, is it not rather the contrary, and is it not more accurate to see in these intended restrictions some applications of the sovereignty of the state? Provided that the obligation to which a government assents does not constitute a veritable abdication, a total or partial alienation of the essential rights which are necessary to its juridical life, the engagement which it undertakes is only one of the manifestations of its liberty. [Editor's transl.]

HYDE, INTERNATIONAL LAW

Volume I, pages 272–277, sections 152 and 153. 1922.

The supremacy of a State as sovereign over what constitutes the national domain, embracing the land and territorial waters and superjacent air space, must be recognized as a fundamental principle of international law, to which the United States avows attachment. There exist, however, certain definite limitations which in practice are acknowledged to restrict the territorial sovereign in the exercise of rights of control. and which vary somewhat according to the nature of the thing over which those rights are asserted. It will be seen that with respect to certain of its territorial waters a State is not deemed to enjoy the same measure of control that it commonly asserts over its lands, and again, that the restrictions to which it is subjected in relation to different classes of water areas are not identical in kind or extent. Thus the duty of a State to yield to foreign vessels a so-called innocent passage along its marginal seas differs widely from that to accord them any privileges of navigation through a river forming an international boundary.

At the present time there is evidence of fresh demands upon the individual State to make concessions heretofore not regarded as obligatory. It is called upon to permit, under conditions not hurtful to itself, foreign powers to make limited use of the air space over the national domain,[41] and to afford them also certain privileges of transit by land.[42]

When the limitation of the right of control is so widely recognized and uniformly applied that every foreign power may reasonably demand observance of it for the benefit of itself or its nationals, it becomes

[41] See Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919, 11 L. of N. T. S. 174, 190, *supra*, 377.

[42] See Convention and Statute on Freedom of Transit, April 20, 1921, 7 L. of N. T. S. 11.

unnecessary to record the fact in treaties. When, however, the limitation is one which is commonly acknowledged to be applicable without discrimination solely in favor of States possessed of a special geographical or economic relationship to the particular area concerned, the need of an appropriate convention is usually conceded. In such case the duty of the territorial sovereign to agree specifically with other States within the favored class, with respect at least to certain limitations, seems to be recognized. Nevertheless, it will be found that the restrictions of a treaty may be such as the territorial sovereign is far from acknowledging the slightest obligation to agree to impose upon itself, and which it yields on grounds of expediency, or in return for a substantial concession. Thus conventions which register what each of the parties thereto appears to regard as common and necessary limitations of the exercise of control over its domain by a contracting territorial sovereign are to be distinguished from those which reveal no such design. . . .

Treaties which impose upon a territorial sovereign limitations of control over its domain which are not required by international law, either for the sake of States generally, or for that of special groups of them, differ widely in scope and design. They may embrace leases of particular areas in perpetuity, vesting in the lessee substantial rights of sovereignty; they may purport to yield for all time to the inhabitants of foreign territory, as did the convention between the United States and Great Britain of October 20, 1818, purely economic rights such as fishing privileges within specified places; they may confer a right of passage across territory; they may burden the territorial sovereign with a duty not to fortify places along its frontier; they may contemplate no arrangement that shall survive the time when the grantor ceases to maintain its sovereignty over the territory concerned. When the arrangement purports to attach permanently to territory or its appurtenances a restriction with respect to freedom of control for the benefit of a State other than the sovereign, the limitation is oftentimes described as a servitude. There is disagreement, however, as to what limitations possessed of such a character may be fairly so designated. There is controversy whether a servitude confers certain rights of sovereignty such as those of governmental administrative control upon the foreign State in whose favor it is yielded. It may be greatly doubted, therefore, whether, in view of the differing opinions of statesmen, the term serves to point to definite limitations of control having a distinctive and recognizable character in law. For that reason its use is believed to obscure rather than clarify the perception of what takes place when contracting States undertake to burden territory with restrictions in favor of a non-territorial sovereign.

In case of controversy concerning the nature and scope of a restriction the precise question is likely to be first, whether the limitation of control

imposed by the treaty is permanent in character, applicable for all time to the area concerned, regardless of changes of sovereignty which it may undergo; and secondly, whether the arrangement serves to clothe a foreign grantee with privileges that are more than economic, embracing, for example, rights of political control. The solution of both questions depends upon the correct interpretation of the treaty involved, an achievement which in turn demands close observance of those fundamental principles of interpretation which are elsewhere discussed. It may be doubted whether the attempt to attach to territory a burden to be fairly regarded by the inhabitants thereof as essentially detrimental to it, and thus in no sense responsive to any equitable demand of the international society, should be deemed to be capable of judicial approval or enforcement in an international forum, even though the validity of the compact is recognized. Again, it may be urged with force that the grantor State lacks (in an international, if not in a domestic or constitutional sense) the power validly to impress upon its territory such a burden for at least a period beyond that when it retains its sovereignty therein.

It must be clear that when a State by any process bargains away various uses of territory over which it otherwise retains its rights as sovereign, it thereby impairs as such its freedom of control, and that the impairment corresponding in exact proportion to what is yielded may even entail the loss of a certain measure of governmental control. Such a result would appear to be at variance with the theory on which State life has in fact developed, and which according to the practice of nations has proved to be expedient. Moreover, it would seem to add to the burden of the territorial sovereign of maintaining or acquiring an unchallenged place in that class of States which are regarded as independent.

TREATY BETWEEN GERMANY, AUSTRIA-HUNGARY, FRANCE, GREAT BRITAIN, ITALY, RUSSIA AND TURKEY

Articles 26 and 29. Berlin, July 13, 1878.

Martens, Nouveau Recueil Général de Traités, Deuxième Série, Volume III, page 449.

Art. 26. The independence of Montenegro is recognized by the Sublime Porte and by all those of the High Contracting Parties who had not hitherto admitted it.

Art. 29. Antivari and its sea-board are annexed to Montenegro under the following conditions:— . . .

Montenegro shall have full and complete freedom of navigation on the Boyana. No fortifications shall be constructed on the course of that river except such as may be necessary for the local defence of the

stronghold of Scutari, and they shall not extend beyond a distance of 6 kilom. from that town.

Montenegro shall have neither ships of war nor flag of war.

The port of Antivari and all the waters of Montenegro shall remain closed to the ships of war of all nations.

The fortifications situated on Montenegrin territory between the lake and the coast shall be razed, and none shall be rebuilt within this zone.

The administration of the maritime and sanitary police, both at Antivari and along the coast of Montenegro, shall be carried out by Austria-Hungary by means of light coast-guard boats.

Montenegro shall adopt the maritime code in force in Dalmatia. On her side Austria-Hungary undertakes to grant Consular protection to the Montenegrin merchant flag.

Montenegro shall come to an understanding with Austria-Hungary on the right to construct and keep up across the new Montenegrin territory a road and a railway.

Absolute freedom of communication shall be guaranteed on these roads.[43] [HERTSLET'S transl.]

THE NORTH ATLANTIC COAST FISHERIES ARBITRATION

Great Britain and the United States. Tribunal of the Permanent Court of Arbitration at The Hague. 1910.

Proceedings in the North Atlantic Coast Fisheries Arbitration, Senate Document (61*st Congress, 3d Session*) *No.* 870, *Volume I, page* 64.

[The treaty of peace of 1783 between Great Britain and the United States continued to inhabitants of the United States the privileges theretofore enjoyed in common with British subjects in the fisheries off Newfoundland, Labrador, and other parts of the North Atlantic Coast.

Great Britain regarded this treaty as abrogated by the war of 1812, whereas the United States considered it as only suspended by and during the war. However, on October 20, 1818, a new treaty was signed with a view of defining the rights of inhabitants of the United States to take fish in certain parts of British north Atlantic coast waters, and to enter

[43] *Cf.* Treaty of Paris, March 30, 1856, arts. 11–14, 15 Martens, Nouv. Rec. Gén., 770, 775; Protocol of Peking, Sept. 7, 1901, art. 7, 32 *ibid.*, 2 sér., 94, 98; Treaty of Versailles, June 28, 1919, art. 358, 13 Am. Jour. Int. L. Suppl. 151, 350; FENWICK, ch. 16.

Cf. also Convention between Panama and United States, Nov. 18, 1903, 33 U. S. Stat. L. 2234; President Roosevelt's message, Dec. 7, 1903, U. S. For. Rel. (1903) vii, xxxiii, xli; Constitution of Panama, 1904, art. 3, RODRIGUEZ, I, 392, 393.

bays and harbors for the purpose of repairs, etc. Article 1 reads as follows:

"Whereas differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof, to take, dry, and cure fish on certain coasts, bays, harbors, and creeks of His Britannic Majesty's dominions in America, it is agreed between the high contracting Parties, that the inhabitants of the said United States shall have forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands on the shores of the Magdalen Islands, and also on the coasts, bays, harbors, and creeks from Mount Joly on the southern coast of Labrador, to and through the Straits of Belleisle and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson Bay Company: And that the American fisherman shall also have liberty forever, to dry and cure fish in any of the unsettled bays, harbors, and creeks of the southern part of the coast of Newfoundland hereabove described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish on, or within three marine miles of any of the coasts, bays, creeks, or harbors of His Britannic Majesty's dominions in America not included within the above-mentioned limits: Provided, however, that the American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them." [8 U. S. Stat. L. 248.]

Differences arose as to the scope and meaning of this article and of the rights and liberties referred to in the article or claimed on behalf of the inhabitants of the United States. Beginning with the seizure of American fishing vessels in 1821–2, the controversy over fishing rights continued in more or less menacing form until 1905 when, on account of the severe restrictive legislation by Newfoundland, affairs reached a critical stage. Negotiations were begun looking to a settlement, and in 1906 a *modus vivendi* covering the fishing season of 1906–7 was agreed upon by the two Governments for the purpose of allaying friction until some definite adjustment could be reached. The *modus* was renewed

for the fishing seasons of 1907–8, 1908–9 and 1909–10, and on January 27, 1909, a *compromis* was signed submitting the controversy to the Permanent Court of Arbitration at The Hague. A tribunal was created composed of the following members of the panel of the court: Heinrich Lammasch, of Austria-Hungary; A. F. de Savornin Lohman, of Holland; George Gray, of the United States; Luis M. Drago, of Argentine; and Sir Charles Fitzpatrick, of Great Britain. The sessions of the tribunal began June 1, 1910, and ended August 12, 1910; the decision was rendered September 7, 1910.

There were seven questions submitted to the tribunal.

First. Great Britain contended for the right, directly or indirectly through Canada or Newfoundland, to make regulations applicable to American fishermen in treaty waters without the consent of the United States, "in respect of (1) the hours, days, or seasons when fish may be taken on the treaty coasts; (2) the method, means and implements to be used in the taking of fish or in the carrying on of fishing operations on such coasts; (3) any other matters of a similar character;" provided such regulations were "reasonable, as being, for instance, appropriate or necessary for the protection and preservation of such fisheries; desirable on grounds of public order and morals; equitable and fair as between local fishermen and the inhabitants of the United States."

The United States, on the other hand, denied the right of Great Britain to make such regulations "unless their appropriateness, necessity, reasonableness, and fairness be determined by the United States and Great Britain by common accord and the United States concurs in their enforcement."]

[The above statement of the case is taken from the syllabus in Scott, The Hague Court Reports, 141. Part only of the award dealing with the first of the seven questions submitted is reproduced here.]

Question I, thus submitted to the Tribunal, resolves itself into two main contentions:

1st. Whether the right of regulating reasonably the liberties conferred by the treaty of 1818 resides in Great Britain;

2nd. And, if such right does so exist, whether such reasonable exercise of the right is permitted to Great Britain without the accord and concurrence of the United States.

The treaty of 1818 contains no explicit disposition in regard to the right of regulation, reasonable or otherwise; it neither reserves that right in express terms, nor refers to it in any way. It is therefore incumbent on this Tribunal to answer the two questions above indicated by interpreting the general terms of Article I of the treaty, and more especially the words "the inhabitants of the United States shall have, for ever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind." This interpretation must be conformable

to the general import of the instrument, the general intention of the parties to it, the subject matter of the contract, the expressions actually used and the evidence submitted.

Now in regard to the preliminary question as to whether the right of reasonable regulation resides in Great Britain:—

Considering that the right to regulate the liberties conferred by the treaty of 1818 is an attribute of sovereignty, and as such must be held to reside in the territorial sovereign, unless the contrary be provided; and considering that one of the essential elements of sovereignty is that it is to be exercised within territorial limits, and that, failing proof to the contrary, the territory is coterminous with the sovereignty, it follows that the burden of the assertion involved in the contention of the United States (*viz.*, that the right to regulate does not reside independently in Great Britain, the territorial sovereign) must fall on the United States. And for the purpose of sustaining this burden, the United States have put forward the following series of propositions, each one of which must be singly considered.

It is contended by the United States: . . .

(3.) That the liberties of fishery granted to the United States constitute an international servitude in their favour over the territory of Great Britain, thereby involving a derogation from the sovereignty of Great Britain, the servient State, and that therefore Great Britain is deprived, by reason of the grant, of its independent right to regulate the fishery.

The Tribunal is unable to agree with this contention:

(a.) Because there is no evidence that the doctrine of international servitudes was one with which either American or British statesmen were conversant in 1818, no English publicists employing the term before 1818, and the mention of it in Mr. Gallatin's report being insufficient;

(b.) Because a servitude in the French law, referred to by Mr. Gallatin, can, since the Code, be only real and cannot be personal (*Code Civil*, article 686);

(c.) Because a servitude in international law predicates an express grant of a sovereign right and involves an analogy to the relation of a *praedium dominans* and a *praedium serviens;* whereas by the treaty of 1818 one State grants a liberty to fish, which is not a sovereign right, but a purely economic right, to the inhabitants of another State;

(d.) Because the doctrine of international servitude in the sense which is now sought to be attributed to it originated in the peculiar and now obsolete conditions prevailing in the Holy Roman Empire of which the *domini terræ* were not fully sovereigns; they holding territory under the Roman Empire, subject at least theoretically, and in some respects also practically, to the courts of that Empire; their right being, moreover, rather of a civil than of a public nature, partaking more of

the character of *dominium* than of *imperium*, and therefore certainly not a complete sovereignty. And because in contradistinction to this quasi-sovereignty with its incoherent attributes acquired at various times, by various means, and not impaired in its character by being incomplete in any one respect or by being limited in favour of another territory and its possessor, the modern State, and particularly Great Britain, has never admitted partition of sovereignty, owing to the constitution of a modern State requiring essential sovereignty and independence;

(e.) Because this doctrine being but little suited to the principle of sovereignty which prevails in States under a system of constitutional government such as Great Britain and the United States, and to the present international relations of sovereign States, has found little, if any, support from modern publicists. It could therefore in the general interest of the community of nations, and of the Parties to this treaty, be affirmed by this Tribunal only on the express evidence of an international contract;

(f.) Because even if these liberties of fishery constituted an international servitude, the servitude would derogate from the sovereignty of the servient State only in so far as the exercise of the rights of sovereignty by the servient State would be contrary to the exercise of the servitude right by the dominant State. Whereas it is evident that, though every regulation of the fishery is to some extent a limitation, as it puts limits to the exercise of the fishery at will, yet such regulations as are reasonable and made for the purpose of securing and preserving the fishery and its exercise for the common benefit, are clearly to be distinguished from those restrictions and "molestations," the annulment of which was the purpose of the American demands formulated by Mr. Adams in 1782, and such regulations consequently cannot be held to be inconsistent with a servitude;

(g.) Because the fishery to which the inhabitants of the United States were admitted in 1783, and again in 1818, was a regulated fishery. . . .

(h.) Because the fact that Great Britain rarely exercised the right of regulation in the period immediately succeeding 1818 is to be explained by various circumstances, and is not evidence of the non-existence of the right;

(i.) Because the words "in common with British subjects" tend to confirm the opinion that the inhabitants of the United States were admitted to a regulated fishery;

(j.) Because the statute of Great Britain, 1819, which gives legislative sanction to the treaty of 1818, provides for the making of "regulations with relation to the taking, drying and curing of fish by inhabitants of the United States 'in common'". . . .

It is finally contended by the United States:

That the United States did not expressly agree that the liberty granted to them could be subjected to any restriction that the grantor might choose to impose on the ground that in her judgment such restriction was reasonable. And that while admitting that all laws of a general character, controlling the conduct of men within the territory of Great Britain, are effective, binding and beyond objection by the United States, and competent to be made upon the sole determination of Great Britain or her colony, without accountability to anyone whomsoever; yet there is somewhere a line, beyond which it is not competent for Great Britain to go, or beyond which she cannot rightfully go, because to go beyond it would be an invasion of the right granted to the United States in 1818. That the legal effect of the grant of 1818 was not to leave the determination as to where that line is to be drawn to the uncontrolled judgment of the grantor, either upon the grantor's consideration as to what would be a reasonable exercise of its sovereignty over the British Empire, or upon the grantor's consideration of what would be a reasonable exercise thereof towards the grantee.

But this contention is founded on assumptions which this Tribunal cannot accept for the following reasons in addition to those already set forth:—

(a.) Because the line by which the respective rights of both parties accruing out of the treaty are to be circumscribed, can refer only to the right granted by the treaty; that is to say, to the liberty of taking, drying and curing fish by American inhabitants in certain British waters in common with British subjects, and not to the exercise of rights of legislation by Great Britain not referred to in the treaty;

(b.) Because a line which would limit the exercise of sovereignty of a State within the limits of its own territory can be drawn only on the ground of express stipulation, and not by implication from stipulations concerning a different subject-matter;

(c.) Because the line in question is drawn according to the principle of international law that treaty obligations are to be executed in perfect good faith, therefore excluding the right to legislate at will concerning the subject-matter of the treaty, and limiting the exercise of sovereignty of the States bound by a treaty with respect to that subject-matter to such acts as are consistent with the treaty;

(d.) Because on a true construction of the treaty the question does not arise whether the United States agreed that Great Britain should retain the right to legislate with regard to the fisheries in her own territory; but whether the treaty contains an abdication by Great Britain of the right which Great Britain, as the sovereign Power, undoubtedly possessed when the treaty was made, to regulate those fisheries;

(e.) Because the right to make reasonable regulations, not inconsistent with the obligations of the treaty, which is all that is claimed by

Great Britain, for a fishery which both Parties admit requires regulation for its preservation, is not a restriction of or an invasion of the liberty granted to the inhabitants of the United States. This grant does not contain words to justify the assumption that the sovereignty of Great Britain upon its own territory was in any way affected; nor can words be found in the treaty transferring any part of that sovereignty to the United States. Great Britain assumed only duties with regard to the exercise of its sovereignty. The sovereignty of Great Britain over the coastal waters and territory of Newfoundland remains after the treaty as unimpaired as it was before. But from the treaty results an obligatory relation whereby the right of Great Britain to exercise its right of sovereignty by making regulations is limited to such regulations as are made in good faith, and are not in violation of the treaty;

(f.) Finally, to hold that the United States, the grantee of the fishing right, has a voice in the preparation of fishery legislation involves the recognition of a right in that country to participate in the internal legislation of Great Britain and her colonies, and to that extent would reduce these countries to a state of dependence.

While therefore unable to concede the claim of the United States as based on the treaty, this Tribunal considers that such claim has been and is to some extent, conceded in the relations now existing between the two Parties. Whatever may have been the situation under the treaty of 1818 standing alone, the exercise of the right of regulation inherent in Great Britain has been, and is, limited by the repeated recognition of the obligations already referred to, by the limitations and liabilities accepted in the special agreement, by the unequivocal position assumed by Great Britain in the presentation of its case before this Tribunal, and by the consequent view of this Tribunal that it would be consistent with all the circumstances, as revealed by this record, as to the duty of Great Britain, that she should submit the reasonableness of any future regulation to such an impartial arbitral test, affording full opportunity therefor, as is hereafter recommended under the authority of Article IV of the special agreement,[44] whenever the reasonableness of any regulation

[44] Article IV of the special agreement provided as follows: "The Tribunal shall recommend for the consideration of the High Contracting Parties rules and a method of procedure under which all questions which may arise in the future regarding the exercise of the liberties above referred to may be determined in accordance with the principles laid down in the award. If the High Contracting Parties shall not adopt the rules and method of procedure so recommended, or if they shall not, subsequently to the delivery of the award, agree upon such rules and methods, then any differences which may arise in the future between the High Contracting Parties relating to the interpretation of the treaty of 1818 or to the effect and application of the award of the Tribunal shall be referred informally to the Permanent Court at The Hague for decision by the summary procedure provided in Chapter IV of The Hague Convention of the 18th of October, 1907." 1 U. S. Treaties 835, 838.

is objected to or challenged by the United States in the manner, and within the time hereinafter specified in the said recommendation.

Now therefore this Tribunal decides and awards as follows:

The right of Great Britain to make regulations without the consent of the United States, as to the exercise of the liberty to take fish referred to in Article I of the treaty of October 20th, 1818, in the form of municipal laws, ordinances or rules of Great Britain, Canada or Newfoundland is inherent to the sovereignty of Great Britain.

The exercise of that right by Great Britain is, however, limited by the said treaty in respect of the said liberties therein granted to the inhabitants of the United States in that such regulations must be made *bona fide* and must not be in violation of the said treaty.

Regulations which are (1) appropriate or necessary for the protection and preservation of such fisheries, or (2) desirable or necessary on grounds of public order and morals without unnecessarily interfering with the fishery itself, and in both cases equitable and fair as between local and American fishermen, and not so framed as to give unfairly an advantage to the former over the latter class, are not inconsistent with the obligation to execute the treaty in good faith, and are therefore reasonable and not in violation of the treaty.

For the decision of the question whether a regulation is or is not reasonable, as being or not in accordance with the dispositions of the treaty and not in violation thereof, the treaty of 1818 contains no special provision. The settlement of differences in this respect that might arise thereafter was left to the ordinary means of diplomatic intercourse. By reason, however, of the form in which Question I is put, and by further reason of the admission of Great Britain by her counsel before this Tribunal that it is not now for either of the Parties to the treaty to determine the reasonableness of any regulation made by Great Britain, Canada or Newfoundland, the reasonableness of any such regulation, if contested, must be decided not by either of the Parties, but by an impartial authority in accordance with the principles hereinabove laid down, and in the manner proposed in the recommendations made by the Tribunal in virtue of Article IV of the agreement.[45]

The Tribunal further decides that Article IV of the agreement is, as stated by counsel of the respective Parties at the argument, permanent in its effect, and not terminable by the expiration of the General Arbitration Treaty of 1908 between Great Britain and the United States.[46]

[45] See note 44, *supra*, 393.

[46] See also North Atlantic Coast Fisheries Arbitration, Proceedings, U. S. Sen. Doc., No. 870, 61st Congress, 3d Session, VIII, 13–31; *ibid.*, IX, 293–361, 540–867; *ibid.*, XI, 1655–1711, 2123–2132. *Cf.* SCHÜCKING, J., dissenting, in The S. S. Wimbledon, P. C. I. J. Publ., Series A, Judgment No. 1, p. 43.

[In conformity with Art. IV of the special agreement submitting the principal dispute to arbitration, the tribunal recommended that in the future the reasonableness of regulations be determined, in case of dispute, by a Permanent Mixed Fishery Commission. This recommendation was accepted.]

OPPENHEIM, INTERNATIONAL LAW

Third Edition, Volume I, page 365, section 203. 1920.

That State servitudes are of great importance, there can be no doubt. The vast majority of writers and the practice of the States accept the conception of State servitudes, although they do not agree upon its definition or extent, and are often divided as to whether a particular restriction upon territorial supremacy is or is not a State servitude. But it was rejected by the Permanent Court of Arbitration at the Hague in the case of the North Atlantic Coast Fisheries (1910) between Great Britain and the United States, mainly upon three grounds: (1) that a servitude in International Law predicated an express grant of a sovereign right; (2) that the doctrine of international servitudes originated in the peculiar and now obsolete conditions prevailing in the Holy Roman Empire; (3) that, being little suited to the principle of sovereignty which prevails in States under a constitutional Government and to the present international relations of sovereign States, it had found little, if any, support from modern publicists. It is hardly to be expected that this opinion of the Court will induce theory and practice to drop the conception of State servitudes, which is of great value. It suitably covers those restrictions on the territorial supremacy of the State by which a part or the whole of its territory is in a limited way made perpetually to serve a certain purpose or interest of another State. That it originated in the peculiar conditions of the Holy Roman Empire does not make it unfit for the conditions of modern life if its practical value can be demonstrated. Further, the assertion that it is but little suited to the principle of sovereignty which prevails in States under a constitutional Government, and has, therefore, found little, if any, support from modern publicists, does not agree with the facts. Lastly, the statement that a servitude in International Law predicated an express grant of a sovereign right, is not based on any other authority than the contention of the United States, which made this unfounded statement in presenting her case before the Tribunal. The fact is that a State servitude, although to a certain degree restricting the sovereignty (territorial supremacy) of the State concerned, does not confer a sovereign right upon the State in favour of which it is established, any more than does any other restriction upon sovereignty.

Aix-la-Chapelle—Maastricht Railroad Company, Defendant and Plaintiff on Appeal, v. Thewis, Plaintiff and Defendant on Appeal, and Royal Dutch Government, Intervener

Germany. Supreme Court of Cologne, VII Civil Division. 1914.

8 *American Journal of International Law* 907.

[The case is stated in the opinion. Part of the opinion is omitted.]

The plaintiff is the owner of a number of houses situated at Naustrass near Herzogenrath, on Wendelin Street. He declares that these houses have been damaged and depreciated by reason of the dominial or government mine worked by the defendant. In virtue of §148 of the General Mining Law, he therefore demands compensation from the defendant for damage sustained and moves:

To condemn the defendant to make full compensation for the damage and depreciation caused to his two houses as a result of his mining operations:

To have this damage appraised by experts, and to condemn the defendant to pay to him the amount to be determined, which should not be less than M. 2000.

The defendant has moved to dismiss the suit.

By an interlocutory judgment of the Court of First Instance of Aix-la-Chapelle, May 10, 1911, whose contents are taken into consideration, the exception pleaded by the defendant on the ground of nonsuability was denied.

By the final judgment of the aforesaid court, May 14, 1912, the defendant was condemned to pay M. 2050 to the plaintiff.

Against this judgment, whose contents are also taken into consideration, the defendant has lodged an appeal and moved to dismiss the action on condition that the disputed judgment be modified.

The plaintiff has moved to dismiss the appeal.

He has given notice of the action to the Royal Dutch Government, and to the Aix-la-Chapelle—Maastricht Railroad Company of Maastricht.

The former only has joined in the legal action, espoused the cause of the plaintiff, and moved to decree according to the plea of the plaintiff.

. . .

The Court of First Instance takes the ground that the claim of the plaintiff is justified by §48 of the General Mining Law of June 24, 1895, of the Prussian States. But this does not square with the facts. The Prussian Law is not at all applicable to this case. The dominial or government mine in question and located at Kirchrath had, as a result of the mining royalty prevailing in that region before the French mining

law of July 28, 1791, become a fiscal mine, and in the course of time came as such in the possession of the Dutch State (*cf.* Brassert, *Zeitschrift für Bergrecht*, Vol. 16, p. 144 ff., especially Bl. 465 ff.). The legal relations of this mine were determined in the Prusso-Netherlandish boundary treaty of June 26, 1816, which endeavored mainly (see, preamble thereto), to fix definitely the boundaries between the two neighboring states, and to remove the difficulties that had arisen in regard to the sovereignty over certain districts. In consequence, and in accordance with Art. 18, "that part of Kerkrade, situated to the right of the Aix-la-Chapelle highway, and the entire part of the Rolduc community, situated on the left bank of the Wurm" were ceded to Prussia. Art. 19 then further provides:

"The cession of the Kerkrade and Rolduc parts resulting from the preceding article shall cause no damage or disadvantage to the exploitation of the coal mine. Formerly, this mine belonged to the Abbey of Rolduc and in the Kerkrade and Rolduc districts it is now being continued for the account of the Dutch Government, in such manner, that this government or, in its place, the lawful owner, retains the authority to carry on in the ceded parts works serviceable for the mining of coal or for drainage purposes. Neither under the pretext of instructions issued to its engineers, nor by imposts or other burdens, may the Government of Prussia interfere with or restrict the mining of coal or the bringing of the coal mined to the surface, nor may it place any hindrance in the way of its being marketed.

"Nor may the Government of Prussia grant private commissions (this should read private concessions—*cf.*, Brassert, *Zeitschrift für Bergrecht*, Vol. 14, p. 268) in the said ceded parts. Existing private concessions are restricted to the limits assigned to them by the act of session or by the laws under which they were granted."

The opinion of the judge of the lower court, to the effect that the aforesaid authority of the Dutch Government must be regarded as a mining concession, transferred to the defendant, does not meet the present case. The plea entered by the intervener that, in conformity with all the circumstances, the boundary treaty between Prussia and The Netherlands is in the nature of an agreement coming within the sphere of international law, by which the territorial sovereignty of the two neighboring states was mutually defined, must be accepted. Parts of the districts of Kerkrade and Rolduc go to Prussia, but the Dutch Government retains the right to carry on mining in the ceded parts. This means, as the intervener correctly states, not what might be termed a mining concession of the Dutch Government granted by Prussia according to civil law, but the exclusion of certain sovereign rights in the ceded parts resulting from the territorial sovereignty. In so far as the right to mine coal and other minerals contained in this coal-field

comes into question, part of this territorial sovereignty remains with Holland. Because of this fact, a sort of international servitude has arisen by which Holland is as a state, entitled, now as previously, in the matter of this mine, to exercise its own legislative authority and police supervision; that is, it has real sovereign rights with respect to the object situated within the territory of the foreign state (see Ullman, *Völkerrecht*, pp. 320 ff.).

This fact is established, first of all, by the boundary treaty itself, as well as by the actual administration in the premises. The dominial mine comes under the administration of the Dutch mining authorities. The Prussian chief mining office has never claimed any right of supervision, and precisely in consideration of the aforesaid Art. 19 of the boundary treaty, and under the sanction of the Prussian Minister of Commerce in the latter's decision upon the appeal, and in harmony with the Prussian ministerial decision of March 24, 1875 (see, Brassert, *Zeitschrift für Bergrecht*, Vol. 14, pp. 267–269), this same office has rejected, as being inadmissable, all requests for concessions by third parties to other minerals within the territory of this coal-field, reserved to the Dutch Government.

Accordingly, the dominial mine is not subject to Prussian legislation, but to the laws of the Netherlands, and it is for these reasons that §148 of the General Mining Law is not applicable to this case. That the houses of the plaintiff are situated on Prussian land is immaterial. For, according to the principles of international private law, the responsibility for damage such as is here claimed to have been sustained, is fixed by the law of the locality in which the mining is being carried on, and not by the laws of the locality where the damage arises (see, Brassert, *Z. f. B.* Vol. 30, p. 371).

In the Netherlands, the French mining law of April 21, 1810, is now in force. According to Art. 15, the mining grantee must there furnish bond for the full compensation of any, even accidental damage. This has led to the principle that the concessionaire is responsible for any, even accidental surface damage. Regarding this point, there is neither in theory nor in practice the slightest doubt as to the applicability of the mining law of April 21, 1810 (see, Brassert, *Z. f. B.*, Vol. 8, p. 521 and Vol. 4 at bottom of page 331).

The question therefore arises: Is the defendant, according to the principles of this French law, responsible in his capacity as a concessionaire? . . .

Since, under the circumstances, the defendant may not be regarded as a concessionaire, but as a leaseholder pure and simple, he is responsible for the damage caused to the houses of the plaintiff by reason of the exploitation of the dominial mine (though not the immediate damager himself), not on the ground of the mining law of April 21, 1810, but on

the ground of the general provisions of Art. 133 ff. of the Civil Code for guilty damage to foreign property.[47]

SECTION 5. TERRITORIAL JURISDICTION[48]

BUCHANAN v. RUCKER

Great Britain. Court of King's Bench. 1808.

9 *East's Reports* 192.

The plaintiff declared in assumpsit for 2000*l* on a foreign judgment of the island Court in Tobago, and at the trial before Lord Ellenborough, C. J. at Guildhall, produced a copy of the proceedings and judgment, certified under the hand-writing of the Chief Justice, and the Seal of the island, which were proved; which, after containing an entry of the declaration, set out a summons to the defendant, therein described as "formerly of the city of Dunkirk, and now of the city of London, merchant," to appear at the ensuing Court "to answer the plaintiff's action; which summons was returned served, &c. by nailing up a copy of the declaration at the Court-house door," &c. on which judgment was afterwards given by default. Whereupon it was objected, that the judgment was obtained against the defendant, who never appeared to have been within the limits of the island, nor to have had any attorney there; nor to have been in any other way subject to the jurisdiction of the Court at the time; and was therefore a nullity. And of this opinion was Lord Ellenborough; though it was alleged, (of which however there was no other than parol proof), that this mode of summoning absentees was

[47] "If the view be accepted that it is the business of international lawyers to clarify conceptions by sifting the chaff from the wheat, and not to abandon that task prematurely merely because it is too difficult, then there should be no doubt that the attitude adopted by the majority of writers is the correct one. For it cannot be denied that there are in international law relationships which present an analogy to prædial servitudes of the Roman law or to easements of the common law almost amounting to identity, namely, those relationships in which a part or the whole of the territory of one State is made to serve the economic needs of another. There exists in such cases not only a dominant tenement (*prædium dominans*) and a 'servient tenement' (*prædium serviens*), but also the possibility of most of the formal requirements of the private law of servitudes being fulfilled." LAUTERPACHT, Private Law Sources and Analogies of International Law, 121.

On servitudes, in general, see FAUCHILLE, I, Pt. I, 676; HYDE, I, §§152–153; LAUTERPACHT, *op. cit.*, 119; MCNAIR, "So-Called State Servitudes," B. Y. B. Int. L. (1925) 111; OPPENHEIM, 4th ed., I, §§203–208.

[48] This section deals only with jurisdiction in civil cases. On the jurisdiction of crimes, see ch. 7, §1, *infra*, 647.

On the jurisdiction of nationals in civil cases, see ch. 3, §3, *supra*, 278.

warranted by a law of the island, and was commonly practised there: and the plaintiff was thereupon nonsuited. And now

Taddy moved to set aside the nonsuit, and for a new trial, on an affidavit verifying the island law upon this subject; which stated "That every defendant against whom any action shall be entered, shall be served with a summons and an office copy of the declaration, with a copy of the account annexed, if any, at the same time, by the Provost Marshal, &c. six days before the sitting of the next Court, &c.; and the Provost Marshal is required to serve the same on each defendant in person. But if such defendant cannot be found, and is not absent from the island; then it shall be deemed good service by leaving the summons, &c. at his most usual place of abode. And if the defendant be absent from the island, and hath a power of attorney recorded in the secretary's or registrar's office of Tobago, and the attorney be resident in the island, or any manager or overseer on his plantation in the island, the service shall be either upon such attorney personally, or by leaving it at his last place of abode, or upon such overseer or manager personally, or by leaving it at the house upon the defendant's plantation where the overseer or manager usually resides. But if no such attorney, overseer, or manager; then the nailing up a copy of the declaration and summons at the entrance of the Court-House shall be held good service.

Lord Ellenborough, C. J. There is no foundation for this motion even upon the terms of the law disclosed in the affidavit. By persons absent from the island must necessarily be understood persons who have been present and within the jurisdiction, so as to have been subject to the process of the Court; but it can never be applied to a person, who, for aught appears, never was present within or subject to the jurisdiction. Supposing, however, that the act had said in terms, that though a person sued in the island had never been present within the jurisdiction, yet that it should bind him upon proof of nailing up the summons at the court door; how could that be obligatory upon the subjects of other countries? Can the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction? The law itself, however, fairly construed, does not warrant such an inference; for "absent from the island" must be taken only to apply to persons who had been present there, and were subject to the jurisdiction of the Court out of which the process issued: and as nothing of that sort was in proof here to shew that the defendant was subject to the jurisdiction at the time of commencing the suit, there is no foundation for raising an assumpsit in law upon the judgment so obtained.

Per Curiam, Rule refused.[49]

[49] *Cf.* Schibsby v. Westenholz, 6 Q. B. 155, *supra*, 288.

Sirdar Gurdyal Singh v. The Rajah of Faridkote

Great Britain. Judicial Committee of the Privy Council. 1894.

Law Reports [1894] *Appeal Cases* 670.

Consolidated appeals from two decrees of the Chief Court of the Punjaub (July 24, 1888), reversing in second appeal the decrees of the Commissioner of Lahore (August 29, 1882), which affirmed decrees of the Assistant Commissioner (Feb. 24, 1882), and dismissed the respondent's suits which were brought on the 12th of November, 1881. . . .

[The statement of the case and the arguments of counsel are omitted. The facts are stated sufficiently in the opinion.]

The judgment of their Lordships was delivered by the Earl of Selborne:—

The respondent, the Rajah of Faridkote, obtained in the Civil Court of that native State, in 1879 and 1880, two *ex parte* judgments, in two suits instituted by him against the appellant, for sums amounting together to Rs.76,474 11a. 3p., and costs. For all the purposes of the question to be now decided, those two suits may be treated as one; the appeals to Her Majesty in Council having been consolidated. Two actions, founded on these judgments, were brought by the Rajah against the appellant in the Court of the Assistant Commissioner of Lahore and were dismissed by that Court, on the ground that the judgments were pronounced by the Faridkote Court, without jurisdiction as against the appellant. On appeal to the Additional Commissioner of Lahore, the judgments of the first Court were upheld. The Rajah then appealed to the Chief Court of the Punjaub, which differed from both those tribunals, and upheld the jurisdiction of the Faridkote Court.

Faridkote is a native State, the Rajah of which has been recognised by Her Majesty as having an independent civil, criminal, and fiscal jurisdiction. The judgments of its Courts are, and ought to be, regarded in Her Majesty's Courts of British India as foreign judgments. The Additional Commissioner of Lahore thought that no action could be brought in Her Majesty's Courts upon a judgment of a native State; but in this opinion their Lordships do not concur.

The appellant was for five years, beginning in 1869, in the service of the late Rajah of Faridkote as his treasurer; and the causes of action, on which the suits in the Faridkote Court were brought, arose within that State, and out of that employment of the appellant by the late Rajah. The claim made in each of the suits was merely personal, for money alleged to be due, or recoverable in the nature of damages, from the appellant. It is immaterial, in their Lordships' view, to the question of jurisdiction (which is the only question to be now decided) whether the case, as stated, ought to be regarded as one of contract or of tort.

The appellant left the late Rajah's service, and ceased to reside within his territorial jurisdiction, in 1874. He was from that time generally resident in another independent native State, that of Jhind, of which he was a native subject and in which he was domiciled; and he never returned to Faridkote after he left it in 1874. He was in Jhind when he was served with certain processes of the Faridkote Court, as to which it is unnecessary for their Lordships to determine what the effect would have been if there had been jurisdiction. He disregarded them, and never appeared in either of the suits instituted by the Rajah, or otherwise submitted himself to that jurisdiction. He was under no obligation to do so, by reason of the notice of the suits which he thus received or otherwise, unless that Court had lawful jurisdiction over him.

Under these circumstances there was, in their Lordships' opinion, nothing to take this case out of the general rule, that the plaintiff must sue in the Court to which the defendant is subject at the time of suit ("*Actor sequitur forum rei*"); which is rightly stated by Sir Robert Phillimore (International Law, vol. 4, s. 891) to "lie at the root of all international, and of most domestic, jurisprudence on this matter." All jurisdiction is properly territorial, and "*extra territorium jus dicenti, impune non paretur.*" Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over moveables within the territory; and, in questions of status or succession governed by domicil, it may exist as to persons domiciled, or who when living were domiciled, within the territory.[50] As between different provinces under one sovereignty (*e.g.*, under the Roman Empire) the legislation of the sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction which any foreign Court ought to recognise against foreigners, who owe no allegiance or obedience to the Power which so legislates.

In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced *in absentem* by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the Courts of every nation except (when authorized by special local legislation) in the country of the forum by which it was pronounced.

These are doctrines laid down by all the leading authorities on international law; among others, by Story (Conflict of Laws, 2nd ed.,

[50] See Cohen v. Cohen, 84 Atl. (Del.) 122; Kapigian v. Minassian, 212 Mass. 412. *Cf.* Beard v. Beard, 21 Ind. 321; 26 Harv. L. Rev. 283, 287. *Cf.* also Kempson v. Kempson, 63 N. J. Eq. 783; 26 Harv. L. Rev. 283, 295.

ss. 546, 549, 553, 554, 556, 586), and by Chancellor Kent (Commentaries, vol. 1, p. 284, note c, 10th ed.), and no exception is made to them, in favour of the exercise of jurisdiction against a defendant not otherwise subject to it, by the Courts of the country in which the cause of action arose, or (in cases of contract) by the Courts of the *locus solutionis*. In those cases, as well as all others, when the action is personal, the Courts of the country in which a defendant resides have power, and they ought to be resorted to, to do justice.

The conclusion of the learned judges in the Chief Court of the Punjaub is expressed in the following sentence of the judgment delivered by Sir Meredyth Plowden in the first of the two actions:—

"On the whole, I think it may be said, that a State assuming to exercise jurisdiction over an absent foreigner, in respect of an obligation arising out of a contract made by the foreigner while resident in the State and to be fulfilled there, is not acting in contravention of the general practice or the principles of international law, so that its judgment should not be binding merely on the ground of the absence of the defendant."

If this doctrine were accepted, its operation, in the enlargement of territorial jurisdiction, would be very important. No authority, of any relevancy, was cited at their Lordships' Bar to support it, except Becquet v. Macarthy [2 B. & Ad. 951], and a passage from the judgment delivered by Blackburn, J., in Schibsby v. Westenholz [L. R. 6 Q. B. 155].

Of Becquet v. Macarthy, it was said by great authority in Don v. Lippman (5 Cl. & F. 1], that it "had been supposed to go to the verge of the law"; and it was explained (as their Lordships think, correctly) on the ground that "the defendant held a public office in the very colony in which he was originally sued." He still held that office at the time when he was sued; the cause of action arose out of, or was connected with it; and, though he was in fact temporarily absent, he might, as the holder of such an office, be regarded as constructively present in the place where his duties required his presence, and therefore amenable to the colonial jurisdiction. If the case could not be distinguished on that ground from that of any absent foreigner who, at some previous time, might have been in the employment of a colonial government, it would, in their Lordships' opinion, have been wrongly decided; and it is evident that Fry, L. J., in Rousillon v. Rousillon [14 Ch. D. 351], took that view.

The words of Blackburn, J.'s, judgment, in Schibsby v. Westenholz [L. R. 6 Q. B. 161], which were relied upon, are these:—

"If, at the time when the obligation was contracted, the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them; though, before finally deciding this, we should like to hear the question argued."

Upon this sentence it is to be observed, that beyond doubt in such a case the laws of the country in which an obligation was contracted might bind the parties, so far as the interpretation and effect of the obligation was concerned, in whatever forum the remedy might be sought. The learned judge had not to consider whether it was a legitimate consequence from this, that they would be bound to submit, on the footing of contract or otherwise, to any assumption of jurisdiction over them in respect of such a contract, by the tribunals of the country in which the contract was made, at any subsequent time, although they might be foreigners resident abroad. That question was not argued, and did not arise, in the case then before the Court; and, if this was what Blackburn, J., meant, their Lordships could not regard any mere inclination of opinion, on a question of such large and general importance, on which the judges themselves would have desired to hear argument if it had required decision, as entitled to the same weight which might be due to a considered judgment of the same authority. Upon the question itself, which was determined in Schibsby v. Westenholz, Blackburn, J., had at the trial formed a different opinion from that at which he ultimately arrived; and their Lordships do not doubt that, if he had heard argument upon the question, whether an obligation to accept the forum *loci contractûs*, as having, by reason of the contract, a conventional jurisdiction against the parties in a suit founded upon that contract for all future time, wherever they might be domiciled or resident, was generally to be implied, he would have come (as their Lordships do) to the conclusion, that such obligation, unless expressed, could not be implied.

Their Lordships will therefore humbly advise Her Majesty to reverse the decrees of the Chief Court of the Punjaub, and to restore those of the Additional Commissioner of Lahore. The respondent will pay the costs of the appeals to the Courts below and of these appeals.[51]

GEORGE PEABODY & ANOTHER v. CHARLES K. HAMILTON

United States. Supreme Judicial Court of Massachusetts. 1870.

106 *Massachusetts Reports* 217.

Contract brought in this court, on an account annexed for £100,000. The writ, dated October 17, 1867, was framed to attach the goods or estate of the defendant, and for want thereof to take his body, but no

[51] See Don v. Lippmann, 5 Cl. & F. 1, 20; Rousillon v. Rousillon, 14 Ch. D. 351, 370. *Cf.* Becquet v. MacCarthy, 2 B. & Ad. 951. See Pennoyer v. Neff, 95 U. S. 714; McEwan v. Zimmer, 38 Mich. 765; McDonald v. Mabee, 243 U. S. 90. *Cf.* Hess v. Pawloski, 274 U. S. 352; Wuchter v. Pizzutti, 276 U. S. 13; SCOTT, "Jurisdiction over Nonresident Motorists," 39 Harv. L. Rev. 563.

See SCOTT, "Jurisdiction over Nonresidents Doing Business Within the State," 32 Harv. L. Rev. 871.

affidavit and certificate were annexed to justify an arrest under the Gen. Sts. c. 124, §1. It described the plaintiffs as of London in England, and the defendant as of the state of New York and commorant of Boston in this Commonwealth; and was indorsed by Charles G. Thomas. The following is a copy of the officer's return of its service: "Suffolk, ss. Boston, October 25, 1867. By virtue hereof, I this day attached a chip as the property of the within named Charles K. Hamilton, and gave to him in hand, in said Boston, a summons for his appearance at court as within commanded. John B. Dearborn, Deputy Sheriff." The defendant filed the following plea to the jurisdiction:

"The defendant, in his proper person appearing for the purpose of objecting to the jurisdiction of this honorable court, says that the plaintiffs are merchants, residents and citizens of London, in the kingdom of Great Britain; that the defendant is a resident and citizen of New Brighton, Richmond county, in the state of New York; that neither is, or was at the time of the purchase and service of the writ in the above entitled action, a citizen of, or temporary resident, or commorant in the Commonwealth of Massachusetts, or within the jurisdiction of this court; that the defendant, at the time of said purchase and service, had neither property nor estate subject to attachment within said jurisdiction; further, that the service of said writ, if any, was made upon him by the officer handing him a summons in hand while he was on board of the English steamer China, bound from Liverpool, England, to Boston in said county of Suffolk, and immediately after said steamer had reached her dock in East Boston, and before she was moored to her dock; that he was journeying on said steamer from Halifax, Nova Scotia, to his home in the state of New York; and that said steamer was at that time, and still is, a British mail steamer. All which he is ready to verify. Whereupon he says, that said service and the circumstances set forth are not sufficient to give jurisdiction to this honorable court; and he prays judgment if this honorable court will or ought to have further cognizance of the writ and action above named." To this plea the plaintiffs demurred as insufficient in law; and the case was thereupon reserved by the chief justice for the determination of the full court.

[The arguments of counsel and part of the opinion are omitted.]

WELLS, J. That both parties are foreigners is no ground for dismissing the writ. Roberts v. Knights, 7 Allen, 449. It is not necessary that a foreign plaintiff should be personally within the jurisdiction, in order to institute an action. The statute requires only that he shall furnish an indorser to his writ, who is an inhabitant of the state. Gen. Sts. c. 123, §20.[52]

[52] See BEALE, "Jurisdiction of Courts over Foreigners," 26 Harv. L. Rev. 283, 288. On the law and practice of European countries, see *ibid.*, 193, 196, 207; PILLET, "Jurisdiction in Actions between Foreigners," 18 *ibid.*, 325.

Personal actions, of a transitory nature, may be maintained in any jurisdiction within which the defendant is found, so that process is legally served upon him. Story Confl. Laws, §§543, 554. Barrell v. Benjamin, 15 Mass. 354. Wright v. Oakley, 5 Met. 400. This we understand to be the general rule of the common law.[53] Such is also the clear implication of the statutes of this Commonwealth. The restriction in Gen. Sts. c. 126, §1, that a party defendant must have been, before the time of action brought, an inhabitant of the state, or that an effectual attachment must be made of his goods, estate or effects, has application only to actions "against a person who is out of the state at the time of the service of the summons." When the party is in the state, however transiently, and the summons is actually served upon him there, the jurisdiction of the court is complete, as to the person of the defendant. In the numerous discussions of the force and effect of judgments rendered in one of the United States against citizens of another state, this has been repeatedly and always recognized as sufficient to give full jurisdiction in transitory actions. Hall v. Williams, 6 Pick. 232, 241. Gleason v. Dodd, 4 Met. 333, 338. Ewer v. Coffin, 1 Cush. 23. Barringer v. King, 5 Gray, 9. Carleton v. Bickford, 13 Gray, 591. . . .

Upon the question of jurisdiction, in its international aspect, we are satisfied that the service of the process, by summons merely, is equally effective with an attachment or arrest of the body.

The defendants contend that service by a separate summons, after a nominal attachment only, is not authorized by the statute. Gen. Sts. c. 123, §§10, 11. The proceeding is, in form, a literal compliance with the statute. We understand it to be in accordance with long established general practice. Howe Pract. 61. It appears to be recognized as a proper mode of service. Belknap v. Gibbens, 13 Met. 471, 475. Orcutt v. Ranney, 10 Cush. 183. No case is cited in which it has ever been held that such service is not good. The language of the provision does not necessarily import "an effectual attachment," such as is required to give jurisdiction against an absent defendant who was never an inhabitant. See Gen. Sts. c. 126, §1. For the purpose of determining the proper mode of service, the return of the officer, that he had attached the property of the defendant, cannot be contradicted by evidence, and is not contradicted by the apparent want of value in the article returned as attached.

The defendant also objects to the service, because it was made upon him while he was still on board a British mail steam-vessel, and "immediately after said steamer had reached her dock in East Boston, and before she was moored to her dock." But we are unable to see any force

[53] See Beale, "Jurisdiction of Courts over Foreigners," 26 Harv. L. Rev. 283. On the law and practice of European countries, see *ibid.*, 193, 197, 209.

in this objection. Whatever jurisdiction the English courts may be authorized to exercise over controversies arising between English subjects or others on board English vessels while in foreign ports; and whatever comity may be properly exercised in remitting such controversies for adjudication to the domestic tribunals; there can be no doubt that the defendant was strictly within the jurisdiction of this court, liable to its process, and that he was properly served with it on board the foreign vessel. Commonwealth v. Peters, 12 Met. 387. But if there were any discretion in the court, as a court of law, in regard to the matter, either on the ground of general comity, or of the nature of the controversy, the question is not presented upon a plea in abatement for insufficient or defective service of the writ. Demurrer sustained.[54]

THE JOHAN AND SIEGMUND, NIEGEL

Great Britain. High Court of Admiralty. 1810.

Edwards Admiralty Reports 242.

This was the case of a Hamburgh ship which had been arrested in the port of Plymouth at the suit of C. F. Grantoff, of London, merchant, as the lawful attorney of C. Storzell and others, all of Hamburgh, and described as the owners of fifteen sixteenth shares of the ship in a cause of possession against the master, also of Hamburgh, and owner of the remaining sixteenth part.

SIR WILLIAM SCOTT.—This is a cause of possession, at the suit of a number of persons, who hold fifteen sixteenth shares of this vessel, against the master, who is the owner of the remaining sixteenth. If this were a British ship, there can be no doubt that by the practice of this court, it would, upon the application of a majority of the parties interested, proceed to dispossess the master, though a part owner, without minutely considering the merits or demerits of his conduct. But I do not know of any instance in which the court of admiralty has entertained a suit of this nature, in the case of a foreign ship. The court, with the consent of the parties, and of the accredited agent of the country to which they belong, certainly does hold plea of causes between foreigners, arising on the *jus gentium;* but this, I think, is a case which cannot be so considered, because whatever may have been the general rule under the old civil law in cases of possession, it has been variously modified by the municipal law of different countries; and, therefore, by entertaining

[54] On jurisdiction of persons brought within the territory by force or fraud, see Williams v. Reed, 29 N. J. L. 385; Union Sugar Refinery v. Mathiesson, 2 Cliff. 304; Jaster v. Currie, 198 U. S. 144; 26 Harv. L. Rev. 283, 285.

On the question whether a court may order a person within its jurisdiction to do an act in a foreign country, see the Salton Sea Cases, 172 Fed. 792; 23 Harv. L. Rev. 390.

this suit, I might deprive the parties of those rights to which they are entitled by the law of their own country, as administered in those courts to which they are directly and properly amenable. By the law of this country, as understood and applied by this court, the majority of owners are entitled to the possession; it is not so by the law of some other countries; what may be the law of Hamburgh I cannot tell; but I might be guilty of great injustice if I were to take upon myself to apply the local regulations of this country to the case of a Hamburgh ship. By the law of Hamburgh, the master may have a paramount right, as owner in possession, or he may have a right to retain the possession as a security for his wages, or for the payment of accounts outstanding between him and the other owners; in short, there may be the greatest diversity in the law of different countries upon this subject. I am very sensible that great inconvenience may arise to the owners of foreign vessels from the want of a competent jurisdiction in the country where the ship happens to be; the master may be roving about from the port of one country to another, and it may be extremely difficult for the rest of the owners to pursue him with effect by any process that the courts of his own country can furnish. It is difficult to suggest the remedy in such a case, but I am of opinion that the defect cannot be supplied by this court, as the right of possession has not been left to depend upon the general maritime law of nations, but has been variously settled in the different maritime codes of different countries.[55]

American Banana Company v. United Fruit Company

United States. Supreme Court. 1909.

213 *United States Reports* 347.

The facts are stated in the opinion.

[The arguments of counsel are omitted.]

Mr. Justice Holmes delivered the opinion of the court.

This is an action brought to recover threefold damages under the Act to Protect Trade against Monopolies. July 2, 1890, c. 647, §7.

[55] *Cf.* The See Reuter, 1 Dods. 22. *Cf.* also The Belgenland, 114 U. S. 355; Royal Mail Steam Packet Co. v. Companhia de Navegacao Lloyd Brasileiro, 27 F. (2d) 1002. "It is natural that a branch of the law which centers around ships which are here today and there tomorrow, should find little difficulty in vesting power in the courts of any state within whose territory the ship may be found, especially since the procedure is *in rem*. Nor does international law forbid the exercise of such power." Jessup, Territorial Waters, 136.

See Ex parte Newman, 14 Wall. 152; The Bifrost, 8 F. (2d) 361; The Thorgerd, 11 F. (2d) 971; The Seirstad, 12 F. (2d) 133; Heredia v. Davies, 12 F. (2d) 500; The Ferm, 15 F. (2d) 887; The Sneland I, 19 F. (2d) 528; Danielsen v. Entre Rios Rys. Co., Ltd., 22 F. (2d) 326; Coffey, "Jurisdiction Over Foreigners in Admiralty Courts," 13 Calif. L. Rev. 93; U. S. For. Rel. (1914) 307, 308.

26 Stat. 209, 210. The Circuit Court dismissed the complaint upon motion, as not setting forth a cause of action. 160 Fed. Rep. 184. This judgment was affirmed by the Circuit Court of Appeals, 166 Fed. Rep. 261, and the case then was brought to this court by writ of error.

The allegations of the complaint may be summed up as follows: The plaintiff is an Alabama corporation, organized in 1904. The defendant is a New Jersey corporation, organized in 1899. Long before the plaintiff was formed, the defendant, with intent to prevent competition and to control and monopolize the banana trade, bought the property and business of several of its previous competitors, with provision against their resuming the trade, made contracts with others, including a majority of the most important, regulating the quantity to be purchased and the price to be paid, and acquired a controlling amount of stock in still others. For the same purpose it organized a selling company, of which it held the stock, that by agreement sold at fixed prices all the bananas of the combining parties. By this and other means it did monopolize and restrain the trade and maintained unreasonable prices. The defendant being in this ominous attitude, one McConnell in 1903 started a banana plantation in Panama, then part of the United States of Colombia, and began to build a railway (which would afford his only means of export), both in accordance with the laws of the United States of Colombia. He was notified by the defendant that he must either combine or stop. Two months later, it is believed at the defendant's instigation, the governor of Panama recommended to his national government that Costa Rica be allowed to administer the territory through which the railroad was to run, and this although that territory had been awarded to Colombia under an arbitration agreed to by treaty. The defendant, and afterwards, in September, the government of Costa Rica, it is believed by the inducement of the defendant, interfered with McConnell. In November, 1903, Panama revolted and became an independent republic, declaring its boundary to be that settled by the award. In June, 1904, the plaintiff bought out McConnell and went on with the work, as it had a right to do under the laws of Panama. But in July, Costa Rican soldiers and officials, instigated by the defendant, seized a part of the plantation and a cargo of supplies and have held them ever since, and stopped the construction and operation of the plantation and railway. In August one Astua, by *ex parte* proceedings, got a judgment from a Costa Rican court, declaring the plantation to be his, although, it is alleged, the proceedings were not within the jurisdiction of Costa Rica, and were contrary to its laws and void. Agents of the defendant then bought the lands from Astua. The plaintiff has tried to induce the government of Costa Rica to withdraw its soldiers and also has tried to persuade the United States to interfere, but has been thwarted in both by the defendant and has failed. The

government of Costa Rica remained in possession down to the bringing of the suit.

As a result of the defendant's acts the plaintiff has been deprived of the use of the plantation, and the railway, the plantation and supplies have been injured. The defendant also, by outbidding, has driven purchasers out of the market and has compelled producers to come to its terms, and it has prevented the plaintiff from buying for export and sale. This is the substantial damage alleged. There is thrown in a further allegation that the defendant has "sought to injure" the plaintiff's business by offering positions to its employés and by discharging and threatening to discharge persons in its own employ who were stockholders of the plaintiff. But no particular point is made of this. It is contended, however, that, even if the main argument fails and the defendant is held not to be answerable for acts depending on the coöperation of the government of Costa Rica for their effect, a wrongful conspiracy resulting in driving the plaintiff out of business is to be gathered from the complaint and that it was entitled to go to trial upon that.

It is obvious that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress.

No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive. See The Hamilton, 207 U. S. 398, 403; Hart v. Gumpach, L. R. 4 P. C. 439, 463, 464; British South Africa Co. v. Companhia de Moçambique [1893], A. C. 602. They go further, at times, and declare that they will punish any one, subject or not, who shall do certain things, if they can catch him, as in the case of pirates on the high seas. In cases immediately affecting national interests they may go further still and may make, and, if they get the chance, execute similar threats as to acts done within another recognized jurisdiction. An illustration from our statutes is found with regard to criminal correspondence with foreign governments. Rev. Stat., §5335. See further Commonwealth v. Macloon, 101 Massachusetts, 1; The Sussex Peerage, 11 Cl. & Fin. 85, 146. And the notion that English statutes bind British subjects everywhere has found expression in modern times and has had some startling applications. Rex v. Sawyer, 2 C. & K. 101; The Zollverein, Swabey, 96, 98. But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. Slater v. Mexican National R. R. Co., 194 U. S. 120, 126. This principle was carried to

an extreme in Milliken v. Pratt, 125 Massachusetts, 374. For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent. Phillips v. Eyre, L. R. 4 Q. B. 225, 239; L. R. 6 Q. B. 1, 28; Dicey, Conflict of Laws (2d ed.), 647. See also Appendix, 724, 726, Note 2, *ibid.*

Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts. But the word commonly is confined to such prophecies or threats when addressed to persons living within the power of the courts. A threat that depends upon the choice of the party affected to bring himself within that power hardly would be called law in the ordinary sense. We do not speak of blockade running by neutrals as unlawful. And the usages of speech correspond to the limit of the attempts of the lawmaker, except in extraordinary cases. It is true that domestic corporations remain always within the power of the domestic law, but in the present case, at least, there is no ground for distinguishing between corporations and men.

The foregoing considerations would lead in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. "All legislation is *prima facie* territorial." Ex parte Blain, In re Sawers, 12 Ch. Div. 522, 528; State v. Carter, 27 N. J. (3 Dutcher) 499; People v. Merrill, 2 Parker, Crim. Rep. 590, 596. Words having universal scope, such as "Every contract in restraint of trade," "Every person who shall monopolize," etc., will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator subsequently may be able to catch. In the case of the present statute the improbability of the United States attempting to make acts done in Panama or Costa Rica criminal is obvious, yet the law begins by making criminal the acts for which it gives a right to sue. We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned. Other objections of a serious nature are urged but need not be discussed.

For again, not only were the acts of the defendant in Panama or Costa Rica not within the Sherman Act, but they were not torts by the law of the place and therefore were not torts at all, however contrary to the ethical and economic postulates of that statute. The substance of the complaint is that, the plantation being within the *de facto* jurisdiction of Costa Rica, that state took and keeps possession of it by virtue of its sovereign power. But a seizure by a state is not a thing that can

be complained of elsewhere in the courts. Underhill v. Hernandez, 168 U. S. 250.[56] The fact, if it be one, that *de jure* the estate is in Panama does not matter in the least; sovereignty is pure fact. The fact has been recognized by the United States, and by the implications of the bill is assented to by Panama.

The fundamental reason why persuading a sovereign power to do this or that cannot be a tort is not that the sovereign cannot be joined as a defendant or because it must be assumed to be acting lawfully. The intervention of parties who had a right knowingly to produce the harmful result between the defendant and the harm has been thought to be a non-conductor and to bar responsibility, Allen v. Flood [1898], A. C. 1, 121, 151, etc., but it is not clear that this is always true, for instance, in the case of the privileged repetition of a slander, Elmer v. Fessenden, 151 Massachusetts, 359, 362, 363, or the malicious and unjustified persuasion to discharge from employment. Moran v. Dunphy, 177 Massachusetts, 485, 487. The fundamental reason is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law. See Kawananakoa v. Polyblank, 205 U. S. 349, 353. In the case of private persons it consistently may assert the freedom of the immediate parties to an injury and yet declare that certain persuasions addressed to them are wrong. See Angle v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 151 U. S. 1, 16–21; Fletcher v. Peck, 6 Cranch, 87, 130, 131.

The plaintiff relied a good deal on Rafael v. Verelst, 2 Wm. Bl. 983; *Ib.* 1055. But in that case, although the Nabob who imprisoned the plaintiff was called a sovereign for certain purposes, he was found to be the mere tool of the defendant, an English Governor. That hardly could be listened to concerning a really independent state. But of course it is not alleged that Costa Rica stands in that relation to the United Fruit Company.

The acts of the soldiers and officials of Costa Rica are not alleged to have been without the consent of the government and must be taken to have been done by its order. It ratified them, at all events, and adopted and keeps the possession taken by them; O'Reilly de Camara v. Brooke, 209 U. S. 45, 52; The Paquete Habana, 189 U. S. 453, 465; Dempsey v. Chambers, 154 Massachusetts, 330, 332. The injuries to the plantation and supplies seem to have been the direct effect of the acts of the Costa Rican government, which is holding them under an

[56] See ch. 2, §2, n. 19, *supra*, 103.

adverse claim of right. The claim for them must fall with the claim for being deprived of the use and profits of the place. As to the buying at a high price, etc., it is enough to say that we have no ground for supposing that it was unlawful in the countries where the purchases were made. Giving to this complaint every reasonable latitude of interpretation we are of opinion that it alleges no case under the act of Congress and discloses nothing that we can suppose to have been a tort where it was done. A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law.[57]

Further reasons might be given why this complaint should not be upheld, but we have said enough to dispose of it and to indicate our general point of view.

Judgment affirmed.[58]

MR. JUSTICE HARLAN concurs in the result.

[57] *Cf.* Ford v. United States, 273 U. S. 593, *infra*, 651.

[58] *Cf.* The Buenos Aires, 5 F. (2d) 425. See BEALE, "Jurisdiction of a Sovereign State," 36 Harv. L. Rev. 241.

CHAPTER V

AUTHORITY ON THE SEAS IN THE LAW OF NATIONS

SECTION 1. AUTHORITY OVER NATIONAL SHIPS

Regina v. James Anderson

Great Britain. Court of Criminal Appeal. 1868.

11 *Cox's Criminal Cases* 198.

Case reserved by Byles, J., at the October Sessions of the Central Criminal Court, 1868, for the opinion of this Court.

James Anderson, an American citizen, was indicted for murder on board a vessel, belonging to the port of Yarmouth in Nova Scotia. She was registered in London, and was sailing under the British flag.

At the time of the offence committed the vessel was in the river Garonne, within the boundaries of the French empire, on her way up to Bordeaux, which city is by the course of the river about ninety miles from the open sea. The vessel had proceeded about half-way up the river, and was at the time of the offence about 300 yards from the nearest shore, the river at that place being about half a mile wide.

The tide flows up to the place and beyond it.

No evidence was given whether the place was or was not within the limits of the port of Bordeaux.

It was objected for the prisoner that the offence having been committed within the empire of France, the vessel being a colonial vessel, and the prisoner an American citizen, the Court had no jurisdiction to try him.

I expressed an opinion unfavourable to the objection, but agreed to grant a case for the opinion of this Court.

The prisoner was convicted of manslaughter. . . .

[The arguments of counsel are omitted.]

Bovill, C. J.—There is no doubt that the place where the offence was committed was within the territory of France, and that the prisoner was therefore subject to the laws of France, which the local authorities of that realm might have enforced if so minded; but at the same time, in point of law, the offence was also committed within British territory, for the prisoner was a seaman on board a merchant vessel, which, as to her crew and master, must be taken to have been at the time under the protection of the British flag, and, therefore, also amenable to the provisions of the British law. It is true that the prisoner was an

American citizen, but he had with his own consent embarked on board a British vessel as one of the crew. Although the prisoner was subject to the American jurisprudence as an American citizen, and to the law of France as having committed an offence within the territory of France, yet he must also be considered as subject to the jurisdiction of British law, which extends to the protection of British vessels, though in ports belonging to another country. From the passage in the treatise of Ortolan, already quoted, it appears that, with regard to offences committed on board of foreign vessels within the French territory, the French nation will not assert their police law unless invoked by the master of the vessel, or unless the offence leads to a disturbance of the peace of the port; and several instances where that course was adopted are mentioned. Among these are two cases where offences were committed on board American vessels—one at the port of Antwerp, and the other at Marseilles—and where, on the local authorities interfering, the American Court claimed exclusive jurisdiction. As far as America herself is concerned, it is clear that she, by the statutes of the 23rd of March, 1825,[1] has made regulations for persons on board her vessels in foreign parts, and we have adopted the same course of legislation. Our vessels must be subject to the laws of the nation at any of whose ports they may be, and also to the laws of our country, to which they belong. As to our vessels when going to foreign parts we have the right, if we are not bound, to make regulations. America has set us a strong example that we have the right to do so. In the present case, if it were necessary to decide the question on the 17 & 18 Vict. c. 104,[2] I should have no hesitation in saying that we now not only legislate for British subjects on board of British vessels, but also for all those who form the crews thereof, and that there is no difficulty in so construing the statute; but it is not necessary to decide that point now. Independently of that statute, the general law is sufficient to determine this case. Here the offence was committed on board a British vessel by one of the crew, and it makes no difference whether the vessel was within a foreign port or not. If the offence had been committed on the high seas it is clear that it would have been within the jurisdiction of the Admiralty, and the Central Criminal Court has now the same extent of jurisdiction Does it make any difference because the vessel was in the river Garonne half-way between the sea and the head of the river? The place where the offence was committed was in a navigable part of the river below bridge, and where the tide ebbs and flows, and great ships do lie and hover. An offence committed at such a place, according to the authorities, is within the Admiralty jurisdiction, and it is the same as if the offence had been committed on the high seas. On the whole I come to the conclusion

[1] Act of 1825, c. 65, 4 U. S. Stat. L. 115.

[2] Merchant Shipping Act, 1854.

that the prisoner was amenable to the British law, and that the conviction was right.

[The concurring opinion of Channell, B., is omitted.]

Byles, J.—I am of the same opinion. I adhere to the opinion that I expressed at the trial. A British ship is, for the purposes of this question, like a floating island; and, when a crime is committed on board a British ship, it is within the jurisdiction of the Admiralty Court, and therefore of the Central Criminal Court, and the offender is as amenable to British law as if he had stood on the Isle of Wight and committed the crime.[3] Two English and two American cases decide that a crime committed on board a British vessel in a river like the one in question, where there is the flux and reflux of the tide, and wherein great ships do hover, is within the jurisdiction of the Admiralty Court; and that is also the opinion expressed in Kent's Commentaries. The only effect of the ship being within the ambit of French territory is that there might have been concurrent jurisdiction had the French claimed it. I give no opinion on the question whether the case comes within the enactment of the Merchant Shipping Act.

[The concurring opinions of Blackburn, J., and Lush, J., are omitted.]

Conviction affirmed.[4]

[3] "While it is true that the ocean is not capable of private dominion, and is the subject of free navigation to all nations, it is established by the highest authorities upon the laws of nations that ships are in all places the quasi-territory of the states to which they belong, and that all persons engaged on board of them are subject to the laws and ordinances of those states." Pinsent, J., in Rhodes v. Fairweather, Newf. (1884–96) 321, 330.

"A ship is a movable chattel, it is not a place; when on a voyage it shifts its place from day to day and from hour to hour, and when in dock it is a chattel which happens at the time to be in a particular place. The jurisdiction over crimes committed on a ship at sea is not of a territorial nature at all. It depends upon the law which for convenience and by common consent is applied to the case of chattels of such a very special nature as ships." Lord Finlay, dissenting, in the Lotus Case, P. C. I. J. Publ., Series A, Judgment No. 9, p. 53.

See also Van Devanter, J., in Cunard Steamship Co. v. Mellon, 262 U. S. 100, 123, *infra*, 449, 452; Bar, 651; Lewis, Foreign Jurisdiction, 10.

[4] See Rex v. Allen, 7 Car. & P. 664; Regina v. Lopez, 1 Dears. & B. C. C. 525. See also the following United States statutes: Act of 1790, c. 9, §8, 1 U. S. Stat. L. 112, 113; Act of 1825, c. 65, §4, 4 *ibid.* 115; U. S. Rev. Stat., §5339; U. S. Crim. Code, §272, 35 U. S. Stat. L. 1088, 1142. And see United States v. Ross, 1 Gall. 624; United States v. Keefe, 3 Mason 475; In re Ross, 140 U. S. 453. *Cf.* United States v. Hamilton, 1 Mason 152; United States v. Wiltberger, 5 Wh. 76; United States v. Robinson, 4 Mason 307.

The United States Crimes Act of 1825, c. 65, §5, provided: "That if any offence shall be committed on board of any ship or vessel, belonging to any citizen or citizens of the United States, while lying in a port or place within the jurisdiction of any foreign state or sovereign, by any person belonging to the company of said ship, or any passenger, on any other person belonging to the company of said ship, or any other passenger, the same offence shall be cognisable and punishable by the proper circuit

The Queen v. Carr and Wilson

Great Britain. High Court of Justice; Queen's Bench Division. 1882.

Law Reports 10 *Queen's Bench Division* 76.

[The statement of the case and the arguments of counsel are omitted. The facts are stated sufficiently in the opinion of Lord Coleridge, C. J.]

Lord Coleridge, C. J. There were on board an English ship, which lay in the Maas moored to the quay at a "dolphin," certain bonds, the subject of larceny. The ship was thus attached to the land of the country of Holland, but was in a place within the ebb and flow of the tide where she could and did lie afloat. There was no actual proof of who stole the bonds, but the evidence pointed to the stealing having taken place whilst the vessel was moored as I have stated, and before she left her moorings to proceed upon her homeward voyage by sea. How the bonds came to this country we know not, nor is it for our present purpose material. It is enough to know that they were here received under circumstances which, apart from the questions now to be considered, clearly warranted a conviction of the receivers. The conviction is for the offence of feloniously receiving these bonds knowing them to have been stolen. Now it is obvious that the prisoners cannot be convicted here unless the stealing took place within the jurisdiction of our courts. The question has therefore to be considered whether the ship was, when the bonds were stolen, within the jurisdiction of the Admiralty, so that the thief, if he had been caught, could have been tried at the Old Bailey. The exact point has never yet, it would seem, been decided. None of the cases cited absolutely cover the precise question now before us. There are, indeed, two questions involved: first, was the ship within the jurisdiction of the Admiralty, so that the stealing took place locally within the jurisdiction of the court which tried the prisoners; and secondly, was the person who stole a person subject to the jurisdiction of that court. The first, a question of place; the second, a question of person. The place is clearly within the old description of a place within

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court of the United States, in the same way and manner, and under the same circumstances, as if said offence had been committed on board of such ship or vessel on the high seas, and without the jurisdiction of such foreign sovereign or state: Provided, always, That if such offender shall be tried for such offence, and acquitted or convicted thereof, in any competent court of such foreign state or sovereign, he shall not be subject to another trial in any court of the United States." (4 U. S. Stat. L. 115.) See United States v. Seagrist, 4 Blatchf. 420. That the Act of 1825, §5, was declaratory, and that United States vessels in foreign ports or waters are governed by United States penal statutes expressly applicable within the admiralty and maritime jurisdiction of the United States, notwithstanding the omission of §5 from the Revised Statutes, see United States v. Bennett, 3 Hughes 466.

Cf. Reg. v. Serva, 2 C. & K. 53; Reg. v. Waina, 2 N. S. W. R. 403.

the ebb and flow of the tide where great ships are accustomed to go. The ship was accustomed to go there in its trading; it was there in the course of trading. There is enough to make it clear that the place is within the jurisdiction. Without saying that the reports are as exact as could be wished, it appears from the reports of Rex v. Allen [1 Mood. C. C. 494; 7 C. & P. 664] and Rex v. Jemot [Russell on Crimes, 5th ed. p. 11 in note] that those cases were such that to draw any tangible and sensible distinction between them and the case now before the Court would be difficult. Again, in Reg. v. Anderson [Law Rep. 1 C. C. R. 161; 38 L. J. (M. C.) 12] the ship was some forty or fifty miles up the Garonne, yet it was held that our courts had jurisdiction. I cannot distinguish that case from the present as to this first point.

With regard to the second point, is there anything in the personality of the thief, who thus stole from a place within the jurisdiction, to render him not triable here? It is true that in Reg. v. Anderson great stress is laid by judges upon the fact that the prisoner was one of the crew. In the report of that case in the Law Journal I find Bovill, C. J., reported as insisting on the right of this country to legislate for persons who come on board its ships. The fact that the prisoner was of the crew is prominently noticed, but not one of the judges says that had it been otherwise their judgment would have been other than it was. The true principle is, that a person who comes on board a British ship, where English law is reigning, places himself under the protection of the British flag, and as a correlative, if he thus becomes entitled to our law's protection, he becomes amenable to its jurisdiction, and liable to the punishments it inflicts upon those who there infringe its requirements. I can draw no distinction between those who form part of the crew, those who come to work in or on the ship, those who are present involuntarily, or those who come voluntarily as passengers. If on board in such case, our law protects them against outrage and wrong, and from that it follows they are liable to the obligations by it imposed. It is said that these bonds may have been stolen by a Dutch subject who came, perhaps without a right, on board for a short time, and who then went back with his plunder to Rotterdam. If so, if the ship had sailed for this country before he got ashore with the bonds thus stolen, instead of after, and brought him to this country against his will, I say he could have been tried and convicted here. The conviction must be affirmed.

Pollock, B. I also think the conviction should be affirmed. The broad question is whether upon this trial of an indictment for receiving, it was proved that the property was so stolen as to give the Court trying it jurisdiction over the thief and theft. Does the rule apply enunciated by Blackburn, J., in Reg. v. Anderson: "All persons on board of her may be considered as within the jurisdiction of that nation whose flag is flying on the ship, in the same manner as if they were within the

territory of that nation." It is admitted that if the theft had been in mid-ocean the conviction would have been proper. It is said, that lying alongside the town the English jurisdiction ceased. I think the distinction is not one of substance. If the crew had been discharged and the ship had been under repair, the circumstances would have been very different, but here there was a large British ship taking or discharging its cargo and passengers in its ordinary course within tidal waters "where great ships do go." To draw distinctions such as we have been invited to do would be to fritter away sound law.

Lopes, J. The conviction should be affirmed. The position of the ship was within the jurisdiction, she was on the high seas, "where great ships do go." It is said the thief may not have been a member of the crew. I think it matters not whether he was or not. The true test is, was he at the time on an English ship protected by, and answerable to, English law.

Stephen, J. I am of the same opinion. The whole question is, was the theft within the jurisdiction of the Admiralty of England? Ever since the time of Richard II., its jurisdiction has extended to where great ships go. Many statutes regulate procedure for applying that jurisdiction, but the jurisdiction itself has, in its extent, so far as I can learn, remained unnarrowed. Of the cases cited, Rex v. Jemot bears out that jurisdiction, it shews it is not limited to waters outside ports. It was a case of an English sailor punished for what he did on an English ship in port in Cuba. Rex v. Allen is to a similar effect. Reg. v. Anderson again is an authority, and it goes further, it affects both place and person, for in that case it was a foreigner who was tried, not a British subject, but it was a foreigner one of the crew; whilst here we have to decide, following these authorities, whether jurisdiction extends to the English ship placed where great ships usually go as part of their voyage for the purposes of its trading, and to all persons who happen to be on board such ship, so as to be entitled to the protection of English law. I see no reason founded on expediency or authority to induce us to say that a ship at anchor is within the jurisdiction, and that a ship moored to the land is not, or to introduce intricacies as to the mode of attachment of the ship to land, or to inquire when the flag is lowered or when hoisted. Such rules would be to make law without meaning, and to narrow well founded and beneficial jurisdiction. I prefer the obvious and wholesome principle that jurisdiction and protection in these cases are co-extensive.

Watkin Williams, J. I agree.

Conviction affirmed.[5]

[5] *Cf.* United States v. Mathues, 21 F. (2d) 533. On the jurisdiction of offences committed in part within the authority of one state and in part within the authority of another, see ch. 7, § 1, *infra.* 647.

Regina v. William Lesley

Great Britain. Court for Crown Cases Reserved. 1860.

Bell's Crown Cases 220.

The following case was reserved by Watson B.

The prisoner was the master of the British ship Louisa Braginton, and the charge against him was for the false imprisonment of several Chilian subjects from Valparaiso to Liverpool.

These persons, having been ordered to be banished from Chili by the government of that country, were brought by force, guarded by soldiers of that state, on board the ship, whence the prisoner, under a contract (a copy accompanies this case) with the Chilian government, carried and conveyed these Chilian subjects to Liverpool.

The evidence, and an abstract of the indictment, accompanies this case. On this evidence I directed a verdict of guilty, reserving the question of law, whether or not the defendant was liable to an indictment in this country under the circumstances, for the opinion of this Court.

. . .

[Part of the statement of the case and the arguments of counsel are omitted.]

The judgment of the Court was delivered, on the 28th January 1860, by

Erle, C. J.—In this case the question is, whether a conviction for false imprisonment can be sustained upon the following facts.

The prosecutor and others, being in Chili, and subjects of that state, were banished by the government from Chili to England.

The defendant, being master of an English merchant vessel lying in the territorial waters of Chili, near Valparaiso, contracted with that government to take the prosecutor and his companions from Valparaiso to Liverpool, and they were accordingly brought on board the defendant's vessel by the officers of the government, and carried to Liverpool by the defendant under his contract. Then, can the conviction be sustained for that which was done within the Chilian waters? We answer no.

We assume that in Chili the act of the government towards its subjects was lawful; and, although an English ship in some respects carries with her the laws of her country in the territorial waters of a foreign state, yet in other respects she is subject to the laws of that state as to acts done to the subjects thereof.

We assume that the government could justify all that it did within its own territory, and we think it follows that the defendant can justify all that he did there as agent for the government, and under its authority. In Dobree v. Napier [2 Bing. N. C. 781] the defendant, on behalf of the Queen of Portugal, seized the plaintiff's vessel for violating a blockade

of a Portuguese port in time of war. The plaintiff brought trespass; and judgment was for the defendant, because the Queen of Portugal, in her own territory, had a right to seize the vessel and to employ whom she would to make the seizure; and therefore the defendant, though an Englishman seizing an English vessel, could justify the act under the employment of the Queen.

We think that the acts of the defendant in Chili become lawful on the same principle, and therefore no ground for the conviction.[6]

The further question remains, can the conviction be sustained for that which was done out of the Chilian territory? And we think it can.

It is clear that an English ship on the high sea, out of any foreign territory, is subject to the laws of England; and persons, whether foreign or English, on board such ship, are as much amenable to English law as they would be on English soil. In Regina v. Sattler [Dears. & Bell's C. C. R. 525] this principle was acted on, so as to make the prisoner, a foreigner, responsible for murder on board an English ship at sea: the same principle has been laid down by foreign writers on international law, among which it is enough to cite Ortolan, *sur la Diplomatie de la Mer, liv.* 2. *cap.* 13.

The Merchant Shipping Act, 17 & 18 Vict. c. 104. s. 267., makes the master and seamen of a British ship responsible for all offences against property or person committed on the sea out of her Majesty's dominions as if they had been committed within the jurisdiction of the Admiralty of England.

Such being the law, if the act of the defendant amounted to a false imprisonment he was liable to be convicted. Now, as the contract of the defendant was to receive the prosecutor and the others as prisoners on board his ship, and to take them, without their consent, over the sea to England, although he was justified in first receiving them in Chili, yet that justification ceased when he passed the line of Chilian jurisdiction, and after that it was a wrong which was intentionally planned and executed in pursuance of the contract, amounting in law to a false imprisonment.

It may be that transportation to England is lawful by the law of Chili, and that a Chilian ship might so lawfully transport Chilian subjects; but for an English ship the laws of Chili, out of the state, are powerless, and the lawfulness of the acts must be tried by English law.

For these reasons, to the extent above mentioned, the conviction is affirmed.

Conviction confirmed accordingly.[7]

[6] See ch. 2, §2, n. 19, *supra*, 103.

[7] "The high sea is common to all nations and foreign to none; and every nation having vessels there has power to regulate them and also to seize them for a violation

Crapo v. Kelly

United States. Supreme Court. 1872.

16 *Wallace's Reports* 610.

[The statement of the case, the arguments of counsel, and part of the opinion are omitted. The facts are stated sufficiently in the opinion.]

Mr. Justice Hunt delivered the opinion of the court. . . .

Omitting all superfluous circumstances, the facts necessary to present the question on the merits are these: On the 23d of February, 1861, the insolvent court of Massachusetts appointed Crapo and others assignees in insolvency of Gibbs & Jenny, and the judge of that court executed and delivered to them an assignment of all the personal property of Gibbs & Jenny. At this date Gibbs & Jenny were the owners of the ship Arctic, an American vessel registered at the port of Fairhaven, in the district of New Bedford, in the State of Massachusetts, which vessel was then on the high seas, to wit, in the Pacific Ocean. On the 30th day of the following April this vessel arrived in the port of New York, and was at once seized as the property of Gibbs & Jenny, by an attachment issued at the suit of one Robinson, a creditor of Gibbs & Jenny, residing in New York. On the next day but one after the arrival of the vessel Crapo came to New York and took possession of her, subject to the possession of Kelly, the sheriff. Crapo represents the title under the Massachusetts assignment, which then, and at all times since, he has sought to enforce. Kelly claims under the New York attachment.

The question is, which proceeding gave the better title.

Certain propositions relating to the question are not disputed.

1. If the assignment under which Crapo claims had been the personal act of Gibbs & Jenny, it would have passed the title to the vessel wherever she might have been at the time of its execution.

2. If the vessel at the time of the execution of the assignment had been within the territorial limits of Massachusetts, the assignment, although not the personal act of Gibbs & Jenny, would have divested their title and that of all persons claiming under them, provided diligence has been used to reduce the vessel to possession.

3. If the vessel had been in the port of New York at the time of the execution of the insolvent assignment (there being no personal assignment), and had subsequently been seized there under attachment pro-

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of its laws." Van Devanter, J., in Maul v. United States, 274 U. S. 501, 511. See also United States v. Lee, 274 U. S. 559.

See also The Atalanta, 8 Op. Atty. Gen. 73; Anderson's Case, U. S. For. Rel. (1879) 435, 436, *ibid.* (1880) 481, Moore, Dig. Int. L., I, 932; Case of the Costa Rica Packet, Great Britain and The Netherlands, Moore, Int. Arb., V, 4948. *Cf.* Murphy v. New York & Cuba Mail S. S. Co., 273, Fed. 305.

ceedings by a New York creditor, such attachment proceeding would have held the vessel as against the prior insolvent assignment.

The first of these propositions results from the fact that personal property, wherever it may be, is under the personal control of its owner, and the title passes by his actual transfer. The second is based upon the idea that the property being actually present and under the control of the law, passes by act of the law. The third proposition assumes that a transfer by legal proceeding possesses less solemnity than one made by the owner himself; that each nation is entitled to protect its own citizens, and that the remedy by law taken by its citizens having the actual possession of the *corpus*, ought to prevail over a title by law from another State, which is not accompanied by such possession. This principle authorizes the Massachusetts assignee to hold the property when in Massachusetts, and the New York creditor to seize it when it is in New York, under the circumstances stated. [1 Parsons's Maritime Law, 78, v. c. and n.; Abbott on Shipping, 6th American edition, 36 and n.; Joy v. Sears, 9 Pickering, 4; Conrad v. Atlantic In. Co., 1 Peters, 449.]

The present case is deficient in each of the elements necessary to bring the vessel within the range of the foregoing principles. She was not transferred by the personal act of the owner. She was not literally within the territory of Massachusetts when the insolvent assignment took effect; and, thirdly, she was not in the port of New York.

The question then arises, while thus upon the high seas was she in law within the territory of Massachusetts. If she was, the insolvent title will prevail.

It is not perceived that this vessel can be said to be upon United States territory, or within United States jurisdiction, or subject to the laws of the United States regulating the transfer of property, if such laws there may be. Except for the purposes and to the extent to which these attributes have been transferred to the United States, the State of Massachusetts possesses all the rights and powers of a sovereign State. By her own consent, as found in article 1 of the Constitution of the United States, she has abandoned her right to wage war, to coin money, to make treaties, and to do certain other acts therein mentioned. None of the subjects there mentioned affect the question before us. The third article of that instrument extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction." This gives the power to the courts of the United States to try those cases in which are involved questions arising out of maritime affairs, and of crimes committed on the high seas. To bring a transaction within that jurisdiction, it must be not simply a transaction which occurred at sea, as the making of a contract, but one in which the question itself is of a maritime nature, or arises out of a maritime affair, or it must be a tort or crime committed on the high seas. Over such cases the United States

courts have jurisdiction; that is, they are authorized to hear and determine them. No rule of property is thereby established. This remains as it would have been had no such authority been given to the United States court.

To Congress is also given power "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations." It will scarcely be claimed that the title to property could be affected by this provision. Nor does the circumstance that the Arctic sailed under the flag of the United States and was entitled to the protection of that government against insult or injury from the citizens or ships of other nations, touch the present point. None of these instances are like that of the passage of a bankrupt law by the United States, which acts directly upon the property of all the citizens of all the States, wherever it may be. Had the claim of either party to this vessel been based upon a proceeding under that statute, the title would have been complete, if the property had been within the territory or jurisdiction of any of the States of the Union.

It is not perceived, therefore, that the relation of Massachusetts to the Union has any effect upon the title to this vessel. It stands as if that State were an independent sovereign State, unconnected with the other States of the Union. The question is the same as if this assignment had been made in London by a British insolvent court, adjudicating upon the affairs of a British subject.

We are of the opinion, for the purpose we are considering, that the ship Arctic was a portion of the territory of Massachusetts, and the assignment by the insolvent court of that State passed the title to her, in the same manner and with the like effect as if she had been physically within the bounds of that State when the assignment was executed.

The rule is thus laid down by Mr. Wheaton in his treatise on International Law [Eighth edition, §106, *et seq.*]: "Both the public and private vessels of every nation on the high seas, and out of the territorial limits of any other State, are subject to the jurisdiction of the state to which they belong. Vattel says that the domain of a nation extends to all its just possessions, and by its possessions we are not to understand its territory only, but all the rights it enjoys. And he also considers the vessels of a nation on the high seas as portions of its territory. Grotius holds that sovereignty may be acquired over a portion of the sea." As an illustration of the proposition that the ship is a portion of the territory of the State, the author proceeds: "Every state has an incontestable right to the service of all its members in the national defence, but it can give effect to this right only by lawful means. Its right to reclaim the military service of its citizens can be exercised only within its own territory, or in some place not subject to the jurisdiction of any other nation. The ocean is such a place, and any state may unquestionably

there exercise, on board its own vessels, its right of compelling the military or naval services of its subjects."

Chancellor Kent, in his Commentaries [Vol. i, p. 26], says: "The high seas are free and open to all the world, and the laws of every state or nation have there a full and perfect operation upon the persons and property of the citizens or subjects of such a state or nation." "No nation has any right or jurisdiction at sea, except it be over the persons of its subjects, in its own public and private vessels; and so far territorial jurisdiction may be conceded as preserved, for the vessels of a nation are in many respects considered as portions of its territory, and persons on board are protected and governed by the law of the country to which the vessel belongs."

Wharton [Conflict of Laws, §356] says: "A ship in the open sea is regarded by the law of nations as a part of the territory whose flag such ship carries." "By this (he says) may be explained several cases quoted as establishing the *lex domicilii*, though they are only sustainable on the ground that the ship at sea is part of the territory whose flag she bears. . . . In respect to principle, ships at sea and the property in them, must be viewed as part of the country to which they belong."

The modern German law is to the same point. Bluntschli, in his *Moderne Volkerrect* [Sec. 317], says: "Ships are to be regarded as floating sections of the land to which they nationally belong, and whose flag they are entitled to carry."

Bischof, in his *Grundriss des positiven internationalen Seerechts* [Graz, 1868; cited in Wharton's Conflict of Laws, §356, n.], says: "Every state is free on the seas, so that its ships are to be regarded as floating sections of its country, *territoria clausa; la continuation ou la prorogation du territoire*, and those on board such ships in foreign waters are under their laws and protection. This even applies to children born to subjects on such ships."

Wildman, in his treatise on International Law [Page 40], says: "Provinces and colonies, however distant, form a part of the territory of the parent state. So of the ships on the high seas. The rights of sovereignty extend to all persons and things not privileged, that are within the territory."

The adjudicated cases in this country are to the same effect. In Plestoro v. Abraham [1 Paige, 236], it was held that where a British subject, being indebted, left England, and while on his voyage to this country and before he arrived here, he was, under the laws of Great Britain, declared a bankrupt, and provisional assignees were appointed, it was held that the assignment to such assignees divested the title of the bankrupt to the personal property brought with him to this country. In giving his opinion upon the motion to dissolve the injunction, Chancellor Walworth said: ". . . In this case the controversy is between the

bankrupt and his assignees and creditors, all residing in the country under whose laws the assignment was made. Even the property itself, at the time of the assignment, was constructively within the jurisdiction of that country, being on the high seas in the actual possession of a British subject. Under such circumstances the assignment had the effect to change the property and divest the title as effectually as if the same had been sold in England under an execution against him, or he had voluntarily conveyed the same to the assignee for the benefit of his creditors."

The case was carried to the Court of Errors of the State of New York, that body being composed of the chancellor, the judges of the Supreme Court, the lieutenant-governor, and the members of the senate. The record did not show distinctly that the vessel which brought the goods was a British ship, and on this point the chancellor's order was reversed. Marcy, justice, and Throop, lieutenant-governor, eminent men and able judges, held that the assignment in Great Britain divested the title of the bankrupt to personal property in this country, and that his property in a vessel on the high seas was likewise transferred. Maynard, Oliver, and Stebbins held that, as to the personal property of the bankrupt *in this* country, the assignment did not effect a transfer of the same, even as between the assignee and the bankrupt. Maynard and Stebbins held that to produce the transfer, under such circumstances, of the property of a British bankrupt, which was on the high seas at the time of the assignment, it must distinctly appear that the vessel was a British vessel, and thus the property was within British jurisdiction. It is fairly to be inferred that if it had appeared that the vessel was a British vessel the chancellor's order would have been sustained. Thus Mr. Ogden, who argued for the reversal of the order, said [3 Wendell, 544]: "Had the goods been on board a British vessel it would have been so averred. In the absence of such averment the fair conclusion is that the vessel in which they were embarked was American; and if so, the goods were as much within our jurisdiction as if landed in a storehouse at New York." Senator Maynard, in his opinion [*Id.* 558], repeats this statement. He says: "The presumption was as fair that it was on board of an American ship as that it was on a British ship; and if so, it was, at the date of the assignment, within the jurisdiction of this country." Stebbins, senator, says [*Id.* 567]: "I hold, therefore, that if this property was laden on board an American vessel, and on the high seas at the time of the assignment, it was within the jurisdiction of the United States, and could no more pass by that assignment than if lodged in the custom-house in New York; and if laden on board a British vessel that fact should have been averred by the assignee as essential to his title." The chancellor's order was reversed, and apparently upon this ground, that it did not actually appear that the ship on which the goods were laden was

a British ship. The principle of the decision was in accordance with the principle announced by the chancellor, as already quoted, to wit, that the presence of the goods in a British ship on the high seas, continued them within British jurisdiction. . . .

Judge Story says [Conflict of Laws, §419], upon this case: "It is difficult to perceive how the doctrine of the chancellor, as to the operation of the British bankrupt laws upon the British subjects and their property *in transitu* can be answered. The transfer must be admitted to be operative to divest the bankrupt's title to the extent of an estoppel as to his own personal claim in opposition to it, for the law of America, be it what it may, had not then operated upon it. It was not locally within our jurisdiction. No one could doubt the right of the assignee to personal property locally in England at the time of the assignment. In what respect does such a case differ from a case where it has not passed into another jurisdiction? Is there any substantial difference between its being on board a British vessel and its being on board of an American vessel on the high seas?" No claim can be made that this vessel was within the jurisdiction of New York when the assignment was executed.

If the title passed to the insolvent assignees, it passed *eo instanti* the assignment was executed. It took effect then or never. The return of the vessel afterwards to America, her arrival in the port of New York, her seizure and sale there did not operate to divest a title already complete. [*Ib.* §391, and Thuret v. Jenkins, 7 Martin, 318, 353, 354.]

Again, the owners of this vessel and the assignees in insolvency were citizens of Massachusetts, and subject to her laws. It is not doubted that a sale of property between them of property on board of this vessel, or of the vessel itself, would be regulated by the laws of Massachusetts. It is not doubted that the vessel was taxable in Massachusetts only, or that if Gibbs or Jenny had been on board of the vessel, and had died before the vessel reached New York, his personal property on or in her would have passed under the laws of Massachusetts. [Morgan v. Parham, *supra*, 471; Hoyt v. Commissioners, 23 New York, 224.]

If this vessel had never returned to the American shores but had gone to the bottom in the Pacific seas, after the assignment was complete, whose vessel would she have been at the time of such loss? There can be but one answer. The Massachusetts statute declares that this assignment vested in Crapo and his associates all the title and interest the insolvent had in this vessel. In other words it vested in them the absolute ownership. There was not then, or for weeks afterwards, any possible question of their title. The insurance-money upon the ship would have been their property, and they would have been bound to collect it and distribute it among the creditors.

Personal property which has an established *situs* in another State, is no doubt governed by the *lex loci sitæ rei*, so far that it will be governed

in its distribution by the laws of the place where found, rather than the law of the domicile. This rule only applies where such property has acquired an established *situs*. Until that occurs there can be no conflict of jurisdiction.

It is said, however, that the fact that the property on board a vessel at sea and the vessel itself, contracts respecting them and the distribution of the assets of the intestate, are regulated by the laws of Massachusetts, arises solely from the circumstance that the owner is a resident of that State; that jurisdiction of the parties it is, that gives the jurisdiction of these subjects. The authorities from Kent, Story, and Wheaton, and the continental authorities, the civil law before cited, as well as the decisions in Plestoro v. Abrahams, make the ship itself, under such circumstances, a part of the territory of the State to which its owner belongs. If he resides in Boston his property in the remotest county of the State is under the protection of its laws, as being upon and within its territory. So his property on his ship, for the purpose we are considering, is legally and constructively within its territory. In each case it is true that the existence of an owner is necessary to call forth the exercise of the law and the duty and power of the State. In this sense, it is true, that the residence of the owner produces the result. It is produced, however, not only by the existence and residence of the owner, but by an extended State territory upon which his property remains, and where it is subject to State laws and entitled to the protection of the same laws.

Grotius [*De Jure Belli*, book ii, ch. iv., §13] holds that sovereignty may be acquired over a portion of the sea, *ratione personarum*. [Wheaton on International Law, §106.] Rutherford and others hold this to be an error, and that no nation has jurisdiction over the ocean itself. All agree that jurisdiction over the public and private vessels of a nation at sea, remains to the nation, and it is expressed in the language already quoted.

In the celebrated Trent Case, occurring in 1862, Messrs. Mason and Slidell were removed from a British private vessel by Commodore Wilkes of the San Jacinto, a public vessel of the United States. Great Britain insisted that the rights of a neutral vessel not only had been violated, for which she demanded apology, but she insisted that these persons should be replaced and returned on board a British ship. This was done, and they were actually placed on board a British vessel in or near the harbor of Boston. They were not British subjects, and their return could only have been demanded for the reason that they had been torn from British soil, and the sanctity of British soil as represented by a British ship had been violated. Citizenship or residence had no influence upon the question.

This vessel, the Arctic, was upon the high seas at the time of the assignment. The status at that time decides the question of jurisdiction.

The State of New York had no jurisdiction over her until long afterwards. No conflict can, therefore, arise between the laws of New York and of Massachusetts. The United States had no jurisdiction over her for the purpose we are considering. We hold that she was subject to the disposition made by the laws of Massachusetts, and that for the purpose and to the extent that title passed to the assignees, the vessel remained a portion of the territory of that State.

Judgment reversed, and the case remanded for further proceedings.[8]

[Mr. Justice Clifford concurred in the reversal of the judgment but did not assent to the reasons given in the opinion of the court. His concurring opinion is omitted.]

Mr. Justice Bradley, with whom concurred Mr. Justice Field, dissenting.

[The dissenting opinion is omitted.]

Marshall, Appellant, v. Murgatroyd, Respondent

Great Britain. Court of Queen's Bench. 1870.

Law Reports 6 *Queen's Bench* 30.

Case stated by justices of the West Riding of Yorkshire under 20 & 21 Vict. c. 43.

An information was preferred by the respondent against the appellant for that she had, since the passing of 8 & 9 Vict. c. 101, and within twelve calendar months from the date of the application by the respondent, been delivered of a bastard child, of which she alleged the appellant to be the father. On the hearing the justices made an order for the maintenance of the child.

[8] In cases of civil wrong committed on board ship upon the high seas the *lex loci delicti commissi* is the law of the flag. See Madrazo v. Willes, 3 B. & A. 353, *infra*, 514; Polydore v. Prince, Ware 402; McDonald v. Mallory, 77 N. Y. 546; International Navigation Co. v. Lindstrom, 123 Fed. 475; The Hamilton, 207 U. S. 398; United States Shipping Board Emergency Fleet Corporation v. Greenwald, 16 F. (2d) 948.

On the law governing marriages solemnized on board ship upon the high seas, see De Moulin v. Druitt, 13 Ir. C. L. 212; Hynes v. McDermott, 82 N. Y. 41; Norman v. Thomson, 121 Calif. 620; Bolmer v. Edsall, 90 N. J. Eq. 299; Fisher v. Fisher, 165 N. E. (N. Y.) 460; White, "Marriages at Sea," 17 L. Quart. Rev. 283; 60 Am. St. Rep. 947; 12 Harv. L. Rev. 273; 19 Jurid. Rev. 178.

On the law governing contracts for carriage of goods upon the high seas, see Malpica v. McKown, 1 Miller (La.) 248; Pope v. Nickerson, 3 Story 465; Lloyd v. Guibert, 1 Q. B. 115.

On the law governing collision between ships of different flags upon the high seas, see The Belgenland, 114 U. S. 355; Dicey, 4th ed., 729; Marsden, Collisions at Sea, 8th ed., 215. And see International Commission of Jurists, Project of Convention of Private International Law, arts. 292–294, 22 Am. Jour. Int. L. Spec. Suppl. 273, 308.

The facts proved before the justices were as follows:—

The respondent was delivered of a bastard child on board the ship Palmyra, whilst sailing from New York to Liverpool; that ship belonged to the Cunard line of steamers, but neither the respondent nor any witness she called was able to prove whether the Palmyra was an English or American vessel. The vessel sailed direct from New York to Liverpool. It was admitted by the appellant's attorney that the Cunard line was an English line of steamers. At the time of the birth of her child the master of the vessel informed the respondent that the ship was in British waters, and, further, that she sailed three days and three nights from and after the birth of the child before the vessel reached Liverpool. But the respondent could give no idea how far the ship was from Liverpool when she was so delivered.

It was contended on the part of the appellant that the ship when respondent was delivered was on the high seas, and at least 600 miles from Liverpool, and that being so, he further contended that the magistrates could not, under the bastardy laws, make an order upon the appellant, inasmuch as the child was born "out of England;" and the appellant cited the case of Reg. v. Blane, 13 Q. B. 769 (E. C. L. R. vol. 66); 18 L. J. (M. C.) 210, which, according to the judgment of Lord Denman, and the other judges, was, that a bastard born out of England could not be affiliated under the provisions of the bastardy laws before magistrates in England. The appellant also contended that the Act under which the information was laid only extended to England and Wales, and that a child could not be affiliated in England if born in Scotland, or out of England and Wales, and he cited the case of Reg. v. Lightfoot, 6 E. & B. 822 (E. C. L. R. vol. 88); 25 L. J. (M. C.) 115, to show that a summons of bastardy could not be served in Scotland.

The question for the opinion of the Court was, were the magistrates justified under the preceding circumstances in making an order upon the appellant in the face of the objections taken by the appellant that the child was born on the high seas and therefore out of England? . . .

[The argument for appellant is omitted.]

The respondent did not appear.

Blackburn, J.—Our judgment must be for the respondent. It has been argued that the provisions of 7 & 8 Vict. c. 101, under which this order is made, extend only to England and Wales, that the child of which the respondent was delivered having been born on the high seas was born out of England, and that therefore the order is invalid. I think that the evidence set out in the case is sufficient to show that the Cunard steamer is an English ship. It is part of the common law and of the law of nations, that a ship on the high seas is a part of the territory of that state to which she belongs; and therefore an English ship is deemed to be part of England. The child having been born on board an English

ship, the statute applies. The justices were therefore right in making the order.

LUSH, J., concurred. Judgment for the respondent.[9]

IN RE LAM MOW

United States. District Court, Northern District of California. 1927.

19 *Federal Reporter*, 2d *Series*, 951.

Petition for writ of *habeas corpus* by Lam Mow, alias Lam Korea. On demurrer to petition. . . .

[The names of counsel are omitted.]

KERRIGAN, DISTRICT JUDGE. Lam Mow, alias Lam Korea, applied to the United States immigration authorities for the port of San Francisco for admission into the United States as a citizen thereof. His claim of citizenship is based upon the ground that he was "born in the United States." There is no conflict as to the facts. The parents of Lam Mow, at the time of his birth, were subjects of China. They were residents of the United States, the father being a lawfully domiciled merchant. They were returning to the United States in December, 1912, after a visit to China, on the steamship Korea, a vessel of American registry. On December 9, 1912, on the high seas (lat. 21° 46′ N., long. 158° 39′ W.), Lam Mow was born. On arrival of the vessel at San Francisco in 1912, Lam Mow was admitted as the son of a merchant. He remained in the United States from 1912 to 1919, when he returned to China, where he has resided until his present return to the United States.

The single question to be considered is whether birth on the high seas aboard an American vessel confers citizenship upon a child whose parents are aliens residing in the United States. Article 14, §1, of the Constitution of the United States, provides as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. . . ." U. S. v. Wong Kim Ark, 169 U. S. 649, 18 S. Ct. 456, 42 L. Ed. 890, held that under this provision the children of resident aliens born in the United States are citizens of the United States.

It is strenuously contended on behalf of petitioner that a vessel of American registry is part of the territory or state within which its home port is situated, and as such a part of the United States; so that a child born on such a vessel, upon the high seas, is born "in the United States." This theory receives some support from the language of various courts in cases involving alien seamen aboard American vessels, and the effect

[9] *Cf.* Scharrenberg v. Dollar Steamship Co., 245 U. S. 122; Cunard Steamship Co. v. Mellon, 262 U.S. 100, *infra*, 449.

upon their status of absence from the country on a voyage. Weedin v. Banzo Okada (C. C. A.) 2 F. (2d) 321; Ex parte T. Nagata (D. C.) 11 F. (2d) 178; Ex parte Kogi Saito (D. C.) 18 F. (2d) 116. Similar language appears in other cases considering question of jurisdiction over crimes committed on American vessels on the high seas. U. S. v. Rodgers, 150 U. S. 249, 14 S. Ct. 109, 37 L. Ed. 1071; Andersen v. U. S., 170 U. S. 481, 18 S. Ct. 689, 42 L. Ed. 1116.

This makes it necessary to consider the nature of the jurisdiction exercised by a sovereign nation over its vessels upon the high seas, in the light of the general principles of international law as recently interpreted by the United States Supreme Court. Scharrenberg v. Dollar S. S. Co., 245 U. S. 122, 38 S. Ct. 28, 62 L. Ed. 189; Cunard S. S. Co. v. Mellon, 262 U. S. 100, 43 S. Ct. 504, 67 L. Ed. 894, 27 A. L. R. 1306. In the latter case the court says:

"In support of their contention the defendants refer to the statement sometimes made that a merchant ship is a part of the territory of the country whose flag she flies. But this, as has been aptly observed, is a figure of speech, a metaphor. Scharrenberg v. Dollar S. S. Co., 245 U. S. 122, 127 (38 S. Ct. 28, 62 L. Ed. 189); In re Ross, 140 U. S. 453, 464 (11 S. Ct. 897, 35 L. Ed. 581); 1 Moore, International Law Digest, §174; Westlake, International Law (2d Ed.) p. 264; Hall, International Law (7th Ed. Higgins) §76; Manning, Law of Nations (Amos) p. 276; Piggott, Nationality, pt. II, p. 13. The jurisdiction which it is intended to describe arises out of the nationality of the ship, as established by her domicile, registry and use of the flag, and partakes more of the characteristics of personal than of territorial sovereignty. See The Hamilton, 207 U. S. 398, 403 (28 S. Ct. 133, 52 L. Ed. 264); American Banana Co. v. United Fruit Co., 213 U. S. 347, 355 (29 S. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas. 1047); 1 Oppenheim, International Law (3d Ed.) §§123–125, 128. It is chiefly applicable to ships on the high seas, where there is no territorial sovereign, and as respects ships in foreign territorial waters it has little application beyond what is affirmatively or tacitly permitted by the local sovereign." Page 123 (43 S. Ct. 507).

The Supreme Court is here recognizing the fact that modern international law regards the fiction of territoriality of vessels on the high seas as untenable, and that the jurisdiction exercised by a state over its merchant vessels upon the ocean is conceded to it in virtue of its ownership of them as property in a place where no local jurisdiction exists. Hall, International Law (7th Ed.) §77, p. 263. This jurisdiction arises out of the practical necessity of protecting the vessel, its passengers and crew, and their possessions, and adjusting their civil relationships and punishing their crimes pending the voyage. It is in this sense that the language used in the seamen's and other cases is to be interpreted. Although the United States has jurisdiction over American vessels

upon the high seas, such vessels are not literally "part of" or "in" the United States.

Birth "in the United States" is required under the Fourteenth Amendment. Jurisdiction, civil and criminal, of the United States over the place of birth, is not in itself enough to bestow citizenship upon one not in fact born in the United States. This is apparent from a consideration of the status of persons found or born within conquered territory. Downes v. Bidwell, 182 U. S. 244, 279, *et seq.*, 21 S. Ct. 770, 45 L. Ed. 1088. Although born in a place where the United States had jurisdiction, namely, aboard the steamship Korea, on the high seas, Lam Mow was not born "in the United States," and is not a citizen of the United States.

The demurrer to the petition for a writ of *habeas corpus* is sustained. Petition denied.[10]

SECTION 2. AUTHORITY OVER FOREIGN SHIPS

Charteris, The Legal Position of Merchantmen in Foreign Ports and National Waters

The British Year Book of International Law, 1920–21, page 45.

The rival systems are the British, to which, it is understood, the United States adheres save in cases covered by express convention, and the French, which counts numerous adherents among the less important maritime powers, as well as the Institute of International Law. Both systems have this in common that they deny to foreign merchantmen exterritorial privileges, but they differ alike in basis and in essential character. The British system, on the one hand, asserts in theory the complete subjection of the ship to the territorial jurisdiction—tempered in England as regards civil jurisdiction by certain limitations in matters not vitally concerning the littoral state, of which, however, the latter is the sole judge. On the other hand it claims, as regards British ships in foreign ports, a complete but concurrent criminal jurisdiction which it is also prepared to concede, as regards foreign ships in British ports, to their flag state. The basis of this system is recognition of the principle of international law that jurisdiction is normally co-extensive with territory, affecting all persons or things physically present within it, unless they are exempted by treaty or a universally accepted immunity.

The French system, as formulated in the celebrated *Avis du Conseil d'État* of November 20, 1806, while maintaining the same fundamental rule of subjection to the local jurisdiction, expressly renounces French jurisdiction over matters of internal discipline, and over crimes and

[10] Affirmed by the Circuit Court of Appeals, Ninth Circuit, in Lam Mow v. Nagle, 24 F. (2d) 316. *Cf.* Great Britain, Nationality and Status of Aliens Act, 1914, §1 (1) (c), 4 & 5 Geo. V. c. 17, *supra*, 210.

offences committed on board by members of the crew, yet retains in reserve the right of the littoral state to intervene even in cases of the excepted class where persons are involved who are strangers to the vessel, or where the peace and good order of the port is actually compromised, or where the assistance of the local authorities is invoked. In the excepted cases jurisdiction belongs exclusively to the flag state and is exercised by the local Consul, and in such cases the French Consul is instructed to dispute the competence of the local authorities should they attempt to assert it, as regards French vessels in foreign ports. . . .

The French system, it is claimed, serves the ends of justice by ensuring due punishment by the law of the flag state for crimes and offences committed, and promotes the interests of navigation by preventing avoidable detention of the vessel. It is extensively adopted by states other than France, either by domestic legislation, or consular convention, or judicial decision on the basis of reciprocity. Both systems, it remains only to add, apply primarily to foreign vessels lying in waters admittedly national of a foreign state, *e. g.* ports, harbours, roadsteads, estuaries, or other enclosed waters. In territorial waters in the open sea—more appropriately described as the marginal belt—in which a maritime state possesses if not sovereignty at least rights of jurisdiction, the right of innocent passage universally accorded to foreign merchantmen suggests reasons for limiting the exercise of the local jurisdiction to acts taking place on the foreign vessel which directly affect the interests of the littoral state or its nationals. To this consideration due practical effect is given as regards criminal jurisdiction over foreigners by the British system in the Territorial Waters Jurisdiction Act, 1876 (41 and 42 Vic. c. 73).[11]

The Sally and The Newton

France. Council of State. 1806.

Collection Complète des Lois, Décrets, Ordonnances, Réglemens, et Avis du Conseil-d'État, Volume 16, *page* 65.

Opinion of the Council of State on the jurisdiction of offences committed on board neutral vessels in the ports and roadsteads of France.

[11] "Among writers, the better line of authority supports the view that as a point of law, foreign merchant vessels in port are subject to the local jurisdiction. This is the view of Westlake, Van Praag, Hall, Evans, Despagnet, Pitt Cobbett, Bluntschli, Charteris, Nielsen, Twiss, and Hyde. Halleck inclines toward that view without taking a definite position. This also seemed to be the position of the Institute in 1898. On the other hand, Latour, Fedozzi, Gregory, Quincy Wright, and possibly Moore, indicate that there are exemptions from the local jurisdiction as a matter of right, and not merely as a matter of courtesy or comity. Usually it is said there are two systems in operation, the French and the English." Jessup, Territorial Waters, 144.

The Council of State which, after the reference made to it by His Majesty, has heard the report of the section of legislation on that of the chief judge, the Minister of Justice, aiming to determine the limits of the jurisdiction which the consuls of the United States of America claim in the ports of Marseilles and Antwerp respecting the offences committed on board the vessels of their nation lying in the ports and roadsteads of France;

Considering that a neutral vessel cannot be regarded without limitation as a neutral place, and that the protection which is accorded it in French ports cannot divest the territorial jurisdiction, as regards anything which touches the interests of the state;

Also that the neutral vessel admitted into a port of the state is completely subject to the laws of police which govern the place where it is received;

That members of its crew are equally within the jurisdiction of the local tribunals as regards the offences which they may commit there, even on board ship, against persons outside the crew, as well as for the civil contracts which they may make with such persons;

But that, while the territorial jurisdiction is beyond doubt to this extent, it is not so as regards offences which are committed on board the neutral vessel by a member of the neutral crew against another member of the same crew;

That, in such case, the rights of the neutral power ought to be respected, as relating to the internal discipline of the vessel, in which the local authority ought not to interfere when its aid is not invoked or when the tranquility of the port is not endangered,

Is of the opinion that this distinction, indicated by the report of the chief judge, and in conformity with usage, is the only rule which it is appropriate to follow in this matter;

And applying this doctrine to the two particular cases over which the United States consuls have claimed jurisdiction;

Considering that, in one of these cases, there was involved an affray which occurred in the boat belonging to the American ship The Newton between two seamen of the same ship; and, in the other, a serious wound inflicted by the first mate of the ship The Sally upon one of its seamen for having fitted out the boat without his order,

Is of the opinion that it is appropriate to entertain the claim and to enjoin the French tribunal from taking cognizance of the two cases aforesaid. [Editor's transl.]

[The opinion of the Council of State was approved by Napoleon on November 20, 1806, and thus acquired the same force and effect as an act of the legislature.][12]

[12] *Cf.* Case of Jally, Sirey (1859) I, 183. See JESSUP, Territorial Waters, 145. See also Inst. de Dr. Int. (1898) 273, 280, arts. 25–37; SCOTT, Resolutions, 143, 150.

Wildenhus's Case

United States. Supreme Court. 1887.

120 *United States Reports* 1.

This appeal brought up an application made to the Circuit Court of the United States for the District of New Jersey, by Charles Mali, the "Consul of His Majesty the King of the Belgians, for the States of New York and New Jersey, in the United States," for himself as such consul, "and in behalf of one Joseph Wildenhus, one Gionviennie Gobnbosich, and one John J. Ostenmeyer," for the release, upon a writ of *habeas corpus*, of Wildenhus, Gobnbosich, and Ostenmeyer from the custody of the keeper of the common jail of Hudson County, New Jersey, and their delivery to the consul, "to be dealt with according to the law of Belgium." . . .

[The petition for the writ set forth that Wildenhus was a domiciled subject of Belgium, a member of the crew of the Belgian steamship Noordland, and that he had mortally wounded another Belgian sailor on the steamship in an affray which occurred between decks while the Noordland lay at dock in Jersey City. With two other members of the crew he had been arrested by the Jersey City police and held for trial by the local authorities.]

Article XI of a Convention between the United States and Belgium "concerning the rights, privileges, and immunities of consular officers," concluded March 9, 1880, and proclaimed by the President of the United States, March 1, 1881, 21 Stat. 776, 781, is as follows:

"The respective consuls-general, consuls, vice-consuls, and consular agents shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of all differences which may arise, either at sea or in port, between the captains, officers, and crews, without exception, particularly with reference to the adjustment of wages and the execution of contracts. The local authorities shall not interfere, except when the disorder that has arisen is of such a nature as to disturb tranquillity and public order on shore, or in the port, or when a person of the country or not belonging to the crew, shall be concerned therein.

"In all other cases, the aforesaid authorities shall confine themselves to lending aid to the consuls and vice-consuls or consular agents, if they are requested by them to do so, in causing the arrest and imprisonment of any person whose name is inscribed on the crew list, whenever, for any cause, the said officers shall think proper."

The claim of the consul was, that, by the law of nations, and the provisions of this treaty, the offence with which Wildenhus was charged is "solely cognizable by the authority of the laws of the Kingdom of

Belgium," and that the State of New Jersey was without jurisdiction in the premises. The Circuit Court refused to deliver the prisoners to the consul and remanded them to the custody of the jailer. 28 Fed. Rep. 924. To reverse that decision this appeal was taken.

[Part of the statement of the case and the arguments of counsel are omitted.]

Mr. Chief Justice Waite, after stating the case as above reported, delivered the opinion of the court.

By §§751 and 753 of the Revised Statutes the courts of the United States have power to issue writs of *habeas corpus* which shall extend to prisoners in jail when they are in "custody in violation of the Constitution or a law or treaty of the United States," and the question we have to consider is, whether these prisoners are held in violation of the provisions of the existing treaty between the United States and Belgium.

It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement; for, as was said by Chief Justice Marshall in The Exchange, 7 Cranch, 116, 144, "it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such . . . merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country." United States v. Diekelman, 92 U. S. 520; 1 Phillimore's Int. Law, 3d ed. 483, §351; Twiss' Law of Nations in Time of Peace, 229, §159; Creasy's Int. Law, 167, §176; Halleck's Int. Law, 1st ed. 171. And the English judges have uniformly recognized the rights of the courts of the country of which the port is part to punish crimes committed by one foreigner on another in a foreign merchant ship. Regina v. Cunningham, Bell C. C. 72; S. C. 8 Cox C. C. 104; Regina v. Anderson, 11 Cox C. C. 198, 204; S. C. L. R. 1 C. C. 161, 165; Regina v. Keyn, 13 Cox C. C. 403, 486, 525; S. C. 2 Ex. Div. 63, 161, 213. As the owner has voluntarily taken his vessel for his own private purposes to a place within the dominion of a government other than his own, and from which he seeks protection during his stay, he owes that government such allegiance for the time being as is due for the protection to which he becomes entitled.

From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and

did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority. Such being the general public law on this subject, treaties and conventions have been entered into by nations having commercial intercourse, the purpose of which was to settle and define the rights and duties of the contracting parties with respect to each other in these particulars, and thus prevent the inconvenience that might arise from attempts to exercise conflicting jurisdictions.

The first of these conventions entered into by the United States after the adoption of the Constitution was with France, on the 14th of November, 1788, 8 Stat. 106, "for the purpose of defining and establishing the functions and privileges of their respective consuls and vice-consuls," Art. VIII of which is as follows:

"The consuls or vice-consuls shall exercise police over all the vessels of their respective nations, and shall have on board the said vessels all power and jurisdiction in civil matters, in all the disputes which may there arise; they shall have an entire inspection over the said vessels, their crew, and the changes and substitutions there to be made; for which purpose they may go on board the said vessels whenever they may judge it necessary. Well understood that the functions hereby allowed shall be confined to the interior of the vessels, and that they shall not take place in any case which shall have any interference with the police of the ports where the said vessels shall be."

It was when this convention was in force that the cases of The Sally and The Newton arose, an account of which is given in Wheaton's Elements of International Law (3d ed.) 153, and in 1 Phillimore's International Law (3d ed.) 484 and (2d ed.) 407. The Sally was an American merchant vessel in the port of Marseilles, and The Newton a vessel of a similar character in the port of Antwerp, then under the dominion of France. In the case of The Sally, the mate, in the alleged exercise of discipline over the crew, had inflicted a severe wound on one of the seamen, and in that of The Newton one seaman had made an assault on another seaman in the vessel's boat. In each case the proper consul of the United States claimed exclusive jurisdiction of the offence, and so did the local authorities of the port; but the Council of State, a branch of the political department of the government of France to which the matter was referred, pronounced against the local tribunals, "considering that one of these cases was that of an assault committed in the boat of

the American ship Newton, by one of the crew upon another, and the other was that of a severe wound inflicted by the mate of the American ship Sally upon one of the seamen for having made use of the boat without leave." This was clearly because the things done were not such as to disturb "the peace or tranquillity of the port." Wheaton's Elements Int. Law, 3d ed. 154. The case of The Sally was simply a quarrel between certain of the crew while constructively on board the vessel, and that of The Newton grew out of a punishment inflicted by an officer on one of the crew for disobedience of orders. Both were evidently of a character to affect only the police of the vessel, and thus within the authority expressly granted to the consul by the treaty.

No other treaty or convention bearing on this subject, to which our attention has been called, was entered into by the United States until a treaty with Sweden and Norway, on the 4th of September, 1816, 8 Stat. 232, where it was agreed, by Art. 5, that: "The consuls and their deputies shall have the right, as such, to act as judges and arbitrators in the differences which may arise between the captains and crews of the vessels of the nation whose affairs are intrusted to their care. The respective governments shall have no right to interfere in matters of this kind, except the conduct of the captain or crew shall disturb the peace and tranquillity of the country in which the vessel may be, or the consul of the place shall feel himself obliged to resort to the interposition and support of the executive authority to cause his decision to be respected and maintained. It being, nevertheless, understood that this kind of judgment or award shall not deprive the contending parties of the right which they have, on their return, to recur to the judicial authorities of their own country."

Substantially the same provision is found in treaties or conventions concluded with Prussia in 1828, Art. X, 8 Stat. 382; with Russia in 1832, Art. VIII, *id.* 448; with Greece in 1837, Art. XII, *id.* 504; with Hanover in 1840, Art. VI, *id.* 556; with Portugal also in 1840, Art. X, *id.* 564; with the Grand Duchy of Mecklenburg-Schwerin in 1847, Art. IX, 9 Stat. 916; with Oldenburg in 1847, *id.* 868; with Austria in 1848, Art. IV, *id.* 946; with the Hanseatic Republics in 1852, Art. I, 10 Stat. 961; with the Two Sicilies in 1855, Art. XIX, 11 Stat. 650; with Denmark in 1861, Art. I, 13 Stat. 605; and with the Dominican Republic in 1867, Art. XXVI, 15 Stat. 487.

In a convention with New Grenada concluded in 1850 the provision was this:

"They (the consuls, &c.) may cause proper order to be maintained on board of vessels of their nation, and may decide on the disputes arising between the captains, the officers, and the members of the crew, unless the disorders taking place on board should disturb the public tranquillity, or persons not belonging to the crew or to the nation in

whose service the consul is employed; in which case the local authorities may interfere." Art. III, clause 8, 10 Stat. 903.

Following this was a convention with France, concluded in 1853, 10 Stat. 996, Art. VIII of which is as follows:

"The respective consuls-general, consuls, vice-consuls, or consular agents, shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of differences which may arise, either at sea or in port, between the captain, officers, and crew, without exception, particularly in reference to the adjustment of wages and the execution of contracts. The local authorities shall not, on any pretext, interfere in these differences, but shall lend forcible aid to the consuls, when they may ask it, to arrest and imprison all persons composing the crew whom they may deem it necessary to confine. Those persons shall be arrested at the sole request of the consuls, addressed in writing to the local authority, and supported by an official extract from the register of the ship of the list of the crew, and shall be held, during the whole time of their stay in the port, at the disposal of the consuls. Their release shall be granted at the mere request of the consuls made in writing. The expenses of the arrest and detention of those persons shall be paid by the consuls."

The same provision in substantially the same language was embraced in a convention with Italy in 1868, Art. XI, 15 Stat. 609; and in another with Belgium, also in 1868, Art. XI, 16 Stat. 761. This convention with Belgium continued in force until superseded by that of 1880–81, under which the present controversy arose.

The form of the provision found in the present convention with Belgium first appeared in a convention with Austria concluded in 1870, Art. XI, 17 Stat. 827, and it is found now in substantially the same language in all the treaties and conventions which have since been entered into by the United States on the same subject. See the conventions with the German Empire in 1871, Art. XIII, 17 Stat. 927; with the Netherlands in 1878, Art. XI, 21 Stat. 668; with Italy in 1881, Art. I, 22 Stat. 832; with Belgium in 1881, as stated above; and with Roumania the same year, Art. XI, 23 Stat. 714.

It thus appears that at first provision was made only for giving consuls police authority over the interior of the ship and jurisdiction in civil matters arising out of disputes or differences on board, that is to say, between those belonging to the vessel. Under this police authority the duties of the consuls were evidently confined to the maintenance of order and discipline on board. This gave them no power to punish for crimes against the peace of the country. In fact, they were expressly prohibited from interfering with the local police in matters of that kind. The cases of The Sally and The Newton are illustrative of this position. That of The Sally related to the discipline of the ship, and that of The

Newton to the maintenance of order on board. In neither case was the disturbance of a character to affect the peace or the dignity of the country.

In the next conventions consuls were simply made judges and arbitrators to settle and adjust differences between those on board. This clearly related to such differences between those belonging to the vessel as are capable of adjustment and settlement by judicial decision or by arbitration, for it simply made the consuls judges or arbitrators in such matters. That would of itself exclude all idea of punishment for crimes against the State which affected the peace and tranquillity of the port; but, to prevent all doubt on this subject, it was expressly provided that it should not apply to differences of that character.

Next came a form of convention which in terms gave the consuls authority to cause proper order to be maintained on board and to decide disputes between the officers and crew, but allowed the local authorities to interfere if the disorders taking place on board were of such a nature as to disturb the public tranquillity, and that is substantially all there is in the convention with Belgium which we have now to consider. This treaty is the law which now governs the conduct of the United States and Belgium towards each other in this particular. Each nation has granted to the other such local jurisdiction within its own dominion as may be necessary to maintain order on board a merchant vessel, but has reserved to itself the right to interfere if the disorder on board is of a nature to disturb the public tranquillity.

The treaty is part of the supreme law of the United States, and has the same force and effect in New Jersey that it is entitled to elsewhere. If it gives the consul of Belgium exclusive jurisdiction over the offence which it is alleged has been committed within the territory of New Jersey, we see no reason why he may not enforce his rights under the treaty by writ of *habeas corpus* in any proper court of the United States. This being the case, the only important question left for our determination is whether the thing which has been done—the disorder that has arisen—on board this vessel is of a nature to disturb the public peace, or, as some writers term it, the "public repose" of the people who look to the state of New Jersey for their protection. If the thing done—"the disorder," as it is called in the treaty—is of a character to affect those on shore or in the port when it becomes known, the fact that only those on the ship saw it when it was done is a matter of no moment. Those who are not on the vessel pay no special attention to the mere disputes or quarrels of the seamen while on board, whether they occur under deck or above. Neither do they as a rule care for anything done on board which relates only to the discipline of the ship, or to the preservation of order and authority. Not so, however, with crimes which from their gravity awaken a public interest as soon as they become known, and especially those of a character which every civilized nation considers itself bound

to provide a severe punishment for when committed within its own jurisdiction. In such cases inquiry is certain to be instituted at once to ascertain how or why the thing was done, and the popular excitement rises or falls as the news spreads and the facts become known. It is not alone the publicity of the act, or the noise and clamor which attends it, that fixes the nature of the crime, but the act itself. If that is of a character to awaken public interest when it becomes known, it is a "disorder" the nature of which is to affect the community at large, and consequently to invoke the power of the local government whose people have been disturbed by what was done. The very nature of such an act is to disturb the quiet of a peaceful community, and to create, in the language of the treaty, a "disorder" which will "disturb tranquillity and public order on shore or in the port." The principle which governs the whole matter is this: Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished by the proper authorities of the local jurisdiction. It may not be easy at all times to determine to which of the two jurisdictions a particular act of disorder belongs. Much will undoubtedly depend on the attending circumstances of the particular case, but all must concede that felonious homicide is a subject for the local jurisdiction, and that if the proper authorities are proceeding with the case in a regular way, the consul has no right to interfere to prevent it. That, according to the petition for the *habeas corpus*, is this case.

This is fully in accord with the practice in France, where the government has been quite as liberal towards foreign nations in this particular as any other, and where, as we have seen in the cases of The Sally and The Newton, by a decree of the Council of State, representing the political department of the government, the French courts were prevented from exercising jurisdiction. But afterwards, in 1859, in the case of Jally, the mate of an American merchantman, who had killed one of the crew and severely wounded another on board the ship in the port of Havre, the Court of Cassation, the highest judicial tribunal of France, upon full consideration held, while the Convention of 1853 was in force, that the French courts had rightful jurisdiction, for reasons which sufficiently appear in the following extract from its judgment:

"Considering that it is a principle of the law of nations that every state has sovereign jurisdiction throughout its territory;

"Considering that by the terms of Article 3 of the Code Napoleon the laws of police and safety bind all those who inhabit French territory, and that consequently foreigners, even *transeuntes*, find themselves subject to those laws;

"Considering that merchant vessels entering the port of a nation other than that to which they belong cannot be withdrawn from the

territorial jurisdiction, in any case in which the interest of the state of which that port forms part finds itself concerned, without danger to good order and to the dignity of the government;

"Considering that every state is interested in the repression of crimes and offences that may be committed in the ports of its territory, not only by the men of the ship's company of a foreign merchant vessel towards men not forming part of that company, but even by men of the ship's company among themselves, whenever the act is of a nature to compromise the tranquillity of the port, or the intervention of the local authority is invoked, or the act constitutes a crime by common law," (*droit commun*, the law common to all civilized nations,) "the gravity of which does not permit any nation to leave it unpunished, without impugning its rights of jurisdictional and territorial sovereignty, because that crime is in itself the most manifest as well as the most flagrant violation of the laws which it is the duty of every nation to cause to be respected in all parts of its territory." 1 Ortolan *Diplomatie de la Mer* (4th ed.), pp. 455, 456; Sirey (N. S.), 1859, p. 189.

The judgment of the Circuit Court is affirmed.[13]

JOHN BROWN, PLAINTIFF IN ERROR, v. DUCHESNE

United States. Supreme Court. 1856.

19 *Howard's Reports* 183.

[The case is stated in the opinion. The arguments of counsel and part of the opinion are omitted.]

MR. CHIEF JUSTICE TANEY delivered the opinion of the court.

This case comes before the court upon a writ of error to the Circuit Court of the United States for the district of Massachusetts.

The plaintiff in error, who was also plaintiff in the court below, brought this action against the defendant for the infringement of a patent which the plaintiff had obtained for a new and useful improvement in constructing the gaff of sailing vessels. The declaration is in the usual form, and alleges that the defendant used this improvement at Boston without his consent. The defendant pleaded that the improvement in question was used by him only in the gaffs of a French schooner, called the Alcyon, of which schooner he was master; that he (the defendant) was a subject of the Empire of France; that the vessel was built in France, and owned and manned by French subjects; and,

[13] *Cf.* Ex parte Anderson, 184 Fed. 114. On the application of similar treaty provisions in civil cases, see The Ester, 190 Fed. 216; The Albergen, 223 Fed. 443; U.S. For. Rel. (1914) 307, 309; JESSUP, Territorial Waters, 182. And see ch. 4, §5, n. 55, *supra*, 408. For an excellent summary of the practice of the principal maritime states, including Great Britain and the United States, see JESSUP, *op. cit.*, 145 *et seq.*

at the time of the alleged infringement, was upon a lawful voyage, under the flag of France, from St. Peters, in the island of Miquelon, one of the colonies of France, to Boston, and thence back to St. Peters, which voyage was not ended at the date of the alleged infringement; and that the gaffs he used were placed on the schooner at or near the time she was launched by the builder in order to fit her for sea.

There is also a second plea containing the same allegations, with the additional averment that the improvement in question had been in common use in French merchant vessels for more than twenty years before the Alcyon was built, and was the common and well-known property of every French subject long before the plaintiff obtained his patent.

The plaintiff demurred generally to each of these pleas, and the defendant joined in demurrer; and the judgment of the Circuit Court being in favor of the defendant, the plaintiff thereupon brought this writ of error.

The plaintiff, by his demurrer, admits that the Alcyon was a foreign vessel, lawfully in a port of the United States for the purposes of commerce, and that the improvement in question was placed on her in a foreign port to fit her for sea, and was authorized by the laws of the country to which she belonged. The question, therefore, presented by the first plea is simply this: whether any improvement in the construction or equipment of a foreign vessel, for which a patent has been obtained in the United States, can be used by such vessel within the jurisdiction of the United States, while she is temporarily there for the purposes of commerce, without the consent of the patentee?

This question depends on the construction of the patent laws. For undoubtedly every person who is found within the limits of a Government, whether for temporary purposes or as a resident, is bound by its laws. The doctrine upon this subject is correctly stated by Mr. Justice Story, in his "Commentaries on the Conflict of Laws," (chap. 14, sec. 541,) and the writers on public law to whom he refers. A difficulty may sometimes arise, in determining whether a particular law applies to the citizen of a foreign country, and intended to subject him to its provisions. But if the law applies to him, and embraces his case, it is unquestionably binding upon him when he is within the jurisdiction of the United States.

The general words used in the clause of the patent laws granting the exclusive right to the patentee to use the improvement, taken by themselves, and literally construed, without regard to the object in view, would seem to sanction the claim of the plaintiff. But this mode of expounding a statute has never been adopted by any enlightened tribunal—because it is evident that in many cases it would defeat the object which the Legislature intended to accomplish. And it is well

settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning.

Neither will the court, in expounding a statute, give to it a construction which would in any degree disarm the Government of a power which has been confided to it to be used for the general good—or which would enable individuals to embarrass it, in the discharge of the high duties it owes to the community—unless plain and express words indicated that such was the intention of the Legislature.

The patent laws are authorized by that article in the Constitution which provides that Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. The power thus granted is domestic in its character, and necessarily confined within the limits of the United States. It confers no power on Congress to regulate commerce, or the vehicles of commerce, which belong to a foreign nation, and occasionally visit our ports in their commercial pursuits. That power and the treaty-making power of the General Government are separate and distinct powers from the one of which we are now speaking, and are granted by separate and different clauses, and are in no degree connected with it. And when Congress are legislating to protect authors and inventors, their attention is necessarily attracted to the authority under which they are acting, and it ought not lightly to be presumed that they intended to go beyond it, and exercise another and distinct power, conferred on them for a different purpose.

Nor is there anything in the patent laws that should lead to a different conclusion. They are all manifestly intended to carry into execution this particular power. They secure to the inventor a just remuneration from those who derive a profit or advantage, within the United States, from his genius and mental labors. . . .

But these acts of Congress do not, and were not intended to, operate beyond the limits of the United States; and as the patentee's right of property and exclusive use is derived from them, they cannot extend beyond the limits to which the law itself is confined. And the use of it outside of the jurisdiction of the United States is not an infringement of his rights, and he has no claim to any compensation for the profit or advantage the party may derive from it.

The chief and almost only advantage which the defendant derived from the use of this improvement was on the high seas, and in other

places out of the jurisdiction of the United States. The plea avers that it was placed on her to fit her for sea. If it had been manufactured on her deck while she was lying in the port of Boston, or if the captain had sold it there, he would undoubtedly have trespassed upon the rights of the plaintiff, and would have been justly answerable for the profit and advantage he thereby obtained. For, by coming in competition with the plaintiff, where the plaintiff was entitled to the exclusive use, he thereby diminished the value of his property. Justice, therefore, as well as the act of Congress, would require that he should compensate the patentee for the injury he sustained, and the benefit and advantage which he (the defendant) derived from the invention.

But, so far as the mere use is concerned, the vessel could hardly be said to use it while she was at anchor in the port, or lay at the wharf. It was certainly of no value to her while she was in the harbor; and the only use made of it, which can be supposed to interfere with the rights of the plaintiff, was in navigating the vessel into and out of the harbor, when she arrived or was about to depart, and while she was within the jurisdiction of the United States. Now, it is obvious that the plaintiff sustained no damage, and the defendant derived no material advantage, from the use of an improvement of this kind by a foreign vessel in a single voyage to the United States, or from occasional voyages in the ordinary pursuits of commerce; or if any damage is sustained on the one side, or any profit or advantage gained on the other, it is so minute that it is incapable of any appreciable value.

But it seems to be supposed, that this user of the improvement was, by legal intendment, a trespass upon the rights of the plaintiff; and that although no real damage was sustained by the plaintiff, and no profit or advantage gained by the defendant, the law presumes a damage, and that the action may be maintained on that ground. In other words, that there is a technical damage, in the eye of the law, although none has really been sustained.

This view of the subject, however, presupposes that the patent laws embrace improvements on foreign ships, lawfully made in their own country, which have been patented here. But that is the question in controversy. And the court is of opinion that cases of that kind were not in the contemplation of Congress in enacting the patent laws, and cannot, upon any sound construction, be regarded as embraced in them. For such a construction would be inconsistent with the principles that lie at the foundation of these laws; and instead of conferring legal rights on the inventor, in order to do equal justice between him and those who profit by his invention, they would confer a power to exact damages where no real damage had been sustained, and would moreover seriously embarrass the commerce of the country with foreign nations. We think these laws ought to be construed in the spirit in which they were made—that

is, as founded in justice—and should not be strained by technical constructions to reach cases which Congress evidently could not have contemplated, without departing from the principle upon which they were legislating, and going far beyond the object they intended to accomplish.

The construction claimed by the plaintiff would confer on patentees not only rights of property, but also political power, and enable them to embarrass the treaty-making power in its negotiations with foreign nations, and also to interfere with the legislation of Congress when exercising its constitutional power to regulate commerce. And if a treaty should be negotiated with a foreign nation, by which the vessels of each party were to be freely admitted into the ports of the other, upon equal terms with its own, upon the payment of the ordinary port charges, and the foreign Government faithfully carried it into execution, yet the Government of the United States would find itself unable to fulfil its obligation if the foreign ship had about her, in her construction or equipment, anything for which a patent had been granted. And after paying the port and other charges to which she was subject by the treaty, the master would be met with a further demand, the amount of which was not even regulated by law, but depended upon the will of a private individual.

And it will be remembered that the demand, if well founded in the patent laws, could not be controlled or put aside by the treaty. For, by the laws of the United States, the rights of a party under a patent are his private property; and by the Constitution of the United States, private property cannot be taken for public use without just compensation. And in the case I have stated, the Government would be unable to carry into effect its treaty stipulations without the consent of the patentee, unless it resorted to its right of eminent domain, and went through the tedious and expensive process of condemning so much of the right of property of the patentee as related to foreign vessels, and paying him such a compensation therefor as should be awarded to him by the proper tribunal. The same difficulty would exist in executing a law of Congress in relation to foreign ships and vessels trading to this country. And it is impossible to suppose that Congress in passing these laws could have intended to confer on the patentee a right of private property, which would in effect enable him to exercise political power, and which the Government would be obliged to regain by purchase, or by the power of its eminent domain, before it could fully and freely exercise the great power of regulating commerce, in which the whole nation has an interest. The patent laws were passed to accomplish a different purpose, and with an eye to a different object; and the right to interfere in foreign intercourse, or with foreign ships visiting our ports, was evidently not in the mind of the Legislature, nor intended to be granted to the patentee.

Congress may unquestionably, under its power to regulate commerce, prohibit any foreign ship from entering our ports, which, in its construction or equipment, uses any improvement patented in this country, or may prescribe the terms and regulations upon which such vessel shall be allowed to enter. Yet it may perhaps be doubted whether Congress could by law confer on an individual, or individuals, a right which would in any degree impair the constitutional powers of the legislative or executive departments of the Government, or which might put it in their power to embarrass our commerce and intercourse with foreign nations, or endanger our amicable relations. But however that may be, we are satisfied that no sound rule of interpretation would justify the court in giving to the general words used in the patent laws the extended construction claimed by the plaintiff, in a case like this, where public rights and the interests of the whole community are concerned.

The case of Caldwell v. Vlissengen, (9 Hare, 416, 9 Eng. L. and Eq. Rep., 51,) and the statute passed by the British Parliament in consequence of that decision, have been referred to and relied on in the argument. The reasoning of the Vice Chancellor is certainly entitled to much respect, and it is not for this court to question the correctness of the decision, or the construction given to the statute of Henry VIII.

But we must interpret our patent laws with reference to our own constitution and laws and judicial decisions. And the court are of opinion that the rights of property and exclusive use granted to a patentee does not extend to a foreign vessel lawfully entering one of our ports; and that the use of such improvement, in the construction, fitting out, or equipment of such vessel, while she is coming into or going out of a port of the United States, is not an infringement of the rights of an American patentee, provided it was placed upon her in a foreign port, and authorized by the laws of the country to which she belongs.

In this view of the subject, it is unnecessary to say anything in relation to the second plea of the defendant, since the matters relied on in the first are sufficient to bar the plaintiff of his action, without the aid of the additional averments contained in the second.

The judgment of the Circuit Court must therefore be affirmed.[14]

[14] The contrary result in Caldwell v. Vanvlissengen, 9 Hare 415, decided under the patent legislation of Great Britain, was promptly corrected by Parliament. See 15 & 16 Vict. c. 83, §26. See also 7 Edw. VII. c. 29, §48. *Cf.* Gardiner v. Howe, 2 Cliff. 462.

Cf. Patterson v. Bark Eudora, 190 U. S. 169; Sandberg v. McDonald, 248 U. S. 185; Strathearn S. S. Co. v. Dillon, 252 U. S. 348; United States v. Bull, 15 Philippine Rep. 7.

On the law governing civil wrongs committed on board foreign ships within territorial waters, excepting ships in innocent passage (see *infra*, 489), see The M. Moxham, 1 P. D. 43, 107; Carr v. Fracis Times & Co. [1902] A. C. 176.

On the law governing marriages solemnized on board foreign ships within territorial waters, excepting ships in innocent passage, see Dicey, 4th ed., 694, 696; Moore,

CUNARD STEAMSHIP COMPANY, LTD., ET AL. v. MELLON, SECRETARY OF THE TREASURY, ET AL.

United States. Supreme Court. 1923.

262 *United States Reports* 100.

Appeals from decrees of the District Court dismissing, on the merits, as many suits brought by the appellant steamship companies for the purpose of enjoining officials of the United States from seizing liquors carried by the appellants' passenger ships as sea stores and from taking other proceedings against the companies and their vessels, under the National Prohibition Act.

[The cases are stated in the opinion. The arguments of counsel and part of the opinion are omitted.]

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

These are suits by steamship companies operating passenger ships between United States ports and foreign ports to enjoin threatened application to them and their ships of certain provisions of the National Prohibition Act. The defendants are officers of the United States charged with the act's enforcement. In the first ten cases the plaintiffs are foreign corporations and their ships are of foreign registry, while in the remaining two the plaintiffs are domestic corporations and their ships are of United States registry. All the ships have long carried and now carry, as part of their sea stores, intoxicating liquors intended to be sold or dispensed to their passengers and crews at meals and otherwise for beverage purposes. Many of the passengers and crews are accustomed to using such beverages and insist that the ships carry and supply liquors for such purposes. By the laws of all the foreign ports at which the ships touch this is permitted and by the laws of some it is required. The liquors are purchased for the ships and taken on board in the foreign ports and are sold or dispensed in the course of all voyages, whether from or to those ports.

The administrative instructions dealing with the subject have varied since the National Prohibition Act went into effect. December 11, 1919, the following instructions were issued (T. D. 38218):

"All liquors which are prohibited importation, but which are properly listed as sea stores on vessels arriving in ports of the United States, should be placed under seal by the boarding officer and kept sealed

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Dig. Int. L., II, 491, 492. *Cf.* Forbes v. Cochrane, 2 B. & C. 448, 467; Twiss, 2d ed., I, 273.

On the law governing collision within territorial waters between ships of different flags, see The Canadienne, G. B. U. S. Cl. Com'n., 426; The Sidra, *ibid.*, 452; The Daylight, Mex. U. S. Gen. Cl. Com'n., 241; Galef v. United States, 25 F. (2d) 134; Royal Mail Steam Packet Co. v. Companhia de Navegaceo Lloyd Brasileiro, 27 F. (2d) 1002; JESSUP, Territorial Waters, 137.

during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purpose.

"Excessive or surplus liquor stores are no longer dutiable, being prohibited importation, but are subject to seizure and forfeiture.

"Liquors properly carried as sea stores may be returned to a foreign port on the vessel's changing from the foreign to the coasting trade, or may be transferred under supervision of the customs officers from a vessel in foreign trade, delayed in port for any cause, to another vessel belonging to the same line or owner."

January 27, 1920, the first paragraph of those instructions was changed (T. D. 38248) so as to read:

"All liquors which are prohibited importation, but which are properly listed as sea stores on American vessels arriving in ports of the United States, should be placed under seal by the boarding officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purpose. All such liquors on foreign vessels should be sealed on arrival of the vessels in port, and such portions thereof released from seal as may be required from time to time for use by the officers and crew."

October 6, 1922, the Attorney General, in answer to an inquiry by the Secretary of the Treasury, gave an opinion to the effect that the National Prohibition Act, construed in connection with the Eighteenth Amendment to the Constitution, makes it unlawful (a) for any ship, whether domestic or foreign, to bring into territorial waters of the United States, or to carry while within such waters, intoxicating liquors intended for beverage purposes, whether as sea stores or cargo, and (b) for any domestic ship even when without those waters to carry such liquors for such purposes either as cargo or sea stores. The President thereupon directed the preparation, promulgation and application of new instructions conforming to that construction of the act. Being advised of this and that under the new instructions the defendants would seize all liquors carried in contravention of the act as so construed and would proceed to subject the plaintiffs and their ships to penalties provided in the act, the plaintiffs brought these suits.

The hearings in the District Court were on the bills or amended bills, motions to dismiss and answers, and there was a decree of dismissal on the merits in each suit. 284 Fed. 890; 285 Fed. 79. Direct appeals under Judicial Code, §238, bring the cases here.

While the construction and application of the National Prohibition Act is the ultimate matter in controversy, the act is so closely related to the Eighteenth Amendment, to enforce which it was enacted, that a right understanding of it involves an examination and interpretation

of the Amendment. The first section of the latter declares, 40 Stat. 1050, 1941:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

These words, if taken in their ordinary sense, are very plain. The articles proscribed are intoxicating liquors for beverage purposes. The acts prohibited in respect of them are manufacture, sale and transportation within a designated field, importation into the same, and exportation therefrom. And the designated field is the United States and all territory subject to its jurisdiction. There is no controversy here as to what constitutes intoxicating liquors for beverage purposes; but opposing contentions are made respecting what is comprehended in the terms "transportation," "importation" and "territory."

Some of the contentions ascribe a technical meaning to the words "transportation" and "importation." We think they are to be taken in their ordinary sense, for it better comports with the object to be attained. In that sense transportation comprehends any real carrying about or from one place to another. It is not essential that the carrying be for hire, or by one for another; nor that it be incidental to a transfer of the possession or title. If one carries in his own conveyance for his own purposes it is transportation no less than when a public carrier at the instance of a consignor carries and delivers to a consignee for a stipulated charge. See United States v. Simpson, 252 U. S. 465. Importation, in a like sense, consists in bringing an article into a country from the outside. If there be an actual bringing in it is importation regardless of the mode in which it is effected. Entry through a custom house is not of the essence of the act.

Various meanings are sought to be attributed to the term "territory" in the phrase "the United States and all territory subject to the jurisdiction thereof." We are of opinion that it means the regional areas—of land and adjacent waters—over which the United States claims and exercises dominion and control as a sovereign power. The immediate context and the purport of the entire section show that the term is used in a physical and not a metaphorical sense,—that it refers to areas or districts having fixity of location and recognized boundaries. See United States v. Bevans, 3 Wheat, 336, 390.

It now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays and other enclosed arms of the sea along its coast and a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles. Church

v. Hubbart, 2 Cranch, 187, 234; The Ann, 1 Fed. Cas., p. 926; United States v. Smiley, 27 Fed. Cas., p. 1132; Manchester v. Massachusetts, 139 U. S. 240, 257–258; Louisiana v. Mississippi, 202 U. S. 1, 52; 1 Kent's Com., 12th ed., *29; 1 Moore International Law Digest, §145; 1 Hyde International Law, §§141, 142, 154; Wilson International Law, 8th ed., §54; Westlake International Law, 2d ed., p. 187, *et seq;* Wheaton International Law, 5th Eng. ed. (Phillipson), p. 282; 1 Oppenheim International Law, 3d ed., §§185–189, 252. This, we hold, is the territory which the Amendment designates as its field of operation; and the designation is not of a part of this territory but of "all" of it.

The defendants contend that the Amendment also covers domestic merchant ships outside the waters of the United States, whether on the high seas or in foreign waters. But it does not say so, and what it does say shows, as we have indicated, that it is confined to the physical territory of the United States. In support of their contention the defendants refer to the statement sometimes made that a merchant ship is a part of the territory of the country whose flag she flies. But this, as has been aptly observed, is a figure of speech, a metaphor. Scharrenberg v. Dollar S. S. Co., 245 U. S. 122, 127; In re Ross, 140 U. S. 453, 464; 1 Moore International Law Digest, §174; Westlake International Law, 2d ed., p. 264; Hall International Law, 7th ed. (Higgins), §76; Manning Law of Nations (Amos), p. 276; Piggott Nationality, Pt. II, p. 13. The jurisdiction which it is intended to describe arises out of the nationality of the ship, as established by her domicile, registry and use of the flag, and partakes more of the characteristics of personal than of territorial sovereignty. See The Hamilton, 207 U. S. 398, 403; American Banana Co. v. United Fruit Co., 213 U. S. 347, 355; 1 Oppenheim International Law, 3d ed., §§123–125, 128. It is chiefly applicable to ships on the high seas, where there is no territorial sovereign; and as respects ships in foreign territorial waters it has little application beyond what is affirmatively or tacitly permitted by the local sovereign. 2 Moore International Law Digest, §§204, 205; Twiss Law of Nations, 2d ed., §166; Woolsey International Law, 6th ed., §58; 1 Oppenheim International Law, 3d ed., §§128, 146, 260.

The defendants further contend that the Amendment covers foreign merchant ships when within the territorial waters of the United States. Of course, if it were true that a ship is a part of the territory of the country whose flag she carries, the contention would fail. But, as that is a fiction, we think the contention is right.

A merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection

of the laws of that place and correlatively is bound to yield obedience to them. Of course, the local sovereign may out of considerations of public policy choose to forego the exertion of its jurisdiction or to exert the same in only a limited way, but this is a matter resting solely in its discretion. The rule, now generally recognized, is nowhere better stated than in The Exchange, 7 Cranch, 116, 136, 144, where Chief Justice Marshall, speaking for this Court, said:

"The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

"All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. . . .

"When private individuals of one nation spread themselves through another, as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently, there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption."

That view has been reaffirmed and applied by this Court on several occasions. United States v. Diekelman, 92 U. S. 520, 525, 526; Wildenhus's Case, 120 U. S. 1, 11; Nishimura Ekiu v. United States, 142 U. S. 651, 659; Knott v. Botany Mills, 179 U. S. 69, 74; Patterson v. Bark Eudora, 190 U. S. 169, 176, 178; Strathearn S. S. Co. v. Dillon, 252 U. S. 348, 355–356. And see Buttfield v. Stranahan, 192 U. S. 470, 492–493; Oceanic Steam Navigation Co. v. Stranahan, 214 U. S. 320, 324; Brolan v. United States, 236 U. S. 216, 218. In the Patterson Case the Court added:

"Indeed, the implied consent to permit them (foreign merchant ships) to enter our harbors may be withdrawn, and if this implied consent may be wholly withdrawn it may be extended upon such terms and conditions as the government sees fit to impose."

In principle, therefore, it is settled that the Amendment could be made to cover both domestic and foreign merchant ships when within the territorial waters of the United States. And we think it has been made to cover both when within those limits. It contains no exception of ships of either class and the terms in which it is couched indicate that none is intended. Such an exception would tend to embarrass its enforcement and to defeat the attainment of its obvious purpose, and therefore cannot reasonably be regarded as implied. . . .

With this understanding of the Amendment, we turn to the National Prohibition Act, c. 85, 41 Stat. 305, which was enacted to enforce it. The act is a long one and most of its provisions have no real bearing here. Its scope and pervading purpose are fairly reflected by the following excerpts from Title II:

"Sec. 3. No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

"Sec. 21. Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance. . . . "

"Sec. 23. That any person who shall, with intent to effect a sale of liquor, by himself, his employee, servant, or agent, for himself or any person, company or corporation, keep or carry around on his person, or in a vehicle, or other conveyance whatever, . . . any liquor . . . in violation of this title is guilty of a nuisance . . . "

"Sec. 26. When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. . . . "

Other provisions show that various penalties and forfeitures are prescribed for violations of the act; and that the only instance in which the possession of intoxicating liquor for beverage purposes is recognized as lawful is where the liquor was obtained before the act went in effect and is kept in the owner's dwelling for use therein by him, his family, and his *bona fide* guests.

As originally enacted the act did not in terms define its territorial field, but a supplemental provision afterwards enacted declares that it "shall apply not only to the United States but to all territory subject

to its jurisdiction," which means that its field coincides with that of the Eighteenth Amendment. There is in the act no provision making it applicable to domestic merchant ships when outside the waters of the United States, nor any provision making it inapplicable to merchant ships, either domestic or foreign, when within those waters, save in the Panama Canal. There is a special provision dealing with the Canal Zone which excepts "liquor in transit through the Panama Canal or on the Panama Railroad." The exception does not discriminate between domestic and foreign ships, but applies to all liquor in transit through the canal, whether on domestic or foreign ships. Apart from this exception, the provision relating to the Canal Zone is broad and drastic like the others. . . .

Examining the act as a whole, we think it shows very plainly, first, that it is intended to be operative throughout the territorial limits of the United States, with the single exception stated in the Canal Zone provision; secondly, that it is not intended to apply to domestic vessels when outside the territorial waters of the United States, and, thirdly, that it is intended to apply to all merchant vessels, whether foreign or domestic, when within those waters, save as the Panama Canal Zone exception provides otherwise. . . .

The plaintiffs invite attention to data showing the antiquity of the practice of carrying intoxicating liquors for beverage purposes as part of a ship's sea stores, the wide extent of the practice and its recognition in a congressional enactment, and argue therefrom that neither the Amendment nor the act can have been intended to disturb that practice. But in this they fail to recognize that the avowed and obvious purpose of both the Amendment and the act was to put an end to prior practices respecting such liquors, even though the practices had the sanction of antiquity, generality and statutory recognition. Like data could be produced and like arguments advanced by many whose business, recognized as lawful theretofore, was shut down or curtailed by the change in national policy. In principle the plaintiffs' situation is not different from that of the innkeeper whose accustomed privilege of selling liquor to his guests is taken away, or that of the dining-car proprietor who is prevented from serving liquor to those who use the cars which he operates to and fro across our northern and southern boundaries. . . .

It therefore is of no importance that the liquors in the plaintiffs' ships are carried only as sea stores. Being sea stores does not make them liquors any the less; nor does it change the incidents of their use as beverages. But it is of importance that they are carried through the territorial waters of the United States and brought into its ports and harbors. This is prohibited transportation and importation in the sense of the Amendment and the act. The recent cases of Grogan v. Walker & Sons and Anchor Line v. Aldridge, 259 U. S. 80, are practically

conclusive on the point. The question in one was whether carrying liquor intended as a beverage through the United States from Canada to Mexico was prohibited transportation under the Amendment and the act, the liquor being carried in bond by rail, and that in the other was whether the transshipment of such liquor from one British ship to another in the harbor of New York was similarly prohibited, the liquor being in transit from Scotland to Bermuda. The cases were considered together and an affirmative answer was given in each, the Court saying in the opinion, p. 89:

"The Eighteenth Amendment meant a great revolution in the policy of this country, and presumably and obviously meant to upset a good many things on as well as off the statute book. It did not confine itself in any meticulous way to the use of intoxicants in this country. It forbade export for beverage purposes elsewhere. True this discouraged production here, but that was forbidden already, and the provision applied to liquors already lawfully made. See Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U. S. 146, 151, n. 1. It is obvious that those whose wishes and opinions were embodied in the Amendment meant to stop the whole business. They did not want intoxicating liquor in the United States and reasonably may have thought that if they let it in some of it was likely to stay. When, therefore, the Amendment forbids not only importation into and exportation from the United States but transportation within it, the natural meaning of the words expresses an altogether probable intent. The Prohibition Act only fortifies in this respect the interpretation of the Amendment itself. The manufacture, possession, sale and transportation of spirits and wine for other than beverage purposes are provided for in the act, but there is no provision for transshipment or carriage across the country from without. When Congress was ready to permit such a transit for special reasons, in the Canal Zone, it permitted it in express words. Title III, §20, 41 Stat. 322."

Our conclusion is that in the first ten cases—those involving foreign ships—the decrees of dismissal were right and should be affirmed, and in the remaining two—those involving domestic ships—the decrees of dismissal were erroneous and should be reversed with directions to enter decrees refusing any relief as respects the operations of the ships within the territorial waters of the United States and awarding the relief sought as respects operations outside those waters. . . .

Mr. Justice McReynolds, dissents.

Mr. Justice Sutherland, dissenting:

I agree with the judgment of the Court in so far as it affects domestic ships, but I am unable to accept the view that the Eighteenth Amendment applies to foreign ships coming into our ports under the circumstances here disclosed.

It would serve no useful purpose to give my reasons at any length for this conclusion. I therefore state them very generally and briefly.

The general rule of international law is that a foreign ship is so far identified with the country to which it belongs that its internal affairs, whose effect is confined to the ship, ordinarily are not subjected to interference at the hands of another State in whose ports it is temporarily present, 2 Moore, Int. Law Dig., p. 292; United States v. Rodgers, 150 U. S. 249, 260; Wildenhus's Case, 120 U. S. 1, 12; and, as said by Chief Justice Marshall, in Murray v. Schooner Charming Betsy, 2 Cranch, 64, 118: ". . . an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . ."

That the Government has full power under the Volstead Act to prevent the landing or transshipment from foreign vessels of intoxicating liquors or their use in our ports is not doubted, and, therefore, it may provide for such assurances and safeguards as it may deem necessary to those ends. Nor do I doubt the power of Congress to do all that the Court now holds has been done by that act, but such power exists not under the Eighteenth Amendment, to whose provisions the act is confined, but by virtue of other provisions of the Constitution, which Congress here has not attempted to exercise. With great deference to the contrary conclusion of the Court, due regard for the principles of international comity, which exist between friendly nations, in my opinion, forbids the construction of the Eighteenth Amendment and of the act which the present decision advances. Moreover, the Eighteenth Amendment, it must not be forgotten, confers concurrent power of enforcement upon the several States, and it follows that if the General Government possesses the power here claimed for it under that Amendment, the several States within their respective boundaries, possess the same power. It does not seem possible to me that Congress, in submitting the Amendment or the several States in adopting it, could have intended to vest in the various seaboard States a power so intimately connected with our foreign relations and whose exercise might result in international confusion and embarrassment.

In adopting the Eighteenth Amendment and in enacting the Volstead Act the question of their application to foreign vessels in the circumstances now presented does not appear to have been in mind. If, upon consideration, Congress shall conclude that when such vessels, in good faith carrying liquor among their sea stores, come temporarily into our ports their officers should, *ipso facto*, become liable to drastic punishment and the ships themselves subject to forfeiture, it will be a simple matter for that body to say so in plain terms. But interference with the purely internal affairs of a foreign ship is of so delicate a nature, so full of possibilities of international misunderstandings and so likely to invite

retaliation that an affirmative conclusion in respect thereof should rest upon nothing less than the clearly expressed intention of Congress to that effect, and this I am unable to find in the legislation here under review.[15]

The Case of the Creole

Great Britain and the United States. Mixed Claims Commission. 1853.

Moore, History and Digest of the International Arbitrations to which the United States has been a Party, Volume IV, page 4375.

[Umpire Bates rendered the following decision:]

"This case having been submitted to the umpire for his decision, he hereby reports that the claim has grown out of the following circumstances:

"The American brig Creole, Captain Ensor, sailed from Hampton Roads, in the State of Virginia, on the 27th October 1841, having on board one hundred and thirty-five slaves, bound for New Orleans. On the 7th of November, at 9 o'clock in the evening, a portion of the slaves rose against the officers, crew, and passengers, wounding severely the captain, the chief mate, and two of the crew, and murdering one of the passengers. The mutineers, having got complete possession of the vessel, ordered the mate, under threat of instant death should he disobey or deceive them, to steer for Nassau, in the island of New Providence, where the brig arrived on the 9th of November 1841.

"The American consul was apprised of the situation of the vessel and requested the governor to take measures to prevent the escape of

[15] See Grogan v. Walker & Sons, 259 U. S. 80; Attorney General Daugherty, "Liquors on American and Foreign Vessels," 33 Op. Atty. Gen. 335; Conboy, "Territorial Sea," 8 Can. Bar Assoc. Proc. 276; 21 Mich. L. Rev. 911; 33 Yale L. Jour. 72.

The Convention between Great Britain and the United States for prevention of smuggling of intoxicating liquors, Jan. 23, 1924, art. 3, provides: "No penalty or forfeiture under the laws of the United States shall be applicable or attach to alcoholic liquors or to vessels or persons by reason of the carriage of such liquors, when such liquors are listed as sea stores or cargo destined for a port foreign to the United States, its territories or possessions on board British vessels voyaging to or from ports of the United States, or its territories or possessions or passing through the territorial waters thereof, and such carriage shall be as now provided by law with respect to the transit of such liquors through the Panama Canal, provided that such liquors shall be kept under seal continuously while the vessel on which they are carried remains within said territorial waters and that no part of such liquors shall at any time or place be unladen within the United States, its territories or possessions." 43 U. S. Stat. L. 1761, 1762. Identical articles, *mutatis muntandis*, have been incorporated in similar treaties with Belgium, Cuba, Denmark, France, Germany, Greece, Italy, Japan, Netherlands, Norway, Panama, Spain, and Sweden. See Jessup, Territorial Waters, ch. 6; 20 Am. Jour. Int. L. 340; n. 23, *infra*, 495.

the slaves and to have the murderers secured. The consul received reply from the governor stating that under the circumstances he would comply with the request.

"The consul went on board the brig, placed the mate in command in place of the disabled master, and found the slaves all quiet.

"About noon twenty African soldiers, with an African sergeant and corporal, commanded by a white officer, came on board. The officer was introduced by the consul to the mate as commanding officer of the vessel.

"The consul on returning to the shore was summoned to attend the governor and council, who were in session, and who informed the consul that they had come to the following decision:

"'1st. That the Courts of law have no jurisdiction over the alleged offenses.

"'2d. That as an information had been lodged before the governor charging that the crime of murder had been committed on board said vessel on the high seas, it was expedient that the parties implicated in so grave a charge should not be allowed to go at large, and that an investigation ought therefore to be made into the charges, and examination taken on oath; when, if it should appear that the original information was correct, and that a murder had actually been committed, that all parties implicated in such crime or other acts of violence should be detained here until reference could be made to the Secretary of State to ascertain whether the parties should be delivered over to the United States Government; if not, how otherwise to dispose of them.

"'3d. That as soon as such examinations should be taken, all persons on board the Creole not implicated in any of the offences alleged to have been committed on board that vessel must be released from further restraint.'

"Then two magistrates were sent on board. The American consul went also. The examination was commenced on Tuesday the 9th, and was continued on Wednesday the 10th, and then postponed until Friday on account of the illness of Captain Ensor. On Friday morning it was abruptly, and without any explanation, terminated.

"On the same day a large number of boats assembled near the Creole, filled with colored persons armed with bludgeons. They were under the immediate command of the pilot who took the vessel into the port, who was an officer of the government, and a colored man. A sloop or larger launch was also towed from the shore and anchored near the brig. The sloop was filled with men armed with clubs, and clubs were passed from her to the persons in the boats. A vast concourse of people were collected on shore opposite the brig.

"During the whole time the officers of the government were on board they encouraged the insubordination of the slaves.

"The Americans in port determined to unite and furnish the necessary aid to forward the vessel and negroes to New Orleans. The consul and the officers and crews of two other American vessels had, in fact, united with the officers, men, and passengers of the Creole to effect this. They were to conduct her first to Indian Key, Florida, where there was a vessel of war of the United States.

"On Friday morning the consul was informed that attempts would be made to liberate the slaves by force, and from the mate he received information of the threatening state of things. The result was that the attorney-general and other officers went on board the Creole. The slaves identified as on board the vessel concerned in the mutiny were sent on shore, and the residue of the slaves were called on deck by direction of the attorney-general, who addressed them in the following terms: 'My friends,' or 'my men, you have been detained a short time on board the Creole for the purpose of ascertaining what individuals were concerned in the murder. They have been identified and will be detained. The rest of you are free and at liberty to go on shore and wherever you please.'

"The liberated slaves, assisted by the magistrates, were then taken on board the boats, and when landed were conducted by a vast assemblage to the superintendent of police, by whom their names were registered. They were thus forcibly taken from the custody of the master of the Creole and lost to the claimants.

"I need not refer to authorities to show that slavery, however odious and contrary to the principles of justice and humanity, may be established by law in any country; and, having been so established in many countries, it can not be contrary to the law of nations.

"The Creole was on a voyage, sanctioned and protected by the laws of the United States, and by the law of nations. Her right to navigate the ocean could not be questioned, and as growing out of that right, the right to seek shelter or enter the ports of a friendly power in case of distress or any unavoidable necessity.

"A vessel navigating the ocean carries with her the laws of her own country, so far as relates to the persons and property on board, and to a certain extent retains those rights even in the ports of the foreign nations she may visit. Now, this being the state of the law of nations, what were the duties of the authorities at Nassau in regard to the Creole? It is submitted the mutineers could not be tried by the courts of that island, the crime having been committed on the high seas. All that the authorities could lawfully do was to comply with the request of the American consul, and keep the mutineers in custody until a conveyance could be found for sending them to the United States.

"The other slaves being perfectly quiet, and under the command of the captain and owners, and on board an American ship, the authorities

should have seen that they were protected by the law of nations, their rights under which can not be abrogated or varied, either by the emancipation act or any other act of the British Parliament.

"Blackstone, 4th volume, speaking of the law of nations, states: 'Whenever any question arises which is properly the object of its jurisdiction, such law is here adopted in its full extent by the common law.'

"The municipal law of England can not authorize a magistrate to violate the law of nations by invading with an armed force the vessel of a friendly nation that has committed no offense, and forcibly dissolving the relations which by the laws of this country the captain is bound to preserve and enforce on board.

"These rights, sanctioned by the law of nations—*viz.*, the right to navigate the ocean and to seek shelter in case of distress or other unavoidable circumstances, and to retain over the ship, her cargo, and passengers the laws of her own country—must be respected by all nations, for no independent nation would submit to their violation.

"Having read all the authorities referred to in the arguments on both sides, I have come to the conclusion that the conduct of the authorities at Nassau was in violation of the established law of nations, and that the claimants are justly entitled to compensation for their losses. I therefore award to the undermentioned parties, their assigns or legal representatives, the sums set opposite their names, due on the 15th of January 1855."[16]

[The total amount awarded was $100,330.]

[16] See The Industria, Forsyth 399; Attorney-General Legare, "Case of the Creole," 4 Op. Atty. Gen. 98; McCargo v. New Orleans Insurance Co., 10 Rob. (La.) 202; Moore, Int. Arb., I, 408, 409, 410; Wheaton, Dana's 8th ed., §103, n. 62.

See also The Eleanor, Edw. Adm. 135, 159; The Brig Concord, 9 Cr. 387; The New York, 3 Wh. 59; The Æolus, 3 Wh. 392; The Maria, 1 Op. Atty. Gen. 509; The Ann, Moore, Int. Arb., IV, 4346; The Augusta, *ibid.;* The Susannah, *ibid.*, IV, 4348; The Alliance, Venez. Arb. (1903) 29; Jessup, Territorial Waters, 194; Moore, Dig. Int. L., II, 339.

United States prohibition regulations of June 2, 1923, §5, provide: "The national prohibition act does not apply to merchant vessels which are forced into port by stress of weather, or by inevitable necessity. The involuntary entrance furnishes a ground of exemption, and, under international law, it is improper to impose fines upon vessels compelled to put into port for such reason. This rule also applies to goods on board vessels so circumstanced. These exemptions depend, however, upon proof of the fact of the urgency of the distress. The necessity must be grave and the proof convincing. Before clearance papers are granted, such vessels must, in all cases, comply with the provisions of customs (T. D. 39442), requiring a bond for landing of liquors on board at a foreign destination and furnishing proof thereof, as provided in section 442 of the tariff act approved September 21, 1922." 25 U. S. Treasury Decisions, Internal Revenue, 144, 145 (T. D. 3484).

"One who ranges along the land or water line of any country with the design of aiding in the subversion of its laws challenges that country to enforce its laws and assumes the risk of his own mistakes and the action of wind and tide and all the

The Queen v. Keyn

Great Britain. Court for Crown Cases Reserved. 1876.

Law Reports 2 Exchequer Division 63.

[The report of this case occupies one hundred seventy-six of the Law Reports pages.[17] There are reproduced below parts only of three of the eleven opinions. The facts being stated sufficiently in Sir R. Phillimore's opinion, the statement of the case is omitted.]

The following judgments were delivered:—

Sir R. Phillimore. The prisoner was indicted at the Central Criminal Court for the manslaughter of Jessie Dorcas Young on the high seas, and within the jurisdiction of the Admiralty of England.

The deceased was a passenger on board the Strathclyde, a British steam-vessel bound from London to Bombay.

This vessel, when at a distance of one mile and nine-tenths of a mile S.S.E. from Dover pier-head, and within two and a half miles from Dover beach, was run into by the Franconia, a German steamer, in consequence of which she sank, and the deceased woman was drowned.

The Franconia was carrying the German mails from Hamburg to St. Thomas in the West Indies.

The prisoner, being the officer in command of the Franconia, was convicted of manslaughter, but a question of law was reserved for this Court of Criminal Appeal. An objection was taken on the part of the prisoner that, inasmuch as he was a foreigner, in a foreign vessel, on a foreign voyage, sailing upon the high seas, he was not subject to the jurisdiction of any Court in this country. The contrary position maintained on the part of the Crown is that, inasmuch as at the time of the collision both vessels were within the distance of three miles from the English shore, the offence was committed within the realm of England, and is triable by the English Court. The case has been most ably conducted on both sides, and the Court has derived very great assistance from the arguments of counsel.

Before I consider the principal question, whether the offence committed on board the foreign vessel be triable here, it may be well to take notice of a subsidiary contention put forward on behalf of the Crown,

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forces of nature." Woods, J., in Latham v. United States, 2 F. (2d) 208, 210. "It would seem correct to deny immunity on account of distress where previous misconduct has forfeited the privilege or where there was an intention to breach the territorial law at the time the circumstances causing distress arose." Dickinson, "Jurisdiction at the Maritime Frontier," 40 Harv. L. Rev. 1, 20. And see The Brig Alerta v. Blas Moran, 9 Cr. 359; The Carlo-Alberto, Sirey (1832) I, 577.

[17] "The judgments delivered, occupying no less than 176 pages in the Law Reports, are indeed a mine of learning on the nature and extent of a state's dominion over the seas, the width of the belt of territorial waters and the nature of a state's rights in and over those waters in international law." Beckett, in B. Y. B. Int. L. (1927) 108, 113.

namely, that the person injured was on board an English ship at the time when she received the injury which was the immediate and direct result of the collision, and that in fact the offence was committed on board an English ship. It seems expedient to deal with this contention in the first place, because, if it be valid, the inquiry as to the jurisdiction of the English Court over a foreign ship would be unnecessary. I am of opinion that this contention cannot be sustained. Looking at the facts stated by the learned judge who tried the case, as well as the indictment, it appears that the prisoner had no intention to injure the Strathclyde or any person on board of her. He was guilty of negligence, and want of nautical skill, and of presence of mind in the management of his vessel, and thereby caused the collision, but the act by which the woman died was not his act, nor was it a consequence immediate or direct of his act. He never left the deck of his own ship, nor did he send any missile from it to the other ship; neither in will nor in deed can he be considered to have been on board the British vessel. He can no more be considered by intendment of law to have been on board the British vessel than he would have been if his bad navigation had caused the Strathclyde to impale herself upon the Franconia, and so to sink. The jurisdiction of the English Court, therefore, cannot be founded on this contention. . . .

With these preliminary observations, I proceed to inquire what is the nature and extent of the jurisdiction over the high seas, which international law confers upon or concedes to the sovereign of the adjacent territory.

Whatever may have been the claims asserted by nations in times past—and perhaps no nation has been more extravagant than England in this matter—it is at the present time an unquestionable proposition of international jurisprudence, that the high seas are of right navigable by the ships of all states. Whether the reasons upon which this liberty of navigation rests be, as some jurists say, that the open sea is incapable of continuous occupation and insusceptible of permanent appropriation, or, as other jurists say, that the use of it is inexhaustible, and, therefore, common to all mankind; or, whether it rests upon both these, or upon other reasons also, it is unnecessary to inquire. This liberty of navigation is a fact recognised by all civilized states.

An important corollary of this proposition is that the merchant vessel (with ships of war we are not now concerned) on the open sea is subject only to the law of her flag, that is, the law of the state to which she belongs.

The next proposition, though it be of an elementary kind, to which attention should be drawn, is, that every state is entitled to exclusive dominion over its own territory, that is, not only over the soil and over all subjects, but over all foreigners commorant therein.

"When," says Marshall, C. J., "private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable, to the jurisdiction of the country": Schooner Exchange v. McFaddon and Others. [7 Cranch's Rep. 145.]

The question as to dominion over portions of the seas inclosed within headlands or contiguous shores, such as the King's Chambers, is not now under consideration. It is enough to say that within this term "territory" are certainly comprised the ports and harbours, and the space between the flux and reflux of tide, or the land up to the furthest point at which the tide recedes. But it is at this point that the difficulty presented by the case before us begins, and here the following questions present themselves for solution:—

1. Is a state entitled to any extension of dominion beyond low-water mark?

2. If so, how far does this territory, or do these territorial waters, as they are usually called, extend?

3. Has a state the same dominion over these territorial waters as over the territory of her soil and in her ports, or is it of a more limited character and confined to certain purposes?

With respect to the first of these questions the answer may be given without doubt or hesitation, namely, that a state is entitled to a certain extension of territory, in a certain sense of that word, beyond low-water mark.

With respect to the second question, the distance to which the territorial waters extend, it appears on an examination of the authorities that the distance has varied (setting aside even more extravagant claims) from 100 to 3 miles, the present limit. . . .

[In an omitted part of the opinion Sir R. Phillimore referred to Grotius, Bynkershoek, Wolff, Vattel, Azuni, Kent, Wheaton, and Massé.]

The third question, though touched upon in the preceding citations, remains to be substantively considered; it is one of much importance, *viz.*, whether, admitting that the state has a dominion over three miles of adjacent water, it is the same dominion which the possessor has over her land and her ports, or is it of a more limited character—limited to the purpose of protecting the adjacent shore, for which it was granted, and not extending to a general sovereignty over all passing vessels, and therefore not improbably called *ligne de respect*? . . .

[In an omitted part of the opinion Sir R. Phillimore reviewed the opinions of publicists and of English and American courts.]

The sound conclusions which result from the investigation of the authorities which have been referred to appear to me to be these:—

The consensus of civilised independent states has recognised a maritime extension of frontier to the distance of three miles from low-water mark, because such a frontier or belt of water is necessary for the defence and security of the adjacent state.

It is for the attainment of these particular objects that a *dominium* has been granted over this portion of the high seas.

This proposition is materially different from the proposition contended for, namely, that it is competent to a state to exercise within these waters the same rights of jurisdiction and property which appertain to it in respect to its lands and its ports. There is one obvious test by which the two sovereignties may be distinguished.

According to modern international law, it is certainly a right incident to each state to refuse a passage to foreigners over its territory by land, whether in time of peace or war. But it does not appear to have the same right with respect to preventing the passage of foreign ships over this portion of the high seas.

In the former case there is no *jus transitus;* in the latter case there is.

The reason of the thing, that is, the defence and security of the state, does not require or warrant the exclusion of peaceable foreign vessels from passing over these waters; and the custom and usage of nations has not sanctioned it.

Consequences fraught with mischief and injustice might flow from the opposite doctrine, which would render applicable to a foreign vessel while *in itinere* from one foreign port to another, passing over these waters, all the criminal law of the adjacent territory. No single instance has been brought to our notice of the practical exercise by any nation of this jurisdiction. . . .

There is yet another argument, already partially adverted to, which appears to me entitled to great weight in an English court of justice.

Upon the subject of the three-miles belt of territorial water, Parliament has frequently legislated. It might perhaps be not impertinently asked, why, if these waters are territorial in the same sense as the land, and those who traverse them are already subject to the law. But, passing by this observation, it will be found on examination of the statutes that the provisions in them are either framed exclusively for British subjects and ships, or that they relate to the protection and peace of the state. . . .

[In an omitted part of the opinion Sir R. Phillimore reviewed relevant British statutes.]

Upon the whole, I am of opinion that the Court had no jurisdiction over this foreigner for an offence committed on board a foreign ship on

the high seas, though within three miles of the coast; that he is governed by the law of the state to which his flag belongs; and that the conviction cannot be sustained. . . .

[The opinion of Lindley, J., concluding that the marginal seas to the three-mile limit are a part of English territory, that the English criminal law is in force therein, and that the Court of Admiralty formerly and the Central Criminal Court thereafter had jurisdiction to try offences committed on the high seas within marginal territorial waters, is omitted.]

[The opinion of Denman, J., differing from that of Lindley, J., chiefly in the conclusion that the offence was committed on a British ship, is omitted.]

[The opinion of Grove, J., concurring in effect in the conclusions of Lindley, J., is omitted.]

[The opinion of Amphlett, J. A., concurring in effect in the conclusions of Lindley, J., is omitted.]

Brett, J. A. The prisoner was at the Central Criminal Court convicted of manslaughter, that is to say, he was found to have been guilty of acts and their results which amount, according to the law of England, to the crime of manslaughter. The prisoner was a German subject.

The question reserved is, whether the Court which tried him had jurisdiction so to do. All are agreed that it had none, unless by reason of the locality in which the crime was committed. It was committed on the open sea, but within three miles of the coast of England. It is suggested that it was also committed on board an English ship. In either case it is urged it was committed in a locality or place subject to the criminal law of England, and to the jurisdiction of the Central Criminal Court. It was argued on the one side that the open sea within three miles of the coast of England is a part of the territory of England as much and as completely as if it were land a part of England; that the criminal law of England, unless expressly restricted, applies to every crime, by whomsoever committed, within the territory of England; that there is no express restriction as to the crime in question; that the criminal law, therefore, is to be applied to the present case. It was further argued that at all events the crime was committed on board an English ship, and, therefore, although by a foreigner, it is by statute to be tried according to the criminal law of England. It was answered that the open sea within three miles of the coast of England is not in any sense a part of the territory of England or within the jurisdiction of the Crown of England; that if it be within the jurisdiction of the Crown, so that the Sovereign or Parliament of England might, by constituting a Court to do so, have properly taken cognizance of the crime, yet no such Court has been constituted, and, therefore, the Central Criminal Court had no jurisdiction. It was further argued that even though the open sea within three miles be a part of the territory of England, yet the

crime was committed on board a foreign ship, and, therefore, could not be tried in England.

The questions raised by these arguments seem to me to be: First, is the open sea within three miles of the coast a part of the territory of England as much and as completely as if it were land a part of England? Secondly, if it is, has the Central Criminal Court any jurisdiction to try alleged crimes there committed, by whomsoever committed? Thirdly, can the crime be properly said to have been committed on board of an English ship so as thereby to give jurisdiction to an English Court, although the sea in question be not a part of England? Fourthly, can it be properly said to have been committed on board of the German ship; and if so, is jurisdiction thereby ousted from an English Court, although the sea in question be a part of English territory? As to the first part, the argument does not deny that it is an axiom of law that the criminal law of England runs everywhere within England, so as to be applicable to every crime by whomsoever therein committed. If the three miles of open sea are a part of the territory of England, it was not denied,—nay it was expressly admitted,—that unless there be an exception in favour of a crime committed on board of a foreign passing ship, and this crime was committed on board of such a ship, the criminal law of England might of right be applied to the crime. What was denied upon this hypothesis, as to the three miles of open sea, was that the Central Criminal Court, or indeed any Court hitherto constituted by the sovereign authority, had had jurisdiction given to it to apply the criminal law to such a case. The great question argued was, whether the three miles of open sea next the coast are or are not a part of the territory of England, meaning thereby a territory in which its law is paramount and exclusive. Before examining this proposition, I should wish to observe that the question what is or is not a part of the realm is, in my opinion, not in general a question for judges to decide. Their duty as to the administration of the criminal law is to administer it, as between the Crown and all persons within the realm, with regard to any crime alleged to have been committed within the realm, and as between the Crown and all the Queen's subjects, with regard to any crime alleged to have been committed by any subject of the Queen anywhere. What are the limits of the realm should in general be declared by Parliament. Its declaration would be conclusive, either as authority or as evidence. But in this case of the open sea there is no such declaration, and the question is in this case necessarily left to the judges, and to be determined on other evidence or authority. Such evidence might have consisted of proof of a continuous public claim by the Crown of England, enforced, when practicable, by arms, but not consented to by other nations. I should have considered such proof sufficient for English judges. In England it cannot be admitted that the limits of England depend on the

consent of any other nation. But no such evidence was offered. The only evidence suggested in this case is, that by the law of nations every country bordered by the sea is to be held to have, as part of its territory, meaning thereby a territory in which its law is paramount and exclusive, the three miles of open sea next to its coast; and, therefore, that England among others has such territory. The question on both sides has been made to depend on whether such is or is not proved to be the law of nations. On the one side it is said there is evidence and authority on which the Court ought to hold that such is the law of nations; on the other side it is said there is no such evidence or authority. The evidence relied on for the Crown is an alleged common acquiescence by recognized jurists of so many countries, as to be substantially of all countries, and declarations of statesmen, and similar declarations of English judges in court in the course of administering law. On the other side it is said that the declarations cited of the judges were opinions only, and not decisions; that there is no common acquiescence of jurists to the alleged effect, or declarations of statesmen; and that if there were, such acquiescence or declarations are not sufficient; that there should be acquiescence by governments declared in treaties or evidenced by acts of government. It is admitted that there is no such acquiescence by any general treaty or by unequivocal acts of many, if of any, governments. Main reliance is placed by the one side on the alleged common agreement of jurists. Their acquiescence or agreement in fact is denied by the other side, and, further, their authority is denied, if such acquiescence or agreement is held to exist. . . .

[In an omitted part of the opinion Judge Brett considered the weight to be attributed to a common agreement or acquiescence among the principal publicists.]

The next questions are whether there is, by reason of such or other evidence, proof of a common consent of nations to any propositions, and if to any, to what proposition, with regard to the three miles of open sea which are adjacent to any country. . . .

[In an omitted part of the opinion Judge Brett reviewed the opinions of publicists and the principal English and American cases on the nature and extent of authority over the marginal seas.]

After citing this long list of authorities, I make the following observations. I have done so because it seems to me that the whole question depends entirely upon authority. There is no reason, founded on the axiomatic rules of right and wrong, why the three miles should or should not be considered as a part of the territory of the adjacent country. They may have been so treated by general consent; they might equally well have not been so treated. If they have been so treated by such consent, the authority for the alleged ownership is sufficient. The question is, whether such a general consent has in this case been proved

by sufficient evidence. I have cited the assertions of a large number of writers, recognised as able writers on international law, of different countries and different periods. I have cited assertions of statesmen, and opinions of great judges, and the decisions of some judges, and the assertion made on behalf of a great government. As there is no common court of nations, and no common legislature, none of these are, in the usual sense, binding on this Court. As the opinions of the judges are manifestly founded on the opinions of the writers, I think the principal evidence is that of the writers. I have already said that, in my opinion, a general consent of recognised writers of different times and different countries to a reasonable proposition is sufficient evidence of a general consent of nations to that proposition. Such a general consent establishes the proposition as one of international law. In this case I think there is a general consent to a proposition with regard to the three miles of open sea adjacent to the shores of sovereign states. I do not think that such general consent, as to a distance of three miles, is impeached by shewing that there has been a difference as to a claim by some with regard to a greater distance than three miles. The question is, what is the proposition to which such general consent as to the three miles is given? The dispute is whether, by the consent of all, certain limited rights are given to the adjacent country, such as a right that the waters should be treated as what is called a neutral zone, or whether the water is, by consent of all, given to the adjacent country as its territory, with all rights of territory, it being agreed by such country with all others, that all shall have a free right of navigation or way over such waters for harmless passage and some other rights. If the first be true, it is impossible, according to the reasoning of Vattel and Marshall, C. J.,—which reasoning, I think, is irresistible—that it can be properly said that the adjacent country has any proprietary right in the three miles, or any dominion, or any sovereignty, or any sovereign jurisdiction. If the latter be correct, the adjacent country has the three miles, as its property, as under its dominion and sovereignty. If so, that three miles are its territorial waters, subject to its rights of property, dominion, and sovereignty. Those are all the rights, and the same rights which a nation has, or can have, over its land territory. If, then, such be its rights over the three miles of sea, that sea is as much a part of its country or territory as its land.

Considering the authorities I have cited, the terms used by them, wholly inconsistent, as it seems to me, with the idea that the adjacent country has no property, no dominion, no sovereignty, no territorial right; and considering the necessary foundation of the admitted rights and duties of the adjacent country as to neutrality, which have always been made to depend on a right and duty as to its territory, I am of opinion that it is proved that, by the law of nations, made by the tacit

consent of substantially all nations, the open sea within three miles of the coast is a part of the territory of the adjacent nation, as much and as completely as if it were land a part of the territory of such nation. By the same evidence which proves this proposition, it is equally proved that every nation which possesses this water territory has agreed with all other nations that all shall have the right of free navigation to pass through such water territory, if such navigation be with an innocent or harmless intent or purpose. This right of free navigation cannot, according to ordinary principles, be withdrawn without common consent; but it by no means derogates from the sovereign authority over all its territory of the state which has agreed to grant this liberty, or easement, or right to all the world.

Every law, recognised or specifically enacted by the sovereign authority of a state, whether therefore written or unwritten, if such law be promulgated in general terms, must, of necessity, apply to the whole territory of such state. There is nothing to limit it to a less area. Every such English law, therefore, that is to say, every enactment of English law, common or statute law, which is not confined to a less area by express words or necessary inference, is, as law, applicable to the whole territory of England in the same way, that is to say, to the water territory just as much as to the land territory. This proposition is evidently an assumed premise in the opinions I have cited of Lord Chelmsford, Lord Wensleydale, and Sir William Erle, and in the judgments I have cited of Lord Hatherley. I think it therefore proved that the offence committed, though it was committed by a foreigner, was within the cognizance of the English criminal law, because it was committed within English territory, unless there be an exceptional privilege in favour of crimes committed on board foreign ships by foreigners, as such ships are passing through the water territory of England, and this crime was committed on board the foreign ship. Now if this exception exists, it is alleged to be proved by the same evidence, to the same effect, as the right of territory and the right of free passage or navigation have been proved. They are proved, as I have said, by a common consent, found in the common consent of the great body of recognised writers, and in the opinions or decisions of great judges of different nations. I can only say of this exception that, although there are one or two expressions by some writers which may be alleged in argument as in support of it, it is not expressed in clear terms by any one. I do not think there is really any evidence of a common assent to it. It follows that, even if the offence could properly be said to have been committed on board the foreign passing ship, still it would be an offence committed within British territory, and therefore cognizable by the British criminal law. . . .

[In an omitted part of the opinion Judge Brett reviewed authorities and concluded that the Court of Admiralty formerly and the Central

Criminal Court thereafter had jurisdiction to try offences committed on the high seas within marginal territorial waters.]

It follows, therefore, in my opinion, that the Central Criminal Court has jurisdiction to try all crimes made cognizable in general terms by English law which may be committed by British subjects on any part of the sea, or which may be committed by any foreigner on board any British ship in any part of the sea, or which may be committed by any foreigner or British subject in any ship, British or foreign, on the open sea within three miles of the coast of Great Britain.

As to the question of whether the criminal offence charged in this case, namely, the offence of manslaughter, was committed on board of the foreign ship or on board of the British ship, I agree entirely with the Lord Chief Justice that it was not committed on board of either. There was no jurisdiction, therefore, given in respect of a complete offence committed locally within the British ship. If there had been a complete offence within the foreign ship, there would have been no exemption on that ground from liability to English law. The only jurisdiction in respect of locality which arises is that which arises from the fact of the foreign ship having been within the territory of Great Britain. Because she was, I am of opinion that the Central Criminal Court had jurisdiction to try the case, and that the prisoner was legally convicted. . . .

[The opinion of Bramwell, J. A., concluding that the Court of Admiralty had no jurisdiction to try offences committed by foreigners on foreign ships within the three-mile limit, that the Central Criminal Court was therefore without such jurisdiction, and that the complete offence in this case was committed on neither the German nor the British ship, is omitted.]

[The opinion of Kelly, C. B., concurring in the conclusions of Sir R. Phillimore, is omitted.]

[The opinion of Lord Coleridge, C. J., concurring in effect in the conclusions of Denman, J., is omitted.]

Cockburn, C. J. The defendant has been convicted of the offence of manslaughter on the high seas, on a trial had at the Central Criminal Court, under the statute 4 & 5 Wm. 4, c. 36, s. 22, which empowers the judges sitting there to hear and determine offences "committed on the high seas and other places within the jurisdiction of the Admiralty of England." The facts were admittedly such as to warrant the conviction, if there was jurisdiction to try the defendant as amenable to English law. Being in command of a steamship, the Franconia, and having occasion to pass the Strathclyde, a British ship, the defendant brought his ship unnecessarily close to the latter, and then, by negligence in steering, ran into the Strathclyde and broke a hole in her, in consequence of which she filled with water and sank, when the deceased, whose death the accused is charged with having occasioned, being on board the Strathclyde, was drowned.

That the negligence of which the accused was thus guilty, having resulted in the death of the deceased, amounts according to English law to manslaughter can admit of no doubt. The question is, whether the accused is amenable to our law, and whether there was jurisdiction to try him?

The legality of the conviction is contested, on the ground that the accused is a foreigner; that the Franconia, the ship he commanded, was a foreign vessel, sailing from a foreign port, bound on a foreign voyage; that the alleged offence was committed on the high seas. Under these circumstances, it is contended that the accused, though he may be amenable to the law of his own country, is not capable of being tried and punished by the law of England.

The facts on which this defence is based are not capable of being disputed; but a twofold answer is given on the part of the prosecution:— 1st. That, although the occurrence on which the charge is founded took place on the high seas in this sense, that the place in which it happened was not within the body of a county, it occurred within three miles of the English coast; that, by the law of nations, the sea, for a space of three miles from the coast, is part of the territory of the country to which the coast belongs; that, consequently, the Franconia, at the time the offence was committed, was in English waters, and those on board were therefore subject to English law. 2ndly. That, although the negligence of which the accused was guilty occurred on board a foreign vessel, the death occasioned by such negligence took place on board a British vessel; and that, as a British vessel is in point of law to be considered British territory, the offence, having been consummated by the death of the deceased in a British ship, must be considered as having been committed on British territory.

I reserve for future consideration the arguments thus advanced on the part of the Crown, and proceed, in the first instance, to consider the general question—how far, independently of them, the accused, having been at the time the offence was committed a foreign subject, in a foreign ship, on a foreign voyage, on the high seas, is amenable to the law of England.

Now, no proposition of law can be more incontestable or more universally admitted than that, according to the general law of nations, a foreigner, though criminally responsible to the law of a nation not his own for acts done by him while within the limits of its territory, cannot be made responsible to its law for acts done beyond such limits:—

"*Leges cujusque imperii,*" says Huber *de Conflictu legum* citing *Dig. de jurisdictione, l. ult.*, "*Vim habent intra terminos ejusdem reipublicae, omnesque ei subjectos obligant, nec ultra.*" "*Extra territorium jus dicenti impune non paretur*" is an old and well-established maxim. "No sovereignty," says Story (Conflict of Laws, s. 539), "can extend its process

beyond its own territorial limits, to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals." "The power of this country," says Dr. Lushington in the case of The Zollverein [1 Sw. Adm. 96], "is to legislate for its subjects all the world over, and as to foreigners within its jurisdiction, but no further."

This rule must, however, be taken subject to this qualification, namely, that if the legislature of a particular country should think fit by express enactment to render foreigners subject to its law with reference to offences committed beyond the limits of its territory, it would be incumbent on the Courts of such country to give effect to such enactment, leaving it to the state to settle the question of international law with the governments of other nations. The question of express legislation will be dealt with hereafter. For the present I am dealing with the subject with reference to the general law alone.

To the general rule to which I have referred there is one exception—that of a foreigner on board the ship of another nation. But the exception is apparent rather than real; for by the received law of every nation a ship on the high seas carries its nationality and the law of its own nation with it, and in this respect has been likened to a floating portion of the national territory. All on board, therefore, whether subjects or foreigners, are bound to obey the law of the country to which the ship belongs, as though they were actually on its territory on land, and are liable to the penalties of that law for any offence committed against it.

But they are liable to that law alone. On board a foreign ship on the high seas, the foreigner is liable to the law of the foreign ship only. It is only when a foreign ship comes into the ports or waters of another state that the ship and those on board become subject to the local law. These are the established rules of the law of nations. They have been adopted into our own municipal law, and must be taken to form part of it.

According to the general law, therefore, a foreigner who is not residing permanently or temporarily in British territory, or on board a British ship, cannot be held responsible for an infraction of the law of this country. Unless, therefore, the accused, Keyn, at the time the offence of which he has been convicted was committed, was on British territory or on board a British ship, he could not be properly brought to trial under English law, in the absence of express legislation.

Moreover, while the accused is thus on general principles exempt from being subject to our criminal law in respect of an offence committed on a foreign ship on the high seas, if we proceed to look at the matter in a more technical point of view, with reference to jurisdiction, equal difficulties will be found to stand in the way of the prosecution.

The indictment on which the defendant has been convicted alleges the offence to have been committed on the high seas, and it is admitted that the place in which it occurred cannot in any sense be said to have been within the body of a county. The case, therefore, if the indictment can be maintained, must necessarily fall within what would formerly have been the jurisdiction of the admiral—a jurisdiction now transferred, but transferred unaltered, to the common-law Courts. It becomes, therefore, necessary to inquire more particularly into the character and extent of the Admiralty jurisdiction. . . .

[In an omitted part of the opinion Chief Justice Cockburn examined the authorities and concluded that the Court of Admiralty never had criminal jurisdiction over foreign ships on the high seas.]

These decisions are conclusive in favour of the accused in the present case, unless the contention, on the part of the Crown, either that the place at which the occurrence, out of which the present inquiry has arisen, was, though on the high seas, yet within British waters, by reason of its having been within three miles of the English shore; or that, the death of the deceased having occurred in a British ship, the offence must be taken to have been there committed, so as in either case to give jurisdiction to the Admiralty, or the Courts substituted for it, shall prevail. These questions it becomes, therefore, necessary carefully to consider.

On entering on the first, it is material to have a clear conception of what the matter in controversy is. The jurisdiction of the admiral, however largely asserted in theory in ancient times, being abandoned as untenable, it becomes necessary for the counsel for the Crown to have recourse to a doctrine of comparatively modern growth, namely, that a belt of sea, to a distance of three miles from the coast, though so far a portion of the high seas as to be still within the jurisdiction of the admiral, is part of the territory of the realm, so as to make a foreigner in a foreign ship, within such belt, though on a voyage to a foreign port, subject to our law, which it is clear he would not be on the high sea beyond such limit. It is necessary to keep the old assertion of jurisdiction and that of to-day essentially distinct, and it should be borne in mind that it is because all proof of the actual exercise of any jurisdiction by the admiral over foreigners in the narrow seas totally fails, that it becomes necessary to give to the three-mile zone the character of territory in order to make good the assertion of jurisdiction over the foreigner therein.

Now, it may be asserted without fear of contradiction that the position that the sea within a belt or zone of three miles from the shore, as distinguished from the rest of the open sea, forms part of the realm or territory of the Crown is a doctrine unknown to the ancient law of England, and which has never yet received the sanction of an English criminal Court of justice. It is true that from an early period the kings of England, possessing more ships than their opposite neighbours, and

being thence able to sweep the Channel, asserted the right of sovereignty over the narrow seas, as appears from the commissions issued in the fourteenth century, of which examples are given in the 4th Institute, in the chapter on the Court of Admiralty, and others are to be found in Selden's *Mare Clausum*, Book 2. At a later period still more extravagant pretensions were advanced. Selden does not scruple to assert the sovereignty of the King of England over the sea as far as the shores of Norway, in which he is upheld by Lord Hale in his treatise *De jure maris:* Hargrave's Law Tracts, p. 10.

In the reign of Charles II. Sir Leoline Jenkins, then the judge of the Court of Admiralty, in a charge to the grand jury at an Admiralty sessions at the Old Bailey, not only asserted the King's sovereignty within the four seas, and that it was his right and province "to keep the public peace on these seas"—that is, as Sir Leoline expounds it, "to preserve his subjects and allies in their possessions and properties upon these seas, and in all freedom and security to pass to and fro on them, upon their lawful occasions," but extended this authority and jurisdiction of the King.

"To preserve the public peace and to maintain the freedom and security of navigation all the world over; so that not the utmost bound of the Atlantic Ocean, nor any corner of the Mediterranean, nor any part of the South or other seas, but that if the peace of God and the King be violated upon any of his subjects, or upon his allies or their subjects, and the offender be afterwards brought up or laid hold of in any of His Majesty's ports, such breach of the peace is to be inquired of and tried in virtue of a commission of oyer and terminer as this is, in such county, liberty, or place as His Majesty shall please to direct—so long an arm hath God by the laws given to his vicegerent, the King."

To be sure, the learned civilian, as regards these distant seas, admits that other sovereigns have a concurrent jurisdiction, which, however, he by no means concedes to them in these so-called British seas. In these the refusal by a foreign ship to strike the flag and lower the topsail to a King's ship he treats as amounting to piracy.

Venice, in like manner, laid claim to the Adriatic, Genoa to the Ligurian Sea, Denmark to a portion of the North Sea. The Portuguese claimed to bar the ocean route to India and the Indian Seas to the rest of the world, while Spain made the like assertion with reference to the West.

All these vain and extravagant pretensions have long since given way to the influence of reason and common sense. If, indeed, the sovereignty thus asserted had a real existence, and could now be maintained, it would of course, independently of any question as to the three-mile zone, be conclusive of the present case. But the claim to such sovereignty, at all times unfounded, has long since been abandoned. No one would now dream of asserting that the sovereign of these realms

has any greater right over the surrounding seas than the sovereigns on the opposite shores; or that it is the especial duty and privilege of the Queen of Great Britain to keep the peace in these seas; or that the Court of Admiralty could try a foreigner for an offence committed in a foreign vessel in all parts of the Channel. No writer of our day, except Mr. Chitty in his treatise on the prerogative, has asserted the ancient doctrine. Blackstone, in his chapter on the prerogative in the Commentaries, while he asserts that the narrow seas are part of the realm, puts it only on the ground that the jurisdiction of the Admiralty extends over these seas. He is silent as to any jurisdiction over foreigners within them. The consensus of jurists, which has been so much insisted on as authority, is perfectly unanimous as to the non-existence of any such jurisdiction. Indeed, it is because this claim of sovereignty is admitted to be untenable that it has been found necessary to resort to the theory of the three-mile zone. It is in vain, therefore, that the ancient assertion of sovereignty over the narrow seas is invoked to give countenance to the rule now sought to be established, of jurisdiction over the three-mile zone. If this rule is to prevail, it must be on altogether different grounds. To invoke as its foundation, or in its support, an assertion of sovereignty which, for all practical purposes, is, and always has been, idle and unfounded, and the invalidity of which renders it necessary to have recourse to the new doctrine, involves an inconsistency, on which it would be superfluous to dwell. I must confess myself unable to comprehend how, when the ancient doctrine as to sovereignty over the narrow seas is adduced, its operation can be confined to the three-mile zone. If the argument is good for anything, it must apply to the whole of the surrounding seas. But the counsel for the Crown evidently shrank from applying it to this extent. Such a pretension would not be admitted or endured by foreign nations. That it is out of this extravagant assertion of sovereignty that the doctrine of the three-mile jurisdiction, asserted on the part of the Crown, and which, the older claim being necessarily abandoned, we are now called upon to consider, has sprung up, I readily admit. Let me endeavour to trace its origin and growth. . . .

[In an omitted part of the opinion Chief Justice Cockburn traced the origin and development, in the writings of the publicists, of the doctrine of jurisdiction over marginal seas within the three-mile zone.]

From the review of these authorities we arrive at the following results. There can be no doubt that the suggestion of Bynkershoek, that the sea surrounding the coast to the extent of cannon-range should be treated as belonging to the state owning the coast, has, with but very few exceptions, been accepted and adopted by the publicists who have followed him during the last two centuries. But it is equally clear that, in the practical application of the rule, in respect of the particular of distance, as also in the still more essential particular of the character and degree of

sovereignty and dominion to be exercised, great difference of opinion and uncertainty have prevailed, and still continue to exist.

As regards distance, while the majority of authors have adhered to the three-mile zone, others, like M. Ortolan and Mr. Halleck, applying with greater consistency the principle on which the whole doctrine rests, insist on extending the distance to the modern range of cannon—in other words doubling it. This difference of opinion may be of little practical importance in the present instance, inasmuch as the place at which the offence occurred was within the lesser distance; but it is, nevertheless, not immaterial as shewing how unsettled this doctrine still is. The question of sovereignty, on the other hand, is all-important. And here we have every shade of opinion.

One set of writers, as, for instance, M. Hautefeuille, ascribe to the state territorial property and sovereignty over the three miles of sea, to the extent of the right of excluding the ships of all other nations, even for the purpose of passage—a doctrine flowing immediately from the principle of territorial property, but which is too monstrous to be admitted. Another set concede territorial property and sovereignty, but make it subject to the right of other nations to use these waters for the purpose of navigation. Others again, like M. Ortolan and M. Calvo, deny any right of territorial property, but concede "jurisdiction;" by which I understand them to mean the power of applying the law, applicable to persons on the land, to all who are within the territorial water, and the power of legislating in respect of it, so as to bind every one who comes within the jurisdiction, whether subjects or foreigners. Some, like M. Ortolan, would confine this jurisdiction to purposes of "safety and police"—by which I should be disposed to understand measures for the protection of the territory, and for the regulation of the navigation, and the use of harbours and roadsteads, and the maintenance of order among the shipping therein, rather than the general application of the criminal law.

Other authors,—for instance, Mr. Manning,—would restrict the jurisdiction to certain specified purposes in which the local state has an immediate interest, namely, the protection of its revenue and fisheries, the exacting of harbour and light dues, and the protection of its coasts in time of war.

Some of these authors,—for instance, Professor Bluntschli,—make a most important distinction between a commorant and a passing ship. According to this author, while the commorant ship is subject to the general law of the local state, the passing ship is liable to the local jurisdiction only in matters of "military and police regulations, made for the safety of the territory and population of the coast." None of these writers, it should be noted, discuss the question, or go the length of asserting that a foreigner in a foreign ship, using the waters in question

for the purpose of navigation solely, on its way to another country, is liable to the criminal law of the adjoining country for an offence committed on board.

Now, when it is remembered that it is mainly on the statements and authority of these writers, and to opinions founded upon them, that we are called upon to hold that foreigners on the so-called territorial sea are subject to the general law of this country, the discrepancy of opinion which I have been pointing out becomes very material. Looking to this, we may properly ask those who contend for the application of the existing law to the littoral sea independently of legislation, to tell us the extent to which we are to go in applying it. Are we to limit it to three miles, or to extend it to six? Are we to treat the whole body of the criminal law as applicable to it, or only so much as relates to "police and safety"? Or are we to limit it, as one of these authors proposes, to the protection of fisheries and customs, the exacting of harbour and light dues, and the protection of our coasts in time of war? Which of these writers are we to follow? What is there in these conflicting views to guide us, in the total absence of precedent or legal sanction, as to the extent to which we may subject foreigners to our law? What is there in them which authorizes us to assume not only that Parliament can of right deal with the three-mile zone as forming part of our territory, but also that, by the mere assent of other nations, the sea to this extent has become so completely a part of our territory as to be subject, without legislation, to the whole body of our existing law, civil and criminal.

But it is said that, although the writers on international law are disagreed on so many essential points, they are all agreed as to the power of a littoral state to deal with the three-mile zone as subject to its dominion, and that consequently we may treat it as subject to our law. But this reasoning strikes me as unsatisfactory; for what does this unanimity in the general avail us when we come to the practical application of the law in the particular instance, if we are left wholly in the dark as to the degree to which the law can be legitimately enforced? This unanimity of opinion that the littoral sea is, at all events for some purposes, subject to the dominion of the local state, may go far to shew that, by the concurrence of other nations, such a state may deal with these waters as subject to its legislation. But it wholly fails to shew that, in the absence of such legislation, the ordinary law of the local state will extend over the waters in question—which is the point which we have to determine.

Not altogether uninfluenced, perhaps, by the diversity of opinion to which I have called attention, the argument in support of the prosecution presents itself—not without some sacrifice of consistency—in more than one shape. At one time it is asserted that, for the space of three miles, not only the sea itself, but the bed on which it rests, forms part of the

territory or realm of the country owning the coast, as though it were so much land; so that the right of passage and anchorage might be of right denied to the ships of other nations. At another time it is said that, while the right is of a territorial character, it is subject to a right of passage by the ships of other nations. Sometimes the sovereignty is asserted, not as based on territorial right, but simply as attaching to the sea, over which it is contended that the nation owning the coast may extend its law to the foreigner navigating within it.

To those who assert that, to the extent of three miles from the coast, the sea forms part of the realm of England, the question may well be put, when did it become so? Was it so from the beginning? It certainly was not deemed to be so as to a three-mile zone, any more than as to the rest of the high seas, at the time the statutes of Richard II. were passed. For in those statutes a clear distinction is made between the realm and the sea, as also between the bodies of counties and the sea; the jurisdiction of the admiral being (subject to the exception already stated as to murder and mayhem) confined strictly to the latter, and its exercise "within the realm" prohibited in terms. The language of the first of these statutes is especially remarkable:

"The admirals and their deputies shall not meddle from henceforth with anything done within the realm of England, but only with things done upon the sea."

It is impossible not to be struck by the distinction here taken between the realm of England and the sea; or, when the two statutes are taken together, not to see that the term "realm," used in the first statute, and "bodies of counties," the term used in the second statute, mean one and the same thing. In these statutes the jurisdiction of the admiral is restricted to the high seas, and, in respect of murder and mayhem, to the great rivers below the bridges, while whatever is within the realm, in other words, within the body of a county, is left within the domain of the common law. But there is no distinction taken between one part of the high sea and another. The three-mile zone is no more dealt with as within the realm than the seas at large. The notion of a three-mile zone was in those days in the womb of time. When its origin is traced, it is found to be of comparatively modern growth. The first mention of it by any writer, or in any court of this country, so far as I am aware, was made by Lord Stowell, with reference to a question of neutral rights, in the first year of the present century, in the case of The Twee Gebroeders. [3 C. Rob. 162.] To this hour it has not, even in theory, yet settled into certainty. For centuries before it was thought of, the great landmarks of our judicial system had been set fast—the jurisdiction of the common law over the land and the inland waters contained within it, forming together the realm of England, that of the admiral over English vessels on the seas, the common property or highway of mankind. . . .

It thus appearing, as it seems to me, that the littoral sea beyond low-water mark did not, as distinguished from the rest of the high seas, originally form part of the territory of the realm, the question again presents itself, when and how did it become so? Can a portion of that which was before high sea have been converted into British territory, without any action on the part of the British Government or legislature—by the mere assertions of writers on public law—or even by the assent of other nations?

And when in support of this position, or of the theory of the three-mile zone in general, the statements of the writers on international law are relied on, the question may well be asked, upon what authority are these statements founded? When and in what manner have the nations, who are to be affected by such a rule as these writers, following one another, have laid down, signified their assent to it? to say nothing of the difficulty which might be found in saying to which of these conflicting opinions such assent had been given.

For, even if entire unanimity had existed in respect of the important particulars to which I have referred, in place of so much discrepancy of opinion, the question would still remain, how far the law as stated by the publicists had received the assent of the civilized nations of the world. For writers on international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it. This assent may be express, as by treaty or the acknowledged concurrence of governments, or may be implied from established usage,—an instance of which is to be found in the fact that merchant vessels on the high seas are held to be subject only to the law of the nation under whose flag they sail, while in the ports of a foreign state they are subject to the local law as well as to that of their own country. In the absence of proof of assent, as derived from one or other of these sources, no unanimity on the part of theoretical writers would warrant the judicial application of the law on the sole authority of their views or statements. Nor, in my opinion, would the clearest proof of unanimous assent on the part of other nations be sufficient to authorize the tribunals of this country to apply, without an Act of Parliament, what would practically amount to a new law. In so doing we should be unjustifiably usurping the province of the legislature. The assent of nations is doubtless sufficient to give the power of parliamentary legislation in a matter otherwise within the sphere of international law; but it would be powerless to confer without such legislation a jurisdiction beyond and unknown to the law, such as that now insisted on, a jurisdiction over foreigners in foreign ships on a portion of the high seas.

When I am told that all other nations have assented to such an absolute dominion on the part of the littoral state, over this portion of the sea, as that their ships may be excluded from it, and that, without any

open legislation, or notice to them or their subjects, the latter may be held liable to the local law, I ask, first, what proof there is of such assent as here asserted; and, secondly, to what extent has such assent been carried? a question of infinite importance, when, undirected by legislation, we are called upon to apply the law on the strength of such assent. It is said that we are to take the statements of the publicists as conclusive proof of the assent in question, and much has been said to impress on us the respect which is due to their authority, and that they are to be looked upon as witnesses of the facts to which they speak, witnesses whose statements, or the foundation on which those statements rest, we are scarcely at liberty to question. I demur altogether to this position. I entertain a profound respect for the opinion of jurists when dealing with the matters of juridical principle and opinion, but we are here dealing with a question not of opinion but of fact, and I must assert my entire liberty to examine the evidence and see upon what foundation these statements are based. The question is not one of theoretical opinion, but of fact, and, fortunately, the writers upon whose statements we are called upon to act have afforded us the means of testing those statements by reference to facts. They refer us to two things, and to these alone—treaties and usage. Let us look a little more closely into both.

First, then, let us see how the matter stands as regards treaties. It may be asserted, without fear of contradiction, that the rule that the sea surrounding the coast is to be treated as a part of the adjacent territory, so that the state shall have exclusive dominion over it, and that the law of the latter shall be generally applicable to those passing over it in the ships of other nations, has never been made the subject-matter of any treaty, or, as matter of acknowledged right, has formed the basis of any treaty, or has even been the subject of diplomatic discussion. It has been entirely the creation of the writers on international law. It is true that the writers who have been cited constantly refer to treaties in support of the doctrine they assert. But when the treaties they refer to are looked at, they will be found to relate to two subjects only—the observance of the rights and obligations of neutrality, and the exclusive right of fishing. In fixing the limits to which these rights should extend, nations have so far followed the writers on international law as to adopt the three miles range as a convenient distance. There are several treaties by which nations have engaged, in the event of either of them being at war with a third, to treat the sea within three miles of each other's coasts as neutral territory, within which no warlike operations should be carried on; instances of which will be found in the various treatises on international law.

Thus, for instance, in the treaties of commerce, between Great Britain and France, of September, 1786; between France and Russia, of

January, 1787; between Great Britain and the United States, of October, 1794, each contracting party engages, if at war with any other nation, not to carry on hostilities within cannon-shot of the coast of the other contracting party; or, if the other should be at war, not to allow its vessels to be captured within the like distance. There are many other treaties of the like tenor, a list of which is given by Azuni (vol. ii. p. 78); and various ordinances and laws have been made by the different states in order to give effect to them.

Again, nations, possessing opposite or neighbouring coasts, bordering on a common sea, have sometimes found it expedient to agree that the subjects of each shall exercise an exclusive right of fishing to a given distance from their own shores, and here also have accepted the three miles as a convenient distance. Such, for instance, are the treaties made between this country and the United States in relation to the fishery off the coast of Newfoundland, and those between this country and France in relation to the fishery on their respective shores; and local laws have been passed to give effect to these engagements.

But in all these treaties this distance is adopted, not as matter of existing right established by the general law of nations, but as matter of mutual concession and convention. Instead of upholding the doctrine contended for, the fact of these treaties having been entered into has rather the opposite tendency: for it is obvious that, if the territorial right of a nation bordering on the sea to this portion of the adjacent waters had been established by the common assent of nations, these treaty arrangements would have been wholly superfluous. Each nation would have been bound, independently of treaty engagement, to respect the neutrality of the other in these waters as much as in its inland waters. The foreigner invading the rights of the local fisherman would have been amenable, consistently with international law, to local legislation prohibiting such infringement, without any stipulation to that effect by treaty. For what object, then, have treaties been resorted to? Manifestly in order to obviate all questions as to concurrent or conflicting rights arising under the law of nations. Possibly, after these precedents and all that has been written on this subject, it may not be too much to say that, independently of treaty, the three-mile belt of sea might at this day be taken as belonging, for these purposes, to the local state. But it is scarcely logical to infer, from such treaties alone, that, because nations have agreed to treat the littoral sea as belonging to the country it adjoins, for certain specified objects, they have therefore assented to forego all other rights previously enjoyed in common, and have submitted themselves, even to the extent of the right of navigation on a portion of the high seas, and the liability of their subjects therein to the criminal law, to the will of the local sovereign, and the jurisdiction of the local state. Equally illogical is it, as it seems to me, from the adoption of the three

mile distance in these particular instances, to assume, independently of everything less, a recognition, by the common assent of nations, of the principle that the subjects of one state passing in ships within three miles of the coast of another shall be in all respects subject to the law of the latter. It may be that the maritime nations of the world are prepared to acquiesce in the appropriation of the littoral sea; but I cannot think that these treaties help us much towards arriving at the conclusion that this appropriation has actually taken place. At all events, the question remains, whether judicially we can infer that the nations who have been parties to these treaties, and still further those who have not, have thereby assented to the application of the criminal law of other nations to their subjects on the waters in question, and on the strength of such inference so apply the criminal law of this country.

The uncertainty in which we are left, so far as judicial knowledge is concerned, as to the extent of such assent, likewise presents, I think, a very serious obstacle to our assuming the jurisdiction we are called upon to exercise, independently of the, to my mind, still more serious difficulty, that we should be assuming it without legislative warrant.

So much for treaties. Then how stands the matter as to usage, to which reference is so frequently made by the publicists in support of their doctrine? When the matter is looked into, the only usage found to exist is such as is connected with navigation, or with revenue, local fisheries, or neutrality, and it is to these alone that the usage relied on is confined. Usage as to the application of the general law of the local state to foreigners on the littoral sea there is actually none. No nation has arrogated to itself the right of excluding foreign vessels from the use of its external littoral waters for the purpose of navigation, or has assumed the power of making foreigners in foreign ships passing through these waters subject to its law, otherwise than in respect of the matters to which I have just referred. Nor have the tribunals of any nation held foreigners in these waters amenable generally to the local criminal law in respect of offences. It is for the first time in the annals of jurisprudence that a Court of justice is now called upon to apply the criminal law of the country to such a case as the present.

It may well be, I say again, that—after all that has been said and done in this respect—after the instances which have been mentioned of the adoption of the three-mile distance, and the repeated assertion of this doctrine by the writers on public law, a nation which should now deal with this portion of the sea as its own, so as to make foreigners within it subject to its law, for the prevention and punishment of offences, would not be considered as infringing the rights of other nations. But I apprehend that as the ability so to deal with these waters would result, not from any original or inherent right, but, from the acquiescence of other states, some outward manifestation of the national will, in the

shape of open practice or municipal legislation, so as to amount, at least constructively, to an occupation of that which was before unappropriated, would be necessary to render the foreigner, not previously amenable to our general law, subject to its control. That such legislation, whether consistent with the general law of nations or not, would be binding on the tribunals of this country—leaving the question of its consistency with international law to be determined between the governments of the respective nations—can of course admit of no doubt. The question is whether such legislation would not, at all events, be necessary to justify our Courts in applying the law of this country to foreigners under entirely novel circumstances in which it has never been applied before.

It is obviously one thing to say that the legislature of a nation may, from the common assent of other nations, have acquired the full right to legislate over a part of that which was before high sea, and as such common to all the world; another and a very different thing to say that the law of the local state becomes thereby at once, without anything more, applicable to foreigners within such part, or that, independently of legislation, the Courts of the local state can *proprio vigore* so apply it. The one position does not follow from the other; and it is essential to keep the two things, the power of Parliament to legislate, and the authority of our Courts, without such legislation, to apply the criminal law where it could not have been applied before, altogether distinct, which, it is evident, is not always done. It is unnecessary to the defence, and equally so to the decision of the case, to determine whether Parliament has the right to treat the three-mile zone as part of the realm consistently with international law. There is a matter on which it is for Parliament itself to decide. It is enough for us that it has, so far as to be binding upon us, the power to do so. The question is whether, acting judicially, we can treat the power of Parliament to legislate as making up for the absence of actual legislation. I am clearly of opinion that we cannot, and that it is only in the instances in which foreigners on the seas have been made specifically liable to our law by statutory enactment that that law can be applied to them. . . .

[In an omitted part of the opinion Chief Justice Cockburn reviewed legislation applicable to foreigners on the seas and also the relevant decisions of English and American courts.]

One common observation arises on all these decisions, though, perhaps, not on all these dicta. They all arise on the construction of Acts of Parliament. In no instance has the judge been called upon to decide how far without legislation the law of this country can be applied to foreigners on the littoral sea, which is the question we are called upon to decide. They are, therefore, but of little avail to the decision of this question.

Taken together, decisions and dicta no doubt shew that the views and opinions of the foreign jurists as to a territorial sea have been received with favour by eminent judicial authorities of this country, and that the doctrine respecting it has been admitted in the construction of statutory enactments; but none of them go the length of establishing, or even suggesting, that, independently of statute, the criminal law of England is applicable to the foreigner navigating these waters.

But the difficulties which stand in the way of the prosecution are not yet exhausted. A technical difficulty presents itself, which appears to be of a formidable character. Assuming everything, short of the ultimate conclusion, to be conceded to the prosecution—granting that the three-mile zone forms part of the territory or realm of England, and that without parliamentary interference the territorial sea has become part of the realm of England, so that jurisdiction has been acquired over it, the question arises—In whom is the jurisdiction? The indictment alleges that the offence was committed on the high seas. To support this averment the place in question must still remain part of the high sea. But if it is to be held to be the high sea, and so within the jurisdiction of the admiral, the prosecution fails, if the admiral never had jurisdiction over foreigners in foreign ships, the proof of which totally fails, and the negative of which, I think, must be considered as established: and no assent on the part of foreign nations to the exercise of dominion and jurisdiction over these waters can, without an Act of Parliament, confer on the admiral or any other judge of this country a larger jurisdiction than he possessed before. If the littoral sea is to be considered territory—in other words, no longer high sea—the present indictment fails, and this, whether the part in question has become part of a county or not. The only distinction known to the law of England, as regards the sea, is between such part of the sea as is within the body of a county and such as is not. In the first there is jurisdiction over the foreigner on a foreign ship; in the other, there is not. Such a thing as sea which shall be at one and the same time high sea and also part of the territory of the realm, is unknown to the present law, and never had an existence, except in the old and senseless theory of a universal dominion over the narrow seas.

To put this shortly. To sustain this indictment the littoral sea must still be considered as part of the high seas, and as such, under the jurisdiction of the admiral. But the admiral never had criminal jurisdiction over foreign ships on the high seas. How, when exercising the functions of a British judge, can he, or those acting in substitution for him, assume a jurisdiction which heretofore he did not possess, unless authorized by statute? On the other hand, if this sea is to be considered as territory, so as to make a foreigner within it liable to the law of England, it cannot come under the jurisdiction of the Admiralty.

In the result, looking to the fact that all pretension to sovereignty or jurisdiction over foreign ships in the narrow seas has long since been wholly abandoned—to the uncertainty which attaches to the doctrine of the publicists as to the degree of sovereignty and jurisdiction which may be exercised on the so-called territorial sea—to the fact that the right of absolute sovereignty therein, and of penal jurisdiction over the subjects of other states, has never been expressly asserted or conceded among independent nations, or, in practice, exercised and acquiesced in, except for violation of neutrality or breach of revenue or fishery laws, which, as has been pointed out, stand on a different footing—as well as to the fact that, neither in legislating with reference to shipping, nor in respect of the criminal law, has parliament thought proper to assume territorial sovereignty over the three-mile zone, so as to enact that all offences committed upon it, by foreigners in foreign ships, should be within the criminal law of this country, but, on the contrary, wherever it was thought right to make the foreigner amenable to our law, has done so by express and specific legislation—I cannot think that, in the absence of all precedent, and of any judicial decision or authority applicable to the present purpose, we should be justified in holding an offence, committed under such circumstances, to be punishable by the law of England, especially as in so holding we must declare the whole body of our penal law to be applicable to the foreigner passing our shores in a foreign vessel on his way to a foreign port.

I am by no means insensible to the argument *ab inconvenienti*, pressed upon us by the Solicitor General. It is, no doubt, desirable, looking to the frequency of collisions in the neighbourhood of our coasts, that the commanders of foreign vessels, who, by unskilful navigation or gross want of care, cause disaster or death, should be as much amenable to the local law as those navigating our own vessels, instead of redress having to be sought in the, perhaps, distant country of the offender. But the remedy for the deficiency of the law, if it can be made good consistently with international law—as to which we are not called upon to pronounce an opinion—should be supplied by the action of the legislature, with whom the responsibility for any imperfection of the law alone rests, not by a usurpation on our part of a jurisdiction which, without legislation, we do not judicially possess.

This matter has been sometimes discussed upon the assumption that the alternative of the non-exercise of jurisdiction on the part of our Courts must be the total impunity of foreigners in respect of collision arising from negligence in the vicinity of our coast. But this is a mistaken view. If by the assent of other nations the three-mile belt of sea has been brought under the dominion of this country, so that consistently with the right of other nations it may be treated as a portion of British territory, which, of course, is assumed as the foundation of the jurisdiction

which the Courts of law are here called upon to exercise, it follows that Parliament can legislate in respect of it. Parliament has only to do so, and the judges of the land will, of course, as in duty bound, give full effect to the law which Parliament shall so create. The question is, whether legislative action shall be applied to meet the exigency of the case, or judicial authority shall be strained and misapplied in order to overcome the difficulty. Every such usurped exercise of judicial power is, in my opinion, a violation of fundamental principles, and in the highest degree unconstitutional. The responsibility is with the legislature, and there it must rest. . . .

[In an omitted part of the opinion Chief Justice Cockburn considered and rejected the Crown's contention that the offence was committed on the British ship.]

[The opinion of Lush, J., concurring in the conclusions of Cockburn, C. J., is omitted.]

POLLOCK, B., and FIELD, J., concurred in the judgment of COCKBURN, C. J.

Conviction quashed.[18]

GREAT BRITAIN, TERRITORIAL WATERS JURISDICTION ACT

Sections 2, 3, and 7. 1878.

41 & 42 *Vict. c.* 73.

Whereas the rightful jurisdiction of Her Majesty, her heirs and successors, extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions:

And whereas it is expedient that all offences committed on the open sea within a certain distance of the coasts of the United Kingdom and of all other parts of Her Majesty's dominions, by whomsoever committed, should be dealt with according to law:

Be it therefore enacted . . .

2. An offence committed by a person, whether he is or is not a subject of her Majesty, on the open sea within the territorial waters of Her

[18] See FOSTER, "Case of The 'Franconia,' " 11 Am. L. Rev. 625; JESSUP, Territorial Waters, 124; MAINE, 2d ed., 38; STEPHEN, History, II, 29; WALKER, 173.

On the question of the *locus criminis*, see BECKETT, "Criminal Jurisdiction over Foreigners," B. Y. B. Int. L. (1927) 108, 112. *Cf.* The Lotus Case, P. C. I. J. Publ., Series A, Judgment No. 9, *infra*, 656.

On the extent and delimitation of the territorial marginal seas, see ch. 4, §2, *supra*, 346, *et seq.*

Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly.

3. Proceedings for the trial and punishment of a person who is not a subject of Her Majesty, and who is charged with any such offence as is declared by this Act to be within the jurisdiction of the Admiral, shall not be instituted in any court of the United Kingdom, except with the consent of one of Her Majesty's Principal Secretaries of State, and on his certificate that the institution of such proceedings is in his opinion expedient, and shall not be instituted in any of the dominions of Her Majesty out of the United Kingdom, except with the leave of the Governor of the part of the dominions in which such proceedings are proposed to be instituted, and on his certificate that it is expedient that such proceedings should be instituted. . . .

7. In this Act, unless there is something inconsistent in the context, the following expressions shall respectively have the meanings hereinafter assigned to them; that is to say, . . .

"The territorial waters of Her Majesty's dominions," in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions:"[19] . . .

[19] See RENAULT, "De l'exercice de la juridiction criminelle d'un Etat dans la mer territoriale," 6 Jour. du Dr. Int. Privé 238.

In 1859, in the trial of an indictment for kidnapping in the Superior Court for Barnstable County, Massachusetts, the alleged offence consisting in the transfer of a fugitive slave from one vessel to another within three miles from shore, it was doubted whether the jurisdiction of the county extended to the three-mile limit. 11 Am. L. Rev. 625, 628. The Massachusetts legislature immediately passed the following statute: "The territorial limits of this Commonwealth extend one marine league from its sea-shore at low-water mark. When an inlet or arm of the sea does not exceed two marine leagues in width between its headlands, a straight line from one headland to the other is declared to be equivalent to the shore line. The boundaries of counties bordering upon the sea shall extend to the line of the State as above defined. The jurisdiction of counties separated by waters within the jurisdiction of the State shall be concurrent." Mass. Acts, 1858–59, p. 640. See also N. J. Laws, 1906, p. 542.

On jurisdiction to arrest or seize for offences committed within territorial waters from foreign ships remaining outside territorial waters, see The Araunah, Moore, Dig. Int. L., II, 985; The Tenyu Maru, 4 Alaska 129; The Grace and Ruby, 283 Fed. 475; JESSUP, Territorial Waters, 111, 242: PIGGOTT, Nationality, II, 40; 18 Am. Jour. Int. L. 229, 232. *Cf.* The Henry L. Marshall, 286 Fed. 260, 292 Fed. 486; JESSUP, *op. cit.*, 247.

BEALE, THE JURISDICTION OF A SOVEREIGN STATE

Harvard Law Review, Volume XXXVI, pages 241, 260. 1923.

But notwithstanding his general jurisdiction over the maritime belt, the sovereign's power is limited by the fact that the littoral seas are part of the highway of nations, and the power to legislate within the three-mile limit cannot be so used as to create an obstacle to navigation. The power of the sovereign to regulate fishing is indubitable; so is his power to police the strip against acts inimical to the sovereign or his territory. But it would seem that no jurisdiction exists to make general laws governing passing vessels. The private law prevailing on such vessels, as well as all laws of merely internal police, must remain the law of the flag.[20]

CHURCH v. HUBBART

United States. Supreme Court. 1804.

2 *Cranch's Reports* 187.

Error from the Circuit Court for the district of Massachusetts, in an action on the case, upon two policies of assurance, whereby John Barker

[20] "The right of innocent passage seems to be the result of an attempt to reconcile the freedom of ocean navigation with the theory of territorial waters. While recognizing the necessity of granting to littoral states a zone of waters along the coast, the family of nations was unwilling to prejudice the newly gained freedom of the seas. As a general principle, the right of innocent passage requires no supporting argument or citation of authority; it is firmly established in international law." JESSUP, Territorial Waters, 120. See also FAUCHILLE, I, Pt. II, 1004, 1088; HALL, 8th ed., 197; HYDE, I, §154.

"If it is claimed that the alleged offense occurred in the course of an innocent passage, the case becomes more complicated. Much will depend upon the nature of the alleged offense. Some acts, such as unloading without payment of duties, permitting diseased or excluded persons to go ashore, or endangering shipping by negligent navigation, are not covered by the privilege. Other acts, such as the transportation of narcotics, excluded immigrants, or spirituous liquors, may be within its scope. If the alleged offense is within the scope of the privilege, something should depend upon previous record and present intention. In the first place, the ship seized may have committed a previous violation of the territorial law, perhaps on the same voyage or during the same season, either from a point within or from a point without the territorial marginal seas. In the second place, there may have been no previous violation but a violation presently may be intended. Such, indeed, may be the sole or principal object of the voyage. In the third place, there may have been no previous violation and there may be none intended. While authorities are few and not very illuminating, it is suggested that cases in the third category are the only ones in which there is a meritorious claim to the privilege of innocent passage. The privilege should not give immunity to ships which have forfeited all claim to territorial indulgence by their previous misconduct, at least not until the right to proceed against them for their previous misconduct has become stale. Certainly it should not give immunity where violations of the territorial law are intended presently." DICKINSON, "Jurisdiction at the Maritime Frontier," 40 Harv. L. Rev. 1, 19.

Church, junior, caused to be insured twenty thousand dollars upon the cargo of the brigantine Aurora, Nathaniel Shaler, master, at and from New-York to one or two Portuguese ports on the coast of Brazil, and at and from thence back to New-York. At the foot of one of the policies was the following clause; "The insurers are not liable for seizure by the Portuguese for illicit trade;" and in the body of the other was inserted the following, "N. B. The insurers do not take the risk of illicit trade with the Portuguese."

The vessel was cleared out for the Cape of Good Hope, and Mr. Church went out in her as supercargo. On the 18th of April she arrived at Rio Janeiro, where she obtained a permit to remain fifteen days, and where Mr. Church sold goods to the amount of about 700 dollars, which were delivered in open day, and in the presence of the guard which had been previously put on board, and to all appearance with the approbation of the officers of the customs. On the 6th of May she sailed from Rio Janeiro bound to the port of Para on the coast of Brazil, and on the 12th, fell in with the schooner Four Sisters of New-York, Peleg Barker, master, bound to the same port, who agreed to keep company, and on the 12th of June they came to anchor about four or five leagues from the land, off the mouth of the river Para, in the bay of Para, about west and by north from Cape Baxos and about two miles to the northward of the Cape "on a meridian line drawn from east to west."—The land to the westward could not be observed from the deck, but might be seen from the mast-head.

The destination of the vessel after her departure from Rio Janeiro, was by the master kept secret from the crew, at the request of Mr. Church, and the master assigned as a reason why they came to anchor off the river Para, that they were in want of water and wood, which was truly the case, the greater part of the water on board having been caught a night or two before, and the crew had been on an allowance of water for ten days.

After the vessels had come to anchor, Mr. Church with two of the seamen of the brig, and the mate of the schooner with two of her seamen, went off in the schooner's long boat to speak a boat seen in shore, to endeavour to obtain a pilot to carry the vessels up the river that they might procure a supply of wood and water, and, if permitted, sell their cargo.

Shortly after the long boat had left the schooner, the latter got under way, (the master of the brig having first gone on board of her,) proceeding towards shore; and observing a schooner-rigged vessel coming from the westward, from whom they expected to get a pilot, they fired a shot ahead of her to bring her to, but not regarding the first shot, a second was fired, when she came to, and her master came on board apparently much alarmed, as if he supposed the schooner and brig to be French. The persons in the Portuguese boat got off in a squall of wind and rain, leaving their captain on board the Four Sisters.

Mr. Church, and the others who went on shore with him, as well as the second mate of the schooner, who was sent on shore with the master of the Portuguese vessel, and in search of Mr. Church, were seized and imprisoned; and on the 14th of June, both the brig and schooner were taken possession of by a body of armed men, on board of three armed boats, and carried into Para. The masters and crews were imprisoned, and underwent several examinations, the principal object of which seemed to be to ascertain whether they were not employed by some of the belligerent powers, to examine the coast, &c.—whether they had not come with intention to trade—whether they had not traded at Rio Janeiro, and why they had kept so close along the coast. They denied the intention to trade, but alleged that they were obliged to put in for wood and water, and to refit. On the 28th of July, the master of the brig was put on board a vessel for Lisbon, but was taken on the passage by a Spanish vessel, and sent to Porto-Rico, from whence he obtained a passage to the United States. . . .

[Part of the statement of the case, the arguments of counsel, and part of the opinion are omitted. The argument on behalf of the insured included the contention, among others, that the seizure was illegal and hence that the loss was not within the exception. For the underwriter it was replied that the seizure was lawful, that the loss was within the exception, and that the insurer was not answerable for the loss. The circuit court had instructed the jury to find in the insurer's favor.]

MARSHALL, C. J. delivered the opinion of the court.

. . . If the proof is sufficient to shew that the loss of the vessel and cargo, was occasioned by attempting an illicit trade with the Portuguese; that an offence was actually committed against the laws of that nation, and that they were condemned by the government on that account, the case comes fairly within the exception of the policies, and the risk was not one intended to be insured against. . . .

For the plaintiff it is contended, that the terms used require an actual traffic between the vessel and inhabitants, and a seizure in consequence of that traffic, or at least that the vessel should have been brought into port, in order to constitute a case which comes within the exception of the policy. But such does not seem to be the necessary import of the words. The more enlarged and liberal construction given to them by the defendants, is certainly warranted by common usage; and wherever words admit of a more extensive or more restricted signification, they must be taken in that sense which is required by the subject matter, and which will best effectuate what it is reasonable to suppose, was the real intention of the parties.

In this case, the unlawfulness of the voyage was perfectly understood by both parties. That the crown of Portugal excluded, with the most jealous watchfulness, the commercial intercourse of foreigners with

their colonies, was probably a fact of as much notoriety as that foreigners had devised means to elude this watchfulness, and to carry on a gainful but very hazardous trade with those colonies. If the attempt should succeed it would be very profitable, but the risk attending it was necessarily great. It was this risk which the underwriters, on a fair construction of their words, did not mean to take upon themselves. "They are not liable," they say, "for seizure by the Portuguese for illicit trade." "They do not take the risk of illicit trade with the Portuguese;" now this illicit trade was the sole and avowed object of the voyage, and the vessel was engaged in it from the time of her leaving the port of New-York. The risk of this illicit trade, is separated from the various other perils to which vessels are exposed at sea, and excluded from the policy. Whenever the risk commences the exception commences also, for it is apparent that the underwriters meant to take upon themselves no portion of that hazard which was occasioned by the unlawfulness of the voyage.

If it could have been presumed by the parties to this contract, that the laws of Portugal, prohibiting commercial intercourse between their colonies and foreign merchants, permitted vessels to enter their ports, or to hover off their coasts for the purposes of trade, with impunity, and only subjected them to seizure and condemnation after the very act had been committed, or if such are really their laws, then indeed the exception might reasonably be supposed to have been intended to be as limited in its construction as is contended for by the plaintiff. If the danger did not commence till the vessel was in port, or till the act of bargain and sale, without a permit from the governor, had been committed, then it would be reasonable to consider the exception as only contemplating that event. But this presumption is too extravagant to have been made. If indeed the fact itself should be so, then there is an end of presumption, and the contract will be expounded by the law; but as a general principle, the nation which prohibits commercial intercourse with its colonies, must be supposed to adopt measures to make that prohibition effectual. They must therefore, be supposed to seize vessels coming into their harbours or hovering on their coasts, in a condition to trade, and to be afterwards governed in their proceedings with respect to those vessels by the circumstances which shall appear in evidence. That the officers of that nation are induced occasionally to dispense with their laws, does not alter them, or legalize the trade they prohibit. As they may be executed at the will of the governor, there is always danger that they will be executed, and that danger the insurers have not chosen to take upon themselves.

That the law of nations prohibits the exercise of any act of authority over a vessel in the situation of the Aurora, and that this seizure is, on that account, a mere marine trespass, not within the exception, cannot

be admitted. To reason from the extent of protection a nation will afford to foreigners to the extent of the means it may use for its own security does not seem to be perfectly correct. It is opposed by principles which are universally acknowledged. The authority of a nation within its own territory is absolute and exclusive. The seizure of a vessel within the range of its cannon by a foreign force is an invasion of that territory, and is a hostile act which it is its duty to repel. But its power to secure itself from injury, may certainly be exercised beyond the limits of its territory. Upon this principle the right of a belligerent to search a neutral vessel on the high seas for contraband of war, is universally admitted, because the belligerent has a right to prevent the injury done to himself by the assistance intended for his enemy: so too a nation has a right to prohibit any commerce with its colonies. Any attempt to violate the laws made to protect this right, is an injury to itself which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same at all times and in all situations. If they are such as unnecessarily to vex and harrass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to.

In different seas and on different coasts, a wider or more contracted range, in which to exercise the vigilance of the government, will be assented to. Thus in the channel, where a very great part of the commerce to and from all the north of Europe, passes through a very narrow sea, the seizure of vessels on suspicion of attempting an illicit trade, must necessarily be restricted to very narrow limits, but on the coast of South America, seldom frequented by vessels but for the purpose of illicit trade, the vigilance of the government may be extended somewhat further; and foreign nations submit to such regulations as are reasonable in themselves, and are really necessary to secure that monopoly of colonial commerce, which is claimed by all nations holding distant possessions.

If this right be extended too far, the exercise of it will be resisted. It has occasioned long and frequent contests, which have sometimes ended in open war. The English, it will be well recollected, complained of the right claimed by Spain to search their vessels on the high seas, which was carried so far that the *guarda costas* of that nation, seized vessels not in the neighbourhood of their coasts. This practice was the subject of long and fruitless negotiations, and at length of open war. The right of the Spaniards was supposed to be exercised unreasonably and vexatiously, but it never was contended that it could only be exercised within the range of the cannon from their batteries. Indeed the right given to our own revenue cutters, to visit vessels four leagues from our

coast, is a declaration that in the opinion of the American government, no such principle as that contended for, has a real existence.[21]

Nothing then is to be drawn from the laws or usages of nations, which gives to this part of the contract before the court the very limited construction which the plaintiff insists on, or which proves that the seizure of the Aurora, by the Portuguese governor, was an act of lawless violence. . . .[22]

To prove that the Aurora and her cargo were sequestered at Para, in conformity with the laws of Portugal, two edicts and the judgment of sequestration have been produced by the defendants in the Circuit Court. These documents were objected to on the principle that they were not properly authenticated, but the objection was overruled, and the judges permitted them to go to the jury. . . .

[In an omitted part of the opinion the court considered the authentication of these documents and concluded that they were not properly authenticated and should not have been permitted to go to the jury.]

The judgment must be reversed with costs and the cause remanded to be again tried in the circuit court, with instructions not to permit the copies of the edicts of Portugal and the sentence in the proceedings mentioned, to go to the jury, unless they be authenticated according to law.

[21] Legislation providing for a limited jurisdiction over foreign ships outside territorial waters has been adopted in many countries. See DICKINSON, "Jurisdiction at the Maritime Frontier," 40 Harv. L. Rev. 1, 13 (United States); JESSUP, Territorial Waters, ch. 2 (Great Britain, United States, and other countries); MASTERSON, Jurisdiction in Marginal Seas (Great Britain and United States); RAESTAD, "Tableau des lois et règles," 21 Rev. Gén. de Dr. Int. Pub. 401 (Great Britain, United States, and other countries).

The Civil Code of Chile, 1855, art. 593, provides: "The adjacent sea, to a distance of one marine league, measured from the line of lowest tide, is territorial sea belonging to the national domain; but the right of police, in all matters concerning the security of the country and the observance of the fiscal laws, extends to a distance of four marine leagues measured in the same manner." See also Argentine, Civil Code, §2374 (former §2340); Ecuador, Civil Code, art. 582; Salvador, Law of Navigation and Marine, art. 2, 11 Am. Jour. Int. L. 674, 714.

[22] *Accord:* Cucullu v. Louisiana Insurance Co., 5 Mart. N. S. (La.) 464. See also The Annapolis, Lush. 295; Francis v. Ocean Insurance Co., 6 Cow. (N. Y.) 404, 425; The Kodiak, 53 Fed. 126, 128; The Coquitlam, 57 Fed. 706, 710; The Alexander, 60 Fed. 914, 918; United States v. Bengochea, 279 Fed. 537, 539; The Grace and Ruby, 283 Fed. 475, 477; The Henry L. Marshall, 286 Fed. 260, 266; United States v. Ford, 3 F. (2d) 643, 644; The Island Home, 6 F. (2d) 467 n.; The Panama, 6 F. (2d) 326; PIGGOTT, Nationality, II, 49; WHEATON, Dana's 8th ed., §179 n. 108; U. S. For. Rel. (1912) 1289, 1296; 40 Harv. L. Rev. 1, 4.

See The Virginius, Moore, Dig. Int. L., II, 895, 967, 980; The Deerhound, *ibid.*, II, 979; The Mary Lowell, *ibid.*, II, 983; The Alabama, *ibid.*, I, 723.

TREATY BETWEEN GREAT BRITAIN AND THE UNITED STATES

Article 2. Washington, January 23, 1924.

43 *United States Statutes at Large* 1761.

Art. 2. (1) His Britannic Majesty agrees that he will raise no objection to the boarding of private vessels under the British flag outside the limits of territorial waters by the authorities of the United States, its territories or possessions in order that enquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are endeavoring to import or have imported alcoholic beverages into the United States, its territories or possessions in violation of the laws there in force. When such enquiries and examination show a reasonable ground for suspicion, a search of the vessel may be instituted.

(2) If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offense against the laws of the United States, its territories or possessions prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with such laws.

(3) The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States its territories or possessions than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense. In cases, however, in which the liquor is intended to be conveyed to the United States its territories or possessions by a vessel other than the one boarded and searched, it shall be the speed of such other vessel and not the speed of the vessel boarded, which shall determine the distance from the coast at which the right under this article can be exercised.[23]

[23] Identical articles, *mutatis mutandis*, have been incorporated in similar treaties with Norway (43 U. S. Stat. L. 1772), Denmark (43 *ibid.* 1809), Germany (43 *ibid.* 1815), Sweden (43 *ibid.* 1830), Italy (43 *ibid.* 1844), Panama (43 *ibid.* 1875), The Netherlands (44 *ibid.* 2013), Cuba (44 *ibid.* 2395), Spain (44 *ibid.* 2465), France (U. S. Treaty Series, No. 755), Belgium (U. S. Treaty Series, No. 759), Greece (U. S. Treaty Series, No. 772), and Japan (70 Congressional Record 2374). See DICKINSON, "Les traités américains concernant les spiritueux," 7 Rev. de Dr. Int., 3 sér., 371; JESSUP, Territorial Waters, ch. 6; 20 Am. Jour. Int. L. 340.

See The Frances Louise, 1 F. (2d) 1004; The Pictonian, 3 F. (2d) 145; United States v. Ford, 3 F (2d) 643, 10 F. (2d) 339; The Marjorie E. Bachman, 4 F. (2d) 405; The Over the Top, 5 F. (2d) 838; United States v. Henning, 7 F. (2d) 488, 13 F. (2d) 74; United States v. The Sagatind, 8 F. (2d) 788, 11 F. (2d) 673; Ford v. United States, 273 U. S. 593; JESSUP, *op. cit.*, ch. 7; 20 Am. Jour. Int. L. 111.

Article 9 of the Convention of Helsingfors for the Suppression of the Contraband Traffic in Alcoholic Liquors (42 L. of N. T. S. 73, 79), signed Aug. 19, 1925, by Denmark, Esthonia, Finland, Germany, Latvia, Lithuania, Norway, Poland and the

GILLAM v. UNITED STATES

United States. Circuit Court of Appeals, Fourth Circuit. 1928.

27 *Federal Reporter, 2d Series*, 296.

Libel by the United States against the schooner Vinces and cargo. From a decree for libelant (20 F. (2d) 164), Michael Gillam, as master and claimant of said schooner and her cargo, appeals. . . .

[The names of counsel and part of the opinion are omitted.]

Before Waddill and Parker, Circuit Judges, and Soper, District Judge.

PARKER, CIRCUIT JUDGE. This is an appeal from a decree in admiralty assessing penalties of $500 and $73,089 against the British schooner Vinces, and ordering the forfeiture of her cargo, under sections 584 and 594 of the Tariff Act of 1922 (19 USCA §§486 and 498). The libel of information, upon which the decree was entered, alleged that the vessel was bound for the United States with a cargo of intoxicating liquors, claimed by the master, of the value of $73,089, that the master did not have on board a manifest describing the cargo as required by law, and that he failed to produce a manifest when demanded by officers of the Coast Guard. The master filed answer, alleging that he filed it for and on behalf of the Smart Shipping Company, Limited, of Halifax, N. S. He averred that both vessel and cargo were owned by that company, and that the vessel was bound on a voyage from St. Pierre, Miquelon, to Nassau, in the Bahamas. He denied that she was bound for the United States, or that she ever at any time came either within 12 miles or within one hour's sailing distance of the coast of this country.

The facts in the case may be briefly stated:

About 4 o'clock on the afternoon of March 14, 1927, as the Coast Guard cutter Mascoutin was returning from Savannah to Charleston, she sighted the Vinces as that vessel crossed her wake, steaming in the direction of the South Carolina coast. The Mascoutin put about and

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Free City of Danzig, Sweden, and the Union of Socialist Soviet Republics, provides as follows:

"The Contracting Parties undertake to raise no objection to the application by any of them of its laws, within a zone extending to twelve nautical miles from the coast or from the exterior limit of the archipelagoes, to vessels which are obviously engaged in contraband traffic.

"If a vessel suspected of engaging in contraband traffic is discovered in the enlarged zone hereinbefore described, and escapes out of this zone, the authorities of the country exercising control over the zone in question may pursue the vessel beyond such zone into the open sea and exercise the same rights in respect of it as if it had been seized within the zone.

"These stipulations are adopted without prejudice to the attitude taken by each of the Contracting Parties with regard to the legal principles governing territorial and Customs zones."

signaled to the Vinces to stop, but, instead of obeying the signal, the latter vessel turned and stood out to sea at full speed. At this time she was about $7\frac{1}{2}$ miles and within one hour's sailing distance of the shore. The Mascoutin gave chase, and overtook her when she was distant from the shore about $12\frac{3}{4}$ miles. She at first refused to heed the signals of the Mascoutin, but after the latter vessel had fired a number of times, and had finally dropped a solid shot across her bow, she hove to and allowed officers from the Mascoutin to come aboard.

The officers who boarded the Vinces demanded of her master that he produce the ship's papers. He produced a number of papers, including shipping articles, certificate of British registry, license to operate radio receiving equipment, and Canadian customs clearance papers, but no manifest covering the cargo. When a specific demand was made upon him to produce a manifest, he failed to do so, but offered the customs clearance papers as such. The Coast Guard officers thereupon searched the vessel and found that she had on board 1,485 cases of champagne and whisky, 1,451 of which were full, and the others only partly full, and 99 kegs of malt. They thereupon seized the vessel and took her into the port of Charleston, where the libel of information was filed for violation by her master of the provisions of the Tariff Act of 1922, in failing to have and produce a manifest as required by the provisions of that act. Upon appraisal the cargo was valued at $73,089 and the vessel herself at $12,000.

The District Judge found that the Vinces was bound for the United States with her cargo of liquor, and was within 12 miles and within an hour's sailing distance of the shore when she was hailed by the Mascoutin, and we think that these findings are amply supported by the evidence. It appears that she sailed from Halifax, N. S., on February 15, 1927, ostensibly bound for Nassau, but that she never reached Nassau, although the distance was only about 1,500 miles, and the voyage should have been made in 7 or 8 days. That Nassau was only a pretended destination, appears from the fact that shortly after leaving Halifax, and while at sea, she transferred her cargo of liquor to another vessel, whose name and the name of whose master the master of the Vinces claimed that he was unable to remember. On March 9th, nearly a month after her departure from Halifax, she was seen by the revenue cutter Shaw a little north of the latitude of Cape Hatteras and approximately 120 miles westward of the course from Halifax to Nassau, engaged in taking on a cargo of liquor from the British schooner Dorothy M. Smart. Even then she did not proceed to Nassau, which port she could have reached in less than 5 days; but, on the contrary, 5 days later, on the morning of March 14th, she was seen hovering near the South Carolina coast, and that afternoon, when first seen by the Mascoutin, she was steaming directly for the shore.

The master of the Vinces strenuously denied that he was bound for the United States, that he was within an hour's sailing distance of the shore, or that he was within the 12-mile limit. The trial judge, however, listened to much testimony on these questions, and, as he saw and heard the witnesses, we would not be justified in disturbing his findings, unless satisfied that he misapprehended the evidence or went against its clear weight. Virginia Shipbuilding Corporation v. U. S. (C. C. A. 4th) 22 F. (2d) 38, 51. We are not so satisfied, but, on the contrary, are convinced from a careful study of the evidence that his findings were correct. This leaves for consideration only the questions of law raised by the appeal. These relate (1) to the validity of the seizure; (2) to the right to assess penalties against the vessel; and (3) to the right to decree the forfeiture of the cargo. We shall consider these in order.

1. The Validity of the Seizure. On this question, the contention in behalf of the vessel is (1) that, as she was admittedly beyond the 3-mile limit at all times, she had not committed a crime within the territorial limits of the United States, and was therefore not subject to seizure; and (2) that under the Treaty with Great Britain of May 23, 1924, 43 Stat. 1761, seizure is authorized only when it appears that the vessel is within one hour's sailing distance of shore and has committted or is attempting to commit an offense against the laws of the United States, which prohibit the importation of alcoholic beverages. No point is made that the vessel was actually overhauled and the seizure actually made beyond the hour's sailing distance and beyond the 12-mile limit, if she was within these limits when signaled; and we think it is clear, under the "hot pursuit" doctrine, that if the right of seizure existed at the time the vessel was signaled, the right was not lost because she had succeeded in getting farther from shore in her attempt to run away. Hudson v. Guestier, 6 Cranch, 281, 3 L. Ed. 224; Ship North v. King, 37 Can. Sup. Ct. 385, 3 Ann. Cas. 806; Jurisdiction at the Maritime Frontier, by Prof. Dickinson, Harvard Law Review, Nov., 1926, and citations in notes 80 and 81.[24]

While it is true, as contended, that the vessel never came within the 3-mile limit of the territorial waters of the United States, we think that, as she was bound for the United States with an unmanifested cargo and came within 12 miles, or 4 marine leagues, of the coast, her seizure was justified under the revenue statutes of the United States, and that these statutes constitute a valid exercise of the sovereign power of the government. Section 431 of the Tariff Act of 1922 provides that the master of every vessel arriving in the United States shall have on board a manifest, in a form prescribed by the Secretary of the Treasury, setting forth among other things a description of the merchandise on board and the names of the persons to whom it is consigned. USCA tit. 19,

[24] See King v. The Ship North, *infra*, 509.

§241. Section 581 authorizes officers of the Coast Guard to board any vessel within 4 leagues of the coast of the United States to examine the manifest, and to inspect, search, and examine the vessel, etc., and, if it appears that any breach or violation of the laws of the United States has been committed whereby the vessel or its cargo is liable to forfeiture, to seize same. USCA tit. 19, §481. Section 583 requires that the master of every vessel "bound to a port or place" in the United States shall deliver to the officer of the Customs or Coast Guard who shall first demand it of him the original and one copy of the manifest. USCA tit. 19, §485. And it is clear that the duty of production under this section is coextensive with the authority to inspect under section 581 and extends 4 leagues from the coast. The Pictonian (C. C. A. 2d) 20 F. (2d) 353, 354. Section 584 provides a penalty of $500 for failure to produce the manifest to the officer demanding same, and, if any goods are not included or described in the manifest, a penalty equal to the value of such goods, with other provisions as to forfeiture of cargo which are hereafter considered. USCA tit. 19, §486. And finally section 594 provides that, whenever a vessel or its owner or master has become subject to a penalty for violation of the customs revenue laws of the United States, it "shall be held for the payment of such penalty and may be seized and proceeded against summarily by libel to recover the same." USCA tit. 19, §498. In view of these provisions, there can be no doubt that the seizure of the vessel was authorized by the statutes upon which the government relies. Maul v. U. S., 274 U. S. 501, 47 S. Ct. 735, 71 L. Ed. 1171; The Squanto (C. C. A. 2d) 13 F. (2d) 548; Arch v. U. S. (C. C. A. 5th) 13 F. (2d) 382; The Henry L. Marshall (C. C. A. 2d) 292 F. 486; *Id.* (D. C.) 286 F. 260, *certiorari* denied 263 U. S. 712, 44 S. Ct. 38, 68 L. Ed. 519; U. S. v. Bengochea (C. C. A. 5th) 279 F. 537; The Mistinguette (D. C.) 14 F. (2d) 753; The Pesaquid (D. C.) 11 F. (2d) 308.

We think it equally clear that these statutes are valid, notwithstanding the fact that the territorial boundaries of the United States extend only to the 3-mile limit. Such provisions have been a part of every tariff act passed by Congress beginning with the statute of 1790 (1 Stat. 145) which introduced the 4-league limit (section 31) of the British hovering statutes. While in effect an assertion of extraterritorial jurisdiction, they are justified on the ground that they are necessary to territorial security and the proper enforcement of the laws of the country. Church v. Hubbart, 2 Cranch, 187, 235, 236, 2 L. Ed. 249; The Apollon, 9 Wheat. 362, 371, 6 L. Ed. 111; Manchester v. Mass., 139 U. S. 240, 268, 11 S. Ct. 559, 35 L. Ed. 159; The Cherie (C. C. A. 1st) 13 F. (2d) 992; Arch v. U. S., *supra;* Dickinson on Jurisdiction at the Maritime Frontier, *supra.*

What was said by Chief Justice Marshall in discussing the exercise of extraterritorial jurisdiction in the leading case of Church v. Hubbart, *supra*, is pertinent here. Said he:

"The authority of a nation within its own territory is absolute and exclusive. . . . But its power to secure itself from injury, may certainly be exercised beyond the limits of its territory. Upon this principle the right of a belligerent to search a neutral vessel on the high seas for contraband of war, is universally admitted, because the belligerent has a right to prevent the injury done to himself by the assistance intended for his enemy; so, too, a nation has a right to prohibit any commerce with its colonies. Any attempt to violate the laws made to protect this right, is an injury to itself which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same at all times and in all situations. If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violations, they will be submitted to."

And we do not think that the right within the 12-mile limit to seize and proceed against vessels bound for the United States, for violation of the provisions of its revenue laws, has been limited in any way by the provisions of the Treaty with Great Britain of 1924 (43 Stat. 1761). The purpose of that treaty, so far as the question here is concerned, was to secure the right to search and arrest ships from which intoxicating liquors are sold just beyond the limits of territorial jurisdiction, not to interfere with the pre-existing right to board and arrest ships bound for the United States which have failed to comply with the provisions of its tariff laws. From the correspondence attending the negotiation of the treaty, this clearly appears. In the communication of the Secretary of State to the British *charge d'affaires ad interim*, under date of July 19, 1923, there occurs the following passage:

"In this connection, it must be emphasized that the proposed agreement would not interfere with British vessels engaged in legitimate commerce and bound for American ports. Such vessels will necessarily come, not only within 12 miles, but within 3 miles, of the American coast, and will hence in any event be subject to examination by American authorities, and will, of course, comply with the applicable laws of the United States. The proposed special agreement would bear only upon those vessels which come within 12 miles, but hover off the 3-mile limit, for the purpose of aiding in the smuggling of intoxicating liquor, or other prohibited articles, into the territory of the United States."

And in the reply to this communication under date of September 17, 1923, this purpose is recognized in the following statement by the charge d'affaires of the British government, *viz:*

"The object of the United States government in making these proposals is to secure the right to search and arrest ships from which spirituous liquors are sold just outside the present limit of territorial jurisdiction."

In the recent case of Ford v. U. S., 273 U. S. 593, 609, 47 S. Ct. 531, 536 (71 L. Ed. 793), construing the treaty, Chief Justice Taft said:

"The treaty indicates a considerate purpose on the part of Great Britain to discourage her merchant ships from taking part in the illicit importation of liquor into the United States, and the further purpose of securing without objection or seizure the transportation on her vessels, through the waters and in ports of the United States, of sealed sea stores and sealed cargoes of liquor for delivery at other destinations than the United States. The counter consideration moving to the United States is the enlargement and a definite fixing of the zone of legitimate seizure of hovering British vessels seeking to defeat the laws against importation of liquor into this country from the sea. The treaty did not change the territorial jurisdiction of the United States to try offenses against its importation laws. That remained exactly as it was."

In this case, moreover, it appears that, when signaled by the Mascoutin, the Vinces was as a matter of fact within an hour's sailing distance of the shore and was bound for the United States, and there was "reasonable cause for belief" that she was "committing or attempting to commit an offense against the laws of the United States . . . prohibiting the importation of alcoholic beverages." The seizure was therefore expressly authorized by the treaty. It is true that the treaty provides that the vessel may be seized and taken into a port of the United States for adjudication in accordance with "such" laws (*i. e.*, laws prohibiting the importation of alcoholic beverages), and that the decree in this case was rendered not under the National Prohibition Act (27 USCA), which prohibits importation, but under the Tariff Act. But there is nothing in the treaty which limits the right of the United States to proceed against a vessel so seized for violation of its tariff laws, where such violations exist. See Ford v. U. S., 273 U. S. 593, 611, 47 S. Ct. 531, 71 L. Ed. 793. And the law is well settled that where the acts complained of constitute violations of the revenue laws, the government may proceed thereunder, even though they also constitute violations of the National Prohibition Act. . . .

[In an omitted part of the opinion the court considered and sustained the assessment of penalties against the vessel and the forfeiture of the cargo.]

Contention is made that the order directing the destruction of the cargo of liquor was not authorized. This is not a question which the vessel or the owner of the cargo can raise. If the cargo was properly forfeited, it is no concern of the vessel or the cargo owner what becomes of it.

There was no error, and the decree of the District Court is accordingly affirmed.[25]

ROSE v. HIMELY

United States. Supreme Court. 1808.

4 *Cranch's Reports* 241.

This was an appeal from the sentence of the circuit court for the district of South Carolina, which reversed that of the district judge, who awarded restitution, to Rose the libellant, of certain goods, part of the cargo of the American schooner Sarah.

This vessel after trading with the brigands, or rebels of St. Domingo, at several of their ports, sailed from thence, with a cargo purchased there, for the United States; and had proceeded more than ten leagues from the coast of St. Domingo, when she was arrested by a French privateer, on the 23d of February, 1804, carried into the Spanish port of Barracoa, in the island of Cuba; and there, with her cargo sold by the captors, on the 18th of March, 1804, before condemnation, but under authority, as it was said, of a person who styled himself agent of the government of St. Domingo, at St. Jago de Cuba. The greater part of the cargo was purchased by —— Colt, the master of an American vessel called the Example, into which vessel the goods were clandestinely transferred from the Sarah, in the night time, and brought into the port of Charleston, in South Carolina, where they were followed by Rose, the supercargo of the Sarah, who filed a libel against them, in behalf of the former owners, complaining of the unlawful seizure on the high seas, and praying for restoration of the goods: whereupon process was issued, and the goods were arrested by the marshal, on the 4th of May, 1804. No steps appear to have been taken by the French captors, towards obtaining a condemnation of the vessel, until time enough had elapsed for them to receive information of the proceedings against the goods in this country. The forms of adjudication were begun in the tribunal of the first instance, at Santo Domingo, in July, 1804, and the condemnation was had before the middle of that month.

This condemnation purports to be made conformably to the first article of the *arrete* of the captain general (Ferrand) of the 1st of March, 1804, which was issued six days subsequent to the seizure of the vessel.

[25] See United States v. Bengochea, 279 Fed. 537; The Mistinguette, 27 F. (2d) 738; United States v. 63 Kegs of Malt, 27 F. (2d) 741. *Cf.* The Sylvia II, 28 F. (2d) 215.

See DICKINSON "Jurisdiction at the Maritime Frontier," 40 Harv. L. Rev. 1; GREY, "Territorial Waters," 42 L. Quart. Rev. 350; MASTERSON, Jurisdiction in Marginal Seas.

This article was as follows; "The port of Santo Domingo is the only one of the colony of Santo Domingo, open to French and foreign commerce; consequently every vessel anchored in the bays, coves and landing places of the coast occupied by the revolters, those destined for the ports in their possession, and coming out with or without cargoes; and generally every vessel sailing within the territorial extent of the island, (except between cape Raphael, and the bay of Ocoa,) found at a less distance than two leagues from the coast, shall be arrested by the vessels of the state, and by privateers bearing our letters of marque, who shall conduct them, as much as possible, into the port of Santo Domingo, that the confiscation of the said vessels and cargoes may be pronounced."

On the 6th of September, 1806, no sentence of condemnation having been produced in evidence, the judge of the district court decreed restitution of the property to the libellant, from which sentence the other party appealed to the circuit court, and there produced the sentence of condemnation, by the tribunal of the first instance, at Santo Domingo. The circuit court reversed the sentence of the district court, and dismissed the libel. From this sentence, the libellant appealed to this court.

[The arguments of counsel and part of the opinion are omitted.]

MARSHALL, CH. J. delivered the opinion of the court.

This is a claim for a cargo of coffee, &c. which, after being shipped from a port in Santo Domingo, in possession of the brigands, was captured by a French privateer, and carried into Barracoa, a small port in the island of Cuba, where it was sold by the captor. The cargo, having been brought by the purchaser into the state of South Carolina, was libelled in the court of admiralty, by the original American owner. The purchaser defends his title by a sentence of condemnation pronounced by a tribunal sitting in Santo Domingo, after the property had been libelled in the court of this country; and by an order of sale made by a person styling himself delegate of the French government of Santo Domingo at St. Jago de Cuba.

The great question to be decided is,

Was this sentence pronounced by a court of competent jurisdiction?

. . .

[In an omitted part of the opinion Chief Justice Marshall examined the jurisdiction of the French court and concluded that it was sitting as an instance court to apply municipal regulations.]

The Sarah was captured more than ten leagues from the coast of St. Domingo, was never carried within the jurisdiction of the tribunal of that colony, was sold at Barracoa, in the island of Cuba, and afterwards condemned as prize under the *arrete* of General Ferrand, which has been stated.

If the court of St. Domingo had jurisdiction of the case, its sentence is conclusive. If it had no jurisdiction, the proceedings are *coram non judice*, and must be disregarded.

Of its own jurisdiction, so far as depends on municipal rules, the court of a foreign nation must judge, and its decision must be respected. But if it exercises a jurisdiction which, according to the law of nations, its sovereign could not confer, however available its sentences may be within the dominions of the prince from whom the authority is derived, they are not regarded by foreign courts. This distinction is taken upon this principle, that the law of nations is the law of all tribunals in the society of nations, and is supposed to be equally understood by all.

Thus the sentence of a court sitting in a neutral territory, and instituted by a belligerent, has been declared not to change the property it professed to condemn; and thus the question whether a prize court sitting in the country of the captor could condemn property lying in a neutral port, has been fully examined, and although the jurisdiction of the court in such case was admitted, yet no doubt appears to have been entertained of the propriety of examining the question, and deciding it according to the practice of nations.

Since courts, who are required to decide whether the condemnation of a vessel and cargo by a foreign tribunal has effected a change of property, may inquire whether the sentence was pronounced by a court which, according to the principles of national law, could have jurisdiction over the subject; this court must inquire whether, in conformity with that law, the tribunal sitting at St. Domingo to punish violations of the municipal laws enacted by its sovereign, could take jurisdiction of a vessel seized on the high seas, for infracting those laws, and carried into a foreign port.

In prosecuting this inquiry, the first question which presents itself to the mind is, what act gives an inchoate jurisdiction to a court?

It cannot be the offence itself. It is repugnant to every idea of a proceeding *in rem*, to act against a thing which is not in the power of the sovereign under whose authority the court proceeds; and no nation will admit that its property should be absolutely changed, while remaining in its own possession, by a sentence which is entirely *ex parte*. Those on board a vessel are supposed to represent all who are interested in it, and if placed in a situation which requires them to take notice of any proceedings against a vessel and cargo, and enables them to assert the rights of the interested, the cause is considered as being properly heard, and all concerned are parties to it. But the owners of vessels navigating the high seas or lying in port, cannot take notice of any proceedings which may be instituted against those vessels in foreign countries; and consequently, such proceedings would be entirely *ex parte*, and a sentence founded on them never would be, and never ought to be, regarded.

The offence then alleged to have been committed by The Sarah, could not be cognizable by the court of St. Domingo, until some other act was performed which should make the owners of the vessel and cargo parties

to the proceedings instituted against them, and should place them within the legitimate power of the sovereign, for the infraction of whose laws they were to be confiscated. There must then be a seizure, in order to vest the possession of the thing in the offended sovereign, and enable his courts to proceed against it. This seizure, if made either by a civil officer, or a cruiser acting under the authority of the sovereign, vests the possession in him, and enables him to inquire, by his tribunals constituted for the purpose, into the allegations made against, and in favour of the offending vessel. Those interested in the property which has been seized are considered as parties to this inquiry, and all nations admit that the sentence, whether correct or otherwise, is conclusive.

Will a seizure *de facto*, made without the territorial dominion of the sovereign under cover of whose authority it is made, give a court jurisdiction of a thing never brought within the dominions of that sovereign?

This is a question upon which considerable difficulty has been felt, and on which some contrariety of opinion exists. It has been doubted whether proceedings, denominated judicial, are, in such a case, merely irregular, or are to be considered as absolutely void, being *coram non judice*. If merely irregular, the courts of the country pronouncing the sentence were the exclusive judges of that irregularity, and their decision binds the world; if *coram non judice*, the sentence is as if not pronounced.

It is conceded that the legislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens. It is not easy to conceive a power to execute a municipal law, or to enforce obedience to that law without the circle in which that law operates. A power to seize for the infraction of a law is derived from the sovereign, and must be exercised, it would seem, within those limits which circumscribe the sovereign power. The rights of war may be exercised on the high seas, because war is carried on upon the high seas; but the pacific rights of sovereignty must be exercised within the territory of the sovereign.

If these propositions be true, a seizure of a person not a subject, or of a vessel not belonging to a subject, made on the high seas, for the breach of a municipal regulation, is an act which the sovereign cannot authorise. The person who makes this seizure, then, makes it on a pretext which, if true, will not justify the act, and is a marine trespasser. To a majority of the court it seems to follow, that such a seizure is totally invalid; that the possession, acquired by this unlawful act, is his own possession, not that of the sovereign; and that such possession confers no jurisdiction on the court of the country to which the captor belongs.

This having been the fact in the case of The Sarah, and neither the vessel, nor the captain, supercargo, nor crew, having ever been brought within the jurisdiction of the court, or within the dominion of the sovereign whose laws were infracted, the jurisdiction of the court over the

subject of its sentence never attached, the proceedings were entirely *ex parte*, and the sentence is not to be regarded. . . .

[In an omitted part of the opinion Chief Justice Marshall discussed and distinguished The Helena, 4 C. Rob. 3, *supra*, 82.]

The sentence of condemnation being considered as null and invalid, the property is unchanged, and therefore ought to be recovered by the libellants, in the court below. But those libellants ought to account with the defendants for the freight, insurance, and duties on importation, and for such other expenses as would have been properly chargeable on themselves as importers; and each party is to bear his own costs.

The sentence of the circuit court is to be reversed, and also the sentence of the district court, so far as it contravenes this opinion, and the cause is to be remanded to the circuit court for the district of South Carolina, for a final decision thereon.

Livingston, J. Without expressing an opinion on the invalidity of a seizure on the high seas under a municipal regulation, if the property be immediately carried into a port of the country to which the capturing vessel belongs, and there regularly proceeded against, I concur in the judgment just delivered, because The Sarah and her cargo were condemned by a French tribunal sitting at St. Domingo, without having been carried into that, or any other French port, and while lying in the port of Charleston, South Carolina, whither they had been carried, by and with the consent of the captor.

Cushing and Chase, Justices, concurred in opinion with Judge Livingston. [26]

[Justice Johnson dissented on the ground that the court was incompetent to question the validity of a seizure made by French authority, whether made upon the high seas or elsewhere, and that the capture and continued possession of ship and cargo were enough to give the French tribunal jurisdiction to decree a forfeiture. The dissenting opinion is omitted.]

Hudson and Smith v. Guestier

United States. Supreme Court. 1810.

6 *Cranch's Reports* 281.

Error to the circuit court for the district of Maryland; in an action of trover for coffee and logwood, the cargo of the brig Sea Flower, which had been captured by the French, for trading to the revolted ports of the island of Hispaniola, contrary to the ordinances of France, and carried into the Spanish port of Baracoa, but condemned by a French

[26] See Wheelwright v. Depeyster, 1 Johns. (N. Y.) 471.

tribunal at Guadaloupe, and sold for the benefit of the captors, and purchased by the defendant Guestier.

Upon the former trial of this case in the court below, a statement of certain facts was agreed to by the counsel for the parties, and read in evidence to the jury, who then found a verdict for the plaintiffs. One of the facts so admitted, and which was then deemed wholly immaterial by both parties, was, that the Sea Flower was captured within one league of the coast of the island of Hispaniola. Upon this fact, which was the only fact in which this case differed from that of Rose v. Himely, (*ante*, vol. 4. p. 241.) the supreme court reversed the first judgment of the court below, (see *ante*, vol. 4. p. 293.) which had been for the plaintiffs, and remanded the cause for further proceedings.

Upon the second trial in the court below, the verdict and judgment were for the defendant.

The plaintiffs took a bill of exceptions to the opinion of the court, who directed the jury "that if they find from the evidence produced, that the brig Sea Flower had traded with the insurgents at Port au Prince, in the island of St. Domingo, and had there purchased a cargo of coffee and logwood, and, having cleared at the said port, and coming from the same, was captured by a French privateer, duly commissioned as such, within six leagues of the island of St. Heneague, a dependency of St. Domingo, for a breach of said municipal regulations, that in such case the capture of the Sea Flower was legal, although such capture was made at the distance of six leagues from the said island of St. Domingo, or St. Heneague, its dependency, and beyond the territorial limits or jurisdiction of said island, and that the said capture, possession, subsequent condemnation and sale of the said Sea Flower, with her cargo, devested the said cargo out of the plaintiffs, and the property therein became vested in the purchaser."

[The arguments of counsel are omitted.]

Livingston, J. In this case, when here before, I dissented from the opinion of the court, because I did not think that the condemnation of a French court at Guadaloupe, of a vessel and cargo lying in the port of another nation, had changed the property: but this ground, which was the only one taken by two of the judges in this case, and by three, in that of Himely v. Rose, and was principally and almost solely relied on at bar, was overruled by a majority of the court, as will appear by examining those two cases, which were decided the same day.[27] I am not, therefore, in determining this cause, as it now comes up, at liberty to proceed upon it; and such must have been the opinion of Judge Chase, on the trial of it, who was one of the court who had proceeded on that principle.

[27] Hudson v. Guestier, 4 Cr. 293.

Considering it, then, as settled that the French tribunal had jurisdiction of property seized under a municipal regulation, within the territorial jurisdiction of the government of St. Domingo, it only remains for me to say whether it will make any difference if, as now appears to have been the case, the vessel were taken on the high seas, or more than two leagues from the coast. If the *res* can be proceeded against when not in the possession or under the control of the court, I am not able to perceive how it can be material whether the capture were made within or beyond the jurisdictional limits of France; or in the exercise of a belligerent or municipal right. By a seizure on the high seas, she interfered with the jurisdiction of no other nation, the authority of each being there concurrent. It would seem also that, if jurisdiction be at all permitted where the thing is elsewhere, the court exercising it must necessarily decide, and that ultimately, or subject only to the review of a superior tribunal of its own state, whether, in the particular case, she had jurisdiction, if any objection be made to it. And, although it be now stated, as a reason why we should examine whether a jurisdiction was rightfully exercised over the Sea Flower, that she was captured more than two leagues at sea, who can say that this very allegation, if it had been essential, may not have been urged before the French court, and the fact decided in the negative? And, if so, why should not its decision be as conclusive on this as on any other point? The judge must have had a right to dispose of every question which was made on behalf of the owner of the property, whether it related to his own jurisdiction, or arose out of the law of nations, or out of the French decrees, or in any other way: and, even if the reasons of his judgment should not appear satisfactory, it would be no reason for a foreign court to review his proceedings, or not to consider his sentence as conclusive on the property.

Believing, therefore, that this property was changed by its condemnation at Guadaloupe, the original owner can have no right to pursue it in the hands of any vendee under that sentence, and the judgment below must, therefore, be affirmed.

The other judges (except the Chief Justice) concurred.

Marshall, Ch. J. observed, that he had supposed that the former opinion delivered in these cases upon this point had been concurred in by four judges. But in this he was mistaken.

The opinion was concurred in by one judge. He was still of opinion that the construction then given was correct.

He understood the expression *en sortant*, in the *arrete*, as confining the case of vessels coming out, to vessels taken in the act of coming out. If it included vessels captured on the return voyage, he should concur in the opinion now delivered.

However, the principle of that case (Rose v. Himely) is now overruled.

Judgment affirmed.[28]

His Majesty The King v. The Ship "North"

Canada. Exchequer Court, British Columbia Admiralty District. 1905.

11 *Exchequer Reports of Canada* 141.

[The case is stated in the opinion. The arguments of counsel and part of the opinion are omitted.]

Martin, L. J. This case raises important questions relating to the fisheries of this province in general and to the extensive and valuable halibut banks of Vancouver Island in particular.

There is, and can be from the evidence, very little dispute about the facts, which are clear, and I find as follows:—That on the morning of the 8th of July last the foreign schooner North alleged in its statement of defence to be "navigated according to the laws of the United States of America," was hove-to and unlawfully engaged in halibut fishing in Quatsino Sound, Vancouver Island, within the three-mile limit, having all its four fishing boats, dories, out for the purpose; that on observing the approach in obvious pursuit, within the three-mile limit and approximately four or five miles off, of the Canadian Fisheries Protection Cruiser Kestrel, she picked up two of her dories and stood out to sea; that the Kestrel continued in pursuit at her highest speed in the attempt to intercept the North; that in the course of that pursuit the Kestrel observed another dory close to and pulling hard from the land towards the schooner, which dory the Kestrel, after slightly deviating from her course, picked up and seized within the three-mile limit, and, after fixing her position by cross-bearings, continued her pursuit of the North, which she overhauled in about ten or twelve minutes and seized, with the two first-mentioned dories about one and three-quarter miles outside the three-mile limit. There were freshly caught halibut lying on the North's deck at the time of seizure, which in all the circumstances must be held to have been caught within the limit. There were also several tons of halibut in her hold, but it cannot be said where they were taken. The

[28] See Cheriot v. Foussat, 3 Bin. (Pa.) 220. "It appears to be settled in this country, that the sentence of a competent Court, proceeding *in rem*, is conclusive with respect to the thing itself, and operates as an absolute change of the property. By such sentence, the right of the former owner is lost, and a complete title given to the person who claims under the decree. No Court of co-ordinate jurisdiction can examine the sentence. The question, therefore, respecting its conformity to general or municipal law, can never arise, for no co-ordinate tribunal is capable of making the inquiry. The decision, in the case of Hudson & Smith, v. Guestier, reported in 6th Cranch, is considered as fully establishing this principle." Marshall, C. J., delivering the opinion in Williams v. Armroyd, 7 Cr. 423, 432.

schooner and the three dories were towed to Winter Harbour, Quatsino Sound, where the fourth dory was afterwards taken when it came in. . . .

So far as the two dories taken within the limit and their tackle, gear and equipment are concerned, it was not argued that they were improperly seized, but as to the schooner and the other dories, it is contended on several grounds that the seizure thereof cannot be justified.

The first is, that no seizure can be made on the high seas for an offence committed within the three-mile limit, which is merely an infringement of municipal or local laws or regulations and not a crime in the proper sense of that word, in which case it is admitted a seizure may be made where the pursuit is continuous. Here the pursuit was begun within the three-mile limit and was clearly continuous, which in fact was not nor could be seriously disputed, for it would be unreasonable to contend that its continuity was broken by stopping to pick up within the limit one of the best evidences of the commission of the offence, as it would be in the case of a constable in pursuit of a thief stopping to pick up the stolen article which the pursued threw away in the course of his flight. Indeed the inference is stronger and the act more advisable in the case of a poaching vessel with her boats out in the ordinary course of fishing operations, because the boats are manned by members of her crew who are a living and active part and parcel of her engaged in breaking the law. See on the wide meaning of "fishing" and "preparing to fish," the case of The Queen v. The Ship Frederick Gerring, Jr. [5 Ex. C. R. 164; 27 S. C. R. 271]; the cases reported and cited in Stockton's Admiralty Digest (1894) on pp. 200 and 598–600; those on the Behring Sea Seal Fishery in this court; and on the same subject in the United States Court of Admiralty, The James G. Swan [50 Fed. 108]; The Kodiak [53 Fed. 126]; and The Alexander [60 Fed. 914].

As regards the rights of merchant vessels in foreign ports, it was said in the leading case of The Queen v. Anderson [L. R. 1 C. C. 161, 166], that "when vessels go into a foreign port they must respect the laws of that nation to which the port belongs," though they may there be still subject to the laws of their own country as though they were on the high seas. And see The Queen v. Carr [10 Q. B. D. 76]; Marshall v. Murgatroyd [L. R. 6 Q. B. 31].

It has likewise been repeatedly laid down by the Supreme Court of the United States, adopting the language of Chief Justice Marshall in the celebrated case of The Exchange [7 Cr. 116, 144], that:—

"When merchant vessels enter (foreign ports) for the purpose of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such . . . merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country."

Followed in United States v. Diekelman [92 U. S. 520], and Wildenhus's Case [120 U. S. 1].

There is no case in English or Canadian reports on this first point, but it has been dealt with by American courts. Church v. Hubbart [2 Cr. 187], is a case where an American ship was seized by the Portuguese Government outside of the three-mile limit for a violation of the prohibition of the Crown of Portugal against all trade by foreigners with its colonies, or hovering off their coast for that purpose. (The learned Judge here quoted the language of Chief Justice Marshall at pp. 234–5–6.)

In Rose v. Himely [4 Cr. 240], the majority of the judges of the same court gave a decision which, it is true, cannot be reconciled with that just cited, but I draw attention to the fact that three of the judges, Livingston, Cushing and Chase, JJ., did not express themselves on the present point, and Mr. Justice Johnson dissented. But the matter must, in my opinion, be considered as settled by the subsequent case of Hudson v. Guestier [6 Cr. 283], decided by the same court, wherein Rose v. Himely is overruled, all the judges concurring, with the exception of Chief Justice Marshall, who gives an explanation (p. 285) of his misapprehension in regard to his former view being shared by certain of his colleagues. In that case it was held that a ship may be seized on the high seas for a breach of municipal regulations committed within the territorial jurisdiction. The court said:

"If the *res* can be proceeded against, when not in the possession or under the control of the court, I am not able to perceive, how it can be material, whether the capture was made within or beyond the jurisdictional limits of France, or in the exercise of a belligerent or municipal right. By a seizure on the high seas, she (France) interfered with the jurisdiction of no other nation, the authority of each being there concurrent."

There the capture was more than two leagues at sea, and the ship was condemned for trading to the revolted parts of the Island of Hispaniola contrary to the ordinances of France.

The Supreme Court of Louisiana in Cucullu v. Louisiana Insurance Co. [16 Am. Dec. 199], followed the principle laid down in Church v. Hubbart, *supra*.

And, *a fortiori*, the right would exist after the territorial waters had been actually entered and violated.

This view is, as would be expected, to be found in the text books on the subject, and I proceed to give extracts from the latest of them. [The reporter omits the extracts. The learned judge quoted Woolsey, Taylor, Hall, and Phillimore. See Reporter's Note, 11 Ex. C. 141, 146n.]

The case of Church v. Hubbart is referred to in the American note to Phillimore's International Law, but the editor does not seem to have been aware of the later and broader decision in Hudson v. Guestier. . . .

Over the waters within the three-mile limit the chief heads of jurisdiction generally asserted by nations are four:—(1) The prohibition of hostilities; (2) the enforcement of quarantine; (3) the prevention of smuggling; and (4) the policing of fisheries; and this last, involving the assertion and protection of the exclusive right of its subjects to fish within said limit, is certainly not the least important duty of a State. So far as this continent is concerned, it is of much consequence in view of the great value of the fisheries; and this "police jurisdiction" by the two nations chiefly concerned (Canada and the United States) has been acquiesced in for a long period, and is admitted, so it is unnecessary to discuss it. As regards the North Atlantic fishery, its history is given by Wharton in his International Law Digest (1886) vol. 3, pars. 300–1; and see Hall's International Law, *supra*, 99 and 154 on British American fisheries generally. Though poaching on the fisheries of a friendly nation is not essentially a crime, yet, as was said by the Supreme Court of Canada in The Queen v. The Frederick Gerring, Jr., *supra*, it is a "nefarious business" and one which "so far as Canadian waters are concerned has been prohibited and criminalized," and the cases hereinbefore cited shew that the governments of Canada and the United States have endeavoured rigidly to suppress the depredation of their waters by foreigners.

It follows from all the foregoing that the seizure herein was lawful.

. . .

The judgment of the court is that the schooner North, her boats, tackle, rigging, apparel, furniture, stores and cargo are condemned and declared forfeited to His Majesty.

Judgment accordingly.[29]

SECTION 3. AUTHORITY OVER SLAVE SHIPS AND PIRATES

Amedie, Johnson Master

Great Britain. The Court of the Lords Commissioners of Appeals in Prize and Colonial Cases. 1810.

1 *Acton's Reports* 240.

In this case an appeal was prosecuted from the sentence of the Vice-Admiralty Court of Tortola, condemning this American ship and a cargo of slaves, as engaged in an illegal trade, from Bonny on the coast of Africa to Matanzas in the island of Cuba.

[29] See The Vinces, 20 F. (2d) 164; Gillam v. United States, 27 F. (2d) 296, 299, *supra*, 496, 498; Convention of Helsingfors, Aug. 19, 1925, art. 9, 42 L. of N. T. S. 73, 79, n. 23, *supra*, 495; 26 Mich. L. Rev. 551. *Cf.* The James Hamilton Lewis, U. S. For. Rel. (1902) App. I, 454; The C. H. White, *ibid.*, 459. *Cf.* also The Itata, Moore, Int. Arb., III, 3067. And see Hyde, I, §236; Jessup, Territorial Waters, 106; Piggott, Nationality, II, 35; Westlake, 2d ed., I, 177; 18 Am. Jour. Int. L. 229, 231.

[The arguments of counsel are omitted.]

Sir Wm. Grant. In the case of the Amedie it must be considered on the evidence produced to the Court, and from the situation of this vessel at the time of capture, that she was employed in carrying slaves from the coast of Africa to a Spanish colony. We are of opinion this appears to have been the original design and purpose of the voyage, notwithstanding the pretence set up to veil the real intention of the proprietor. The American claimant however complains of the injury and interruption he has sustained in carrying on his usual and lawful trade, that of importing slaves for the purpose of sale, and calls upon the prize court to redress the grievance and repair the damage he has sustained by the capture and unjust detention of this vessel. On the different occasions when cases of this description formerly came before the Court, the slave trade was liable to considerations very different from those which now belong to it. So far as respected the transportation of slaves to the colonies of foreign nations, this trade had been prohibited by the laws of America only; this country had taken no notice of that prohibition; our law sanctioned the trade which it was the policy of the American law first to restrict and finally to abolish. It appeared to us therefore difficult to consider the prohibitory law of America in any other light than as one of those municipal regulations of a foreign state of which this Court could not take any cognizance, and of course could not be called upon to enforce; nor could it possibly bar a party in a court of prize. But by the alteration which has since taken place in our law, the question stands now upon very different grounds. We do now, and did at the time of this capture, take an interest in preventing that traffic in which this ship was engaged. The slave trade has since been totally abolished in this country, and our Legislature has declared the African slave trade is contrary to the principles of justice and humanity. Whatever opinion, as private individuals, we before might have entertained upon the nature of this trade, no court of justice could with propriety have assumed such a position as the basis of any of its decisions whilst it was permitted by our own laws: But we do now lay down as a principle, that this is a trade which cannot, abstractedly speaking, be said to have a legitimate existence; I say, abstractedly speaking, because we cannot legislate for other countries; nor has this country a right to controul any foreign legislature that may think proper to dissent from this doctrine and give permission to its subjects to prosecute this trade. We cannot, certainly, compel the subjects of other nations to observe any other than the first and generally received principles of universal law. But thus far we are now entitled to act, according to our law, and to hold that *prima facie* the trade is altogether illegal, and thus to throw on a claimant the whole burden of proof, in order to shew that by the particular law of his own country he is entitled

to carry on this traffic. As the case now stands, we think that no claimant can be heard in an application to a court of prize for the restoration of the human beings he carried unjustly to another country for the purpose of disposing of them as slaves. The consequence of making such proof is not now necessary to determine; but where it cannot be made, the party must be considered to have failed in establishing his asserted right. We are of opinion, upon the whole, that persons engaged in such a trade cannot, upon principles of universal law, have a right to be heard upon a claim of this nature in any court. In the present case the claimant does not bring himself within the protection of the law of his own country; he appears to have been acting in direct violation of that law which admits of no right of property such as he claims: Ours is express and satisfactory upon the subject. Where, therefore, there is no right established to carry on this trade, no claim to restitution of this property can be admitted. We are hence of opinion the sentence of the Court below was valid, and ought to be affirmed.

Sentence. Pronounced against the appeal and affirmed the sentence of the Court below, condemning the ship and cargo as lawful prize.[30]

Madrazo v. Willes

Great Britain. Court of King's Bench. 1820.

3 *Barnewall and Alderson* 353.

The declaration stated that the plaintiff was a subject of the king of Spain, and that on the 12th of July, 1817, at Havannah, in the island of Cuba, he was lawfully possessed of a certain brig called, &c., and continued so possessed until the committing of the trespasses after mentioned, to wit, at, &c.; and that the said brig was, to wit, on, &c., lawfully cleared out for a certain voyage in the slave-trade, to wit, from Havannah to the coast of Africa, and back; and that on the 16th of January, 1818, on the high seas, to wit, off Cape St. Paul's, on the coast of Africa, defendant, with force and arms, seized the said brig, together with her stores, &c., and 300 slaves, and also divers goods, &c. on board of the said brig, and kept and detained for a long time, and converted and disposed of the slaves, goods, &c., to his own use; by means whereof the said brig was prevented from further prosecuting the said voyage, and the plaintiff deprived of great gains, which would have accrued from the slaves and goods, and from taking on board other slaves and other goods, and from carrying them to the island of Cuba: plea, not guilty. At the trial at the last London sittings after Michaelmas term,

[30] *Accord:* The Africa, 2 Acton 1; The Nancy, 2 Acton 4; The Anne, 2 Acton 6; The Fortuna, 1 Dods. 81. See also United States v. La Jeune Eugenie, 2 Mason 409, *supra*, 13.

it appeared that the defendant, who was a captain in the royal navy, had, on the 16th of January, 1818, off Cape St. Paul's, unlawfully taken possession of the ship of the plaintiff, a Spanish merchant, which was engaged in the slave-trade on the coast of Africa. The only question which arose was as to the amount of damages. It occurred to the Lord Chief Justice at the trial, that the plaintiff was not entitled to recover the value of the slaves in an English court of justice; and, accordingly, he desired the jury to find their verdict separately for each part of the damage, giving to the defendant liberty to move to reduce the verdict to the smaller sum, in case the Court should agree with him on the point. The jury found a verdict for the plaintiff, damages 21,180*l.*, being for the deterioration of the ship's stores and goods 3000*l.*, and for the supposed profit of the cargo of slaves 18,180*l.* And now,

Jervis moved for a rule *nisi* to reduce the damages to 3000*l.* By the 47 G. 3. c. 36., the slave-trade, and all dealings connected with it, were declared unlawful. It follows, therefore, as a consequence, that no one can be allowed to recover damages in respect of a cargo of slaves. And the 51 G. 3. c. 23. goes still further; for it declares that trade to be contrary to the principles of justice, humanity, and sound policy. Now, it being the duty of English courts of justice to be guided by those principles, no one, whether he be a foreigner or an Englishman, can be permitted there to claim any compensation in respect of such a traffic. . . .

[Part of the argument is omitted.]

Abbott C. J. On further consideration, it appears to me that there is no sufficient ground for reducing this verdict to the smaller sum found by the jury. Considering the very extensive language used in the two acts of parliament to which we have been referred, I had at first thought that it was not competent, even for a foreigner, to come into an English court of justice, and there to recover damages for a loss sustained by him in the prosecution of a trade declared by the British legislature, in such strong language, to be unlawful. It was with that view that I directed the jury to separate the damages in this case; for it occurred to me, that though the plaintiff might not be entitled to recover for the slaves, still, inasmuch as, at all events, the defendant ought to have taken away the slaves promptly, if at all, the subsequent detention of the ship was an injury, for which the plaintiff was entitled to compensation. But I am now satisfied that the words used by the legislature, although large and extensive, can only be taken to be applicable to British subjects. By the 58 G. 3. c. 36. it appears that a treaty had been made with Spain for the prohibition of an important branch of the trade; and that, with regard to the remainder, special provisions had been made, and a special court constituted for the purpose of settling the disputes which might occur. Now that shows most strongly, that but for such a treaty, the trade would have been perfectly legal in a

Spaniard; and the 10th section of that act, by which a certain sum is provided, as a full compensaton for all losses sustained in consequence of the seizure of vessels previously to the ratification of that treaty, seems to me to corroborate most strongly this view of the subject; for it enables the parties sued to plead that clause in bar of the action, which would obviously have been unnecessary, if under the previous acts no action could have been maintained at all. This clause, therefore, seems to me to be a legislative recognition of a foreigner's right of suit. And by the 11th and 12th sections it is provided, that all suits commenced in the Courts of Admiralty shall proceed, if commenced; and that the damages, &c., when recovered, shall be paid to the government of this country. All these clauses, taken together, appear to me to shew, that what occurred to me at *nisi prius* was not a sound exposition of the law. I am therefore of opinion, that the verdict for the larger sum found by the jury is right, and that we ought to refuse this rule.

Bayley J. I do not think that there is sufficient doubt, in this case, to induce us to grant a rule. A British court of justice is always open to the subjects of all countries in amity with us, and they are entitled to compensation for any wrongful act done by a British subject to them. It is no answer to the present action to say, that it would not be maintainable by a British subject; for the only questions are, whether the act of the defendant be wrongful, and what injury the plaintiff has sustained from it? Although the language used by the legislature in the statute referred to, is undoubtedly very strong, yet it can only apply to British subjects, and can only render the slave-trade unlawful if carried on by them: it cannot apply, in any way, to a foreigner. It is true, that if this were a trade contrary to the law of nations, a foreigner could not maintain this action. But it is not; and as a Spaniard cannot be considered as bound by the acts of the British legislature prohibiting this trade, it would be unjust to deprive him of a remedy for the wrong which he has sustained. He had a legal property in the slaves, of which he has, by the defendant's act, been deprived. The 58 G. 3. c. 36. proceeds on this principle; and the provisions referred to by my Lord Chief Justice, seem to me to be conclusive on the subject. I think, therefore, that we ought not to disturb this verdict.

Holroyd J. However much I may regret that any damages can be recoverable for such a subject as this, yet I think we are bound to say that this plaintiff is entitled to them. I agree with the construction which has been put on the 58 G. 3. c. 36.; and I think, that even independently of that act, the action would have been maintainable for the loss of the slaves.

Best J. The statutes which have been referred to, speak in just terms of indignation of the horrible traffic in human beings; but they speak only in the name of the British nation. The declaration of

the British legislature, that the slave-trade is contrary to justice and humanity, cannot affect the subjects of other countries, or prevent them from carrying on this trade out of the limits of the British dominions. The assertion of a right to controul the subjects of other states in this respect, would be inconsistent with that independence which we acknowledge that every foreign government possesses. If a ship be acting contrary to the general law of nations, she is thereby subject to confiscation; but it is impossible to say that the slave-trade is contrary to what may be called the common law of nations. It was, until lately, carried on by all the nations of Europe. A practice so sanctioned can only be rendered illegal by the consent of all the powers. Most of the states of Christendom have now consented to the abolition of the slave-trade, and concurred with us in declaring it to be unjust and inhuman. The subjects of any of these states could not, I think, maintain an action in the courts of this country for any injury happening to them in the prosecution of this trade; but Spain has reserved to herself a right of carrying it on in that part of the world where this transaction occurred. Her subjects could not legally be interrupted in buying slaves in that part of the globe, and have a right to appeal to the justice of this country for any injury sustained by them from such an interruption. These principles are confirmed by the decisions of the Court of Admiralty, and also by a judgment of Sir William Grant, pronounced at the Cock-pit. The cases to which I allude are, the Fortuna, the Donna Marianna, and the Diana, in the Admiralty Court; and the Admedie, before the Privy Council. [Dodson's Ad. Rep. 81, 91, 95.] These cases establish this rule, that ships, which belong to countries that have prohibited the slave-trade, are liable to capture and condemnation, if found employed in such trade; but that the subjects of countries which permit the prosecution of this trade, cannot be interrupted while carrying it on. It is clear, from these authorities, that the slave-trade is not condemned by the general law of nations. The subjects of Spain have only to look to the municipal laws of their own country, and cannot be affected by any laws made by our government. The rule for reducing the damages, in this case, must therefore be refused.

Rule refused.[31]

[31] See The Diana, 1 Dods. 95; Le Louis, 2 Dods. 210; The San Juan Nepomuceno, 1 Hagg. Adm. 265; The Antelope, 10 Wh. 66, *supra*, 20.

On the abolition of the slave trade by treaty and international act in the nineteenth century, see QUENEUIL, De la Traité des Noirs et de l'Esclavage; ch. 1, §2, n. 9, *supra*, 25.

Sir Leoline Jenkins, Opinion on Piracy

Great Britain. A Charge Given at a Session of Admiralty within the Cinque Ports. 1668.

Wynne, Life of Jenkins, Volume I, pages lxxxv, lxxxvi.

Gentlemen of the Jury, . . .

There are some Sorts of Felonies and Offences, which cannot be committed any where else but upon the Sea, within the Jurisdiction of the Admiralty. These I shall insist upon a little more particularly, and the chiefest in this Kind is Piracy.

You are therefore to enquire of all Pirates and Sea-rovers, they are in the Eye of the Law *Hostes humani generis*, Enemies not of one Nation or of one Sort of People only, but of all Mankind. They are outlaw'd, as I may say, by the Laws of all Nations; that is, out of the Protection of all Princes and of all Laws whatsoever. Every Body is commissioned, and is to be armed against them, as against Rebels and Traytors, to subdue and to root them out.[32]

That which is called Robbing upon the Highway, the same being done upon the Water, is called Piracy: Now Robbery, as 'tis distinguished from Thieving or Larceny, implies not only the actual taking away of my Goods, while I am, as we say, in Peace, but also the putting me in Fear, by taking them away by Force and Arms out of my Hands, or

[32] "A pirate is regarded by all nations as a general enemy; he is said to be a '*hostis humani generis*,' and piracy to be a '*delictum contra genus humanum*.' As the open sea is not the territory of any one nation, it is not competent to any one nation to preserve order or remove delinquents on its surface, as it is in the ports, rivers, and lakes of a State. The ship of any nation may therefore lawfully attack and capture a pirate, and may bring it into a port of its country; and the captain and crew might be tried for the crime of piracy in the courts of that country. It is the exterritorial character of the open sea, the consequent absence of all specific obligation of any nation to repress piracy, and the general right of all nations to take part in its prevention, that has led to the maxim of a pirate being an enemy of mankind, and not the peculiar malignity of the offence." Lewis, Foreign Jurisdiction and the Extradition of Criminals, 13.

"Piracy by law of nations, in its jurisdictional aspects, is *sui generis*. Though statutes may provide for its punishment, it is an offence against the law of nations; and as the scene of the pirate's operations is the high seas, which it is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of all mankind—*hostis humani generis*—whom any nation may in the interest of all capture and punish." Moore, J., dissenting, in the Lotus Case, P. C. I. J. Publ., Series A, Judgment No. 9, p. 70.

See Dawson's Trial, 13 How. St. Tr. 451, 455; The Marianna Flora, 3 Mason 116, 120, 11 Wh. 1, 40; Dole v. New England Insurance Co., 2 Cliff. 394, 417, 418; Kent, Commentaries, I, 171; Oppenheim, 4th ed., I, §278.

in my Sight and Presence;[33] when this is done upon the Sea, without a lawful Commission of War or Reprizals, it is downright Piracy.[34]

[33] *Cf.* King v. Mason, 8 Mod. 74; The Adonis, 2 Op. Atty. Gen. 19.

[34] "Now piracy is only a sea-term for robbery, piracy being a robbery committed within the jurisdiction of the Admiralty. If any man be assaulted within that jurisdiction, and his ship or goods violently taken away without legal authority, this is robbery and piracy. If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself, or any of the goods, or tackle, apparel or furniture, with a felonious intention, in any place where the lord Admiral hath, or pretends to have jurisdiction, this is also robbery and piracy." Sir Charles Hedges, charging the grand jury, in Dawson's Trial, 13 How. St. Tr. 451, 454. See also Bonnet's Trial, 15 *ibid.* 1231, 1234; Attorney-General v. Kwok-a-Sing, 5 P. C. 179, 199; United States v. Smith, 5 Wh. 153, 161, 163.

"With every respect for so high an authority, this definition [Sir Charles Hedges, *supra*], though no doubt correct as far as it goes, can hardly be regarded as complete. If it asserts that every act done in any part of the high seas is piracy, which, if done in England would be robbery, it would follow that if a French sailor on a French ship extorted money from one of his fellow sailors on the middle of the Atlantic, by threatening to accuse him of infamous crimes, he would be guilty of piracy, for such an act would undoubtedly be robbery if done in England. On the other hand, according to the definition quoted, if an armed ship full of men made a desperate attempt to capture a merchantman with a view to plunder, and was, after a severe action, herself captured, the captain and crew would not be guilty of piracy, for their act done on land would have been not robbery, but an assault with intent to rob, even though it might have been accompanied by murder. Hence it seems to follow that some acts done at sea, which would be robbery if done on shore, are not piracy; and that some acts which would not be robbery if done on shore, would, according to the common use of language, be piracy if done at sea. I have never met with a definition of the offence which dealt with or appeared to recognize these difficulties. I think, however, it may be safely stated that in modern times at least no case has been treated as piracy unless the ship itself has been taken from the control of its lawful master and either plundered or carried off or scuttled by the criminals, or unless the criminals have been cruising as robbers and thieves. Whether mere cruising in order to commit piracy has been treated as piracy by courts of law, I cannot say, but I think that commanders of British men-of-war would feel no hesitation in treating as a pirate an armed vessel cruising for piratical purposes even if there were no proof that it had accomplished them." Stephen, History of the Criminal Law, II, 28. See also Forsyth, 117; 38 Harv. L. Rev. 334, 357.

"The act of violence need not be consummated; a mere attempt, such as attacking or even chasing a vessel for the purpose of attack, by itself comprises piracy. On the other hand, it is doubtful whether persons cruising in armed vessels with the intention of committing piracies are liable to be treated as pirates before they have committed a single act of violence." Oppenheim, 4th ed., I, §276.

"The legislative authority of a state may doubtless enlarge the definition of the crime of piracy, but the state must confine the operation of the new definition to its own citizens and to foreigners on its own vessels. Two states also may agree by treaty to regard as piracy a particular crime which is not so defined in the international code, and the stipulation will be obligatory upon the contracting parties. The effect of such a treaty is in general to give to both the contracting parties jurisdiction over that offence for the trial and punishment of such of the citizens of the two countries as commit the offense, but the operation of such a treaty has no bearing on other nations." Clifford, J., in Dole v. New England Insurance Co., 2 Cliff. 394, 417. See also Calvo, I, §§488–492; Oppenheim, 4th ed., I, §280; Pradier-Fodéré, V, 817.

The Magellan Pirates

Great Britain. High Court of Admiralty. 1853.

1 *Spink's Admiralty and Ecclesiastical Reports* 81.

This was a cause arising under 13 & 14 Vict. c. 26., in pursuance of which the Court was prayed to determine and pronounce that certain persons captured by Her Majesty's sloop "Virago," in the Straits of Magellan, were pirates, and to adjudge the number of them, in order to the usual application being made for the bounty. . . .

These cases have generally been decided in a summary manner on the hearing of the petition; but in the present case the petition was opposed by the Queen's Proctor, the Admiralty Proctor and also a proctor for the owner of the "Eliza Cornish," who asserted an interest, inasmuch as, if the men who seized the "Eliza Cornish" were not pirates, but only revolted subjects of the Chilian Government, his party would then have a claim for damages against that Government; which, if the men were pirates, could not, as he was advised, be supported.

[Part of the statement of the case, the names of counsel, and part of the opinion are omitted.]

Dr. Lushington. The Court has two questions to determine; first, whether the acts set forth in these proceedings were done by persons falling under the denomination of pirates according to the true construction of the two Acts of Parliament passed upon this subject. I say the two Acts, because, though I am fully aware that the first, *viz.*, 6 Geo. 4. c. 49. is repealed, yet I think that in ascertaining the true meaning of the statute now in existence, *viz.*, 13 & 14 Vict. c. 26., I am bound to look at both Acts.

Should this first question be decided in the affirmative, then it will be necessary to determine as to the number of persons which the Court is to pronounce as having been concerned in this piracy. . . .

Now, the words of the first Act of Parliament are these:—"The actual taking, sinking, or destroying of boats, &c., manned by pirates or persons engaged in acts of piracy;" and the second Act has these words: "After the said 1st day of June, attack or be engaged with any persons alleged to be pirates, afloat or ashore." The words omitted, therefore, in this latter Act, are—"persons engaged in acts of piracy," and the words substituted are, "persons alleged to be pirates." . . .

It may be well, I think, to bear in mind what is the object of both statutes, because, respecting that matter there can be no doubt. The title to the first is, "An Act for the encouraging the Capture or Destruction of Piratical Ships and Vessels," and it must have been the wish and intention of the Legislature to put down piratical acts by whomsoever

committed. Now, how am I to determine who are pirates, except by the acts that they have committed? I apprehend that, in the administration of our criminal law, generally speaking, all persons are held to be pirates who are found guilty of piratical acts; and piratical acts are robbery and murder upon the high seas. I do not believe that, even where human life was at stake, our Courts of Common Law ever thought it neccessary to extend their inquiries further, if it was clearly proved against the accused that they had committed robbery and murder upon the high seas. In that case they were adjudged to be pirates, and suffered accordingly. Whatever may have been the definition in some of the books, and I have been referred by Her Majesty's advocate to an American Case [United States v. Smith, 5 Wheaton 153], where, I believe, all the authorities bearing on this subject are collected, it was never, so far as I am able to find, deemed necessary to inquire whether parties so convicted of these crimes had intended to rob on the high seas, or to murder on the high seas indiscriminately.

Though the municipal law of different countries may and does differ, in many respects, as to its definition of piracy, yet I apprehend that all nations agree in this: that acts, such as those which I have mentioned, when committed on the high seas, are piratical acts, and contrary to the law of nations.

It is true, that where the subjects of one country may rebel against the ruling power, and commit divers acts of violence with regard to that ruling power, that other nations may not think fit to consider them as acts of piracy.[35] But, however this may be, I do not think it necessary to follow up that disquisition on the present occasion. I think it does not follow that, because persons who are rebels or insurgents may commit against the ruling power of their own country acts of violence, they may not be, as well as insurgents and rebels, pirates also; pirates for other acts committed towards other persons. It does not follow that rebels or insurgents may not commit piratical acts against the subjects of other states, especially if such acts were in no degree connected with the insurrection or rebellion.

Even an independent state may, in my opinion, be guilty of piratical acts. What were the Barbary pirates of olden times? What many of the African tribes at this moment? It is, I believe, notorious, that tribes now inhabiting the African coast of the Mediterranean will send out their boats and capture any ships becalmed upon their coasts. Are they not pirates, because, perhaps, their whole livelihood may not depend on piratical acts? I am well aware that it has been said that a state

[35] See The Ambrose Light, 25 Fed. 408; The Three Friends, 166 U. S. 1, 63, *supra*, 139, 143. But see Republic of Bolivia v. Indemnity Mutual Marine Assurance Co. [1909] 1 K. B. 785; and ch. 2, §5, n. 46, *supra*, 143.

cannot be piratical; but I am not disposed to assent to such dictum as a universal proposition.[36]

It appears to me, therefore, that in affixing a construction to this statute, I am entitled to hold that the intention of the Legislature was, that acts of piracy might constitute men pirates, notwithstanding they were committed by the subjects of a barbarous state, or by insurgents. It appears to me this is true as a general, though, perhaps, not as a universal proposition.

Having thus briefly stated my opinion as to the construction of the statute, I will now advert, with equal brevity, to what appears to have been our own law; and for this purpose: because in considering what is the true meaning of an Act of Parliament where any expression is used, I think the probability is, where nothing appears in the context to the contrary, the term in the Act of Parliament is used in conformity with a similar term known in Common Law, and not in a more general or extensive sense.

Now, I refer to Russell on Crimes, where we find the result of many older authorities. He commences in these words: "The offence of piracy, at Common Law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there" [Russell on Crimes, book ii. ch. 8. s. 1]: and in a subsequent part I find the following: "If a robbery be committed in creeks, harbours, ports, &c., in foreign countries, the Court of Admiralty indisputably has jurisdiction of it, and such offence is consequently piracy." [*Ibid.* s. 2.] There is a case also stated here which I think applies: "Where a prisoner was indicted for stealing three chests of tea out of the 'Aurora,' of London, on the high seas, and it was proved that the larceny was committed while the vessel lay off Wampa, in the river, twenty or thirty miles from the sea, but there was no evidence as to the tide flowing or otherwise, at the place where the vessel lay; it was held, from the circumstance that the tea was stolen on board the vessel which had crossed the ocean, that there was sufficient evidence that the larceny was committed on the high seas." [*Ibid.*]

Again, it was decided in another case, that where A, standing on the shore of a harbour, fired a loaded musket at a revenue cutter which had struck upon a sand-bank in the sea, about 100 yards from the shore, by which firing a person was maliciously killed on board the vessel, it was piracy. [*Ibid.*]

It appears to me, therefore, that, from the quotations which I have just made, I derive two advantages; one, in being enabled with greater certainty to affix a true meaning to the statute itself; the other, a reference

[36] See MONTMORENCY, "Barbary States in International Law," 4 Grot. Soc. Trans. 87; MONTMORENCY, "Piracy and the Barbary Corsairs," 35 L. Quart. Rev. 133.

to what I must more particularly consider,—the place where the occurrence happened.

I will now advert to so much of the facts as will be sufficient to enable me to judge whether the present claim is well-founded.

It appears that, towards the latter end of 1851, there was an insurrection in some of the dominions belonging to the States of Chili. General Cruz was at the head of this insurrection, failed, and retired into the country. There was a Chilian convict settlement at a place called Punta Arenas, the garrison of which consisted of 160 soldiers, and 450 male convicts. An officer in that garrison raised an insurrection against the governor, murdered him, and, in conjunction with those who conspired with him, seized a British vessel, called "The Eliza Cornish," and also an American vessel called the "Florida." They murdered the master of the "Eliza Cornish," and a Mr. Deane, a passenger and part owner, and they also murdered the owner of the "Florida," who was on board. These facts coming to the knowledge of Admiral Thoresby, the commander-in-chief of that station, he despatched the "Virago," a British steamer, under the command of Captain Houston Stewart, to the Straits of Magellan. On the 28th January, 1852, a vessel, which proved to be the "Eliza Cornish," was descried working out of the Straits; chase was made; a shot fired across her bows brought her to; she was boarded and seized by orders of Captain Stewart.

At the time she was so seized she was in possession of a large number of the persons who had raised the insurrection at Punta Arenas. There were found on board her 128 men, 24 women, and 18 children; the guns were loaded and the men were armed. These were under the command of a man named Bruno Brionis, who held a commission from Cambiaso, the leader of the insurrection, and the instigator of the murders and robberies then committed; and these men were afterwards delivered up to the Chilian authorities at Valparaiso. Captain Stewart proceeded in search of Cambiaso and the other insurgents, giving that name to those who had left Punta Arenas. He secured fifty-six at a place called Wood's Bay, and on the 15th February he discovered the "Florida" herself, in the possession of a large number of the same people. It was said that these insurgents had, whilst at sea, risen against Cambiaso and five others, and, with the aid of the American master and crew, brought the vessel to the port where Captain Stewart had found her.

On board the "Florida" was found treasure which had been plundered from the "Eliza Cornish." All the persons on board the "Florida," not American, were delivered up to the Chilian authorities.

As to the general character of these transactions, I really cannot bring myself to entertain a doubt. Even if I could be induced to adopt the distinction, that the acts in question were the acts of insurgents, I should still, even from that, adhere to the opinion that they were piratical

acts;—piratical acts, too, in my judgment, in no degree whatsoever connected with the insurrection or rebellion, or with the intention of these parties to go to any other part of the world. They were acts, in one sense, of wanton cruelty, in the murder of foreign subjects, and in the indiscriminate plunder of their property. I am of opinion that the persons who did these acts were guilty of piracy, and were to be deemed pirates, unless some of the other objections which have been urged ought to prevail.

It has been said that these acts were not committed on the high seas, and, therefore, the murder and robbery not properly or legally piratical. This objection well deserves consideration; for it is true that murder and robbery, done upon land, and not by persons notoriously pirates, would not be piracy. Here, as I understand the facts, the "Eliza Cornish" and the "Florida" were seized in port, and the murders committed in port or committed on land, on the persons taken out of the vessels. Had the vessels been recaptured whilst lying in port, there might be raised an argument, though I do not say it would prevail, that these offences, legally speaking, would not be classed as acts of piracy. I say it might be so; though I am not disposed to hold that the doctrine that the port, forming a part of the dominions of the State to which it belongs, ought in all cases to divest robbery and murder done in such port of the character of piracy.[37] I am much more strongly inclined to hold this from the facts quoted from Russell; and I am still more inclined to come to that conclusion for another reason, because the statute expressly contemplates acts done on shore, for these are the words: "Shall, after the said first day of June, attack or be engaged with any persons alleged to be pirates, afloat or ashore," manifestly intending to take cognisance of piratical offences, or offences of that class, when they were committed on shore. It would quite fail if it were not so; because we all know that pirates are not perpetually at sea, but under the necessity of going on shore at various places; and, of course, they must be followed and taken there, or not at all.

In this case, however, the ships were carried away and navigated by the very same persons who originally seized them. Now, I consider the possession at sea to have been a piratical possession; to have been a continuation of the murder and robbery; and the carrying away the ships on the high seas, to have been piratical acts, quite independently of the original seizure. . . .

[In an omitted part of the opinion Dr. Lushington considered the circumstances of each capture and concluded that each capture was within the meaning of the Act of Parliament.]

[37] But *cf.* Republic of Bolivia v. Indemnity Mutual Marine Assurance Co. [1909] 1 K. B. 785; HYDE, I, §231; OPPENHEIM, 4th ed., I, §277.

I cannot conclude my judgment without expressing my opinion that it was for services like these that the Legislature intended to provide a reward; services of great importance to the safe navigation of the seas in that part of the world, and affected by the capture of a band of persons whose acts of murder and plunder, both on land and at sea, rendered their capture and punishment indispensable to the safety of ships of all nations occupied in those waters.

I trust I have not put too latitudinarian a construction on this Act of Parliament, from my high consideration of the services so rendered, and of the decision and promptitude whereby those measures were so successfully taken; and I repeat my opinion, that the persons so taken are justly to be deemed pirates, and were, when captured, within the meaning of the Act.[38]

UNITED STATES, AN ACT TO CODIFY, REVISE, AND AMEND THE PENAL LAWS

Section 290. 1909.

35 *United States Statutes at Large* 1088, 1145.

Sec. 290. Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.[39]

[38] *Cf.* Republic of Bolivia v. Indemnity Mutual Marine Assurance Co. [1909] 1 K. B. 785.

"No one has ever contended that a man could not be convicted of robbery, unless he had a general purpose to rob everybody. Such a rule is no more applicable to robbery on the seas, than on the land. If an act of piracy is proved, it surely would not be a good defence for the pirates, that their purpose was to seize vessels belonging to citizens of one nation only; or even that the piratical enterprise was designed for the taking of only a single ship." DAVIS, J., in Dole v. Merchants' Insurance Co., 51 Me. 465, 468. See also In re Tivnan, 5 Best & S. 645; Attorney-General v. Kwok-a-Sing, 5 P. C. 179; United States v. Smith, 5 Wh. 153; United States v. Brig Malek Adhel, 2 How. 210; DICKINSON, "Is the Crime of Piracy Obsolete," 38 Harv. L. Rev. 334.

[39] See United States v. Smith, 5 Wh. 153. On the history of United States legislation with respect to piracy, see U. S. For. Rel. (1887) 757, 794; 38 Harv. L. Rev. 334, 342. See also Canada, Criminal Code, 1 Can. Rev. Stat., 1927, c. 36, §137.

On piracy, in general, see FAUCHILLE, I, Pt. II, 72; GEBERT, "Die völkerrechtliche Denationalisierung der Piraterie," 26 *Z.* f. Int. R. 8; HALL, 8th ed., 310; HYDE, I, §§231–234; OPPENHEIM, 4th ed., I, §§272–280; ORTOLAN, 4th ed., I, 207; PRADIER-FODÉRÉ, V, 773; STIEL, Der Tatbestand der Piraterie.

CHAPTER VI

JURISDICTIONAL IMMUNITIES IN THE LAW OF NATIONS

SECTION 1. FOREIGN STATES AND SOVEREIGNS

HEIRS OF EMPEROR MAXIMILIAN v. LEMAÎTRE

France. Court of Appeal of Paris. 1872.

Sirey, Recueil Général des Lois et des Arrets (1872) *Pt. II*, 68.

The heirs of Emperor Maximilian lodged an appeal from a judgment rendered by the Civil Tribunal of the Seine, Nov. 24, 1871, in favor of Lemaître, reported Sirey (1871) Pt. II, p. 225.—The Court reversed this judgment for the following reasons:

THE COURT.—Considering that it is a principle, in consequence of the mutual independence of states, that the French tribunals have no jurisdiction to judge engagements contracted by foreign sovereigns, acting as chiefs of state in virtue of the public power;—That the engagement of which Lemaître seeks performance belongs in that category;—That in effect Lemaître claims payment of a sum of 51,479 francs, being the amount of a bill for insignia made by him in 1855 and 1866 on an order coming from the government of Maximilian, Emperor of Mexico;—That an order for insignia intended to be distributed among those who have received the conferring of an order as a reward for their public services is, on the part of the sovereign, an act of public administration;—That Lemaître alleges in vain, in the process of citation, in order to efface the character of the engagement which excludes the jurisdiction of the French tribunals, that in the course of the manufacture with which he was entrusted he set himself to obtain the personal guarantee of Emperor Maximilian, acting no longer as chief of state, but engaging himself in a private obligation;—That the plaintiff does not show substantial facts calculated on the whole to call for the examination of this pretention;—That it is contradicted also by the document which is produced in support of his claim;—That the bill on account of which Lemaître claims payment of 51,479 francs shows at the bottom a certification of the minister plenipotentiary of Mexico in France, who certifies to the accuracy of it, and who declares that if the Mexican legation has not made payment, it is because the necessary funds have not been remitted by the administration of the imperial orders of Mexico, which ordered the insignia pursuant to directions from His Majesty the Emperor;—

Considering that it is thus certain from the proof itself of the claim and destined to illumine its essential nature that the suit has for its object an engagement contracted by a foreign sovereign, exercising the attributes of public power;—That international rules therefore oblige the French tribunals to declare themselves incompetent;—For these reasons, let it be annulled; declare that the tribunal was incompetent; etc.[1]

March 15, 1872.—Court of Paris, First Chamber.—MM. Gilardin, first presiding judge; Chevrier, advocate-general; Martin and Carraby, advocates. [Editor's transl.]

THE LIÉGE-LUXEMBURG RAILWAY COMPANY v. THE NETHERLANDS STATE (DEPARTMENT OF STATE WATERS)

Belgium. Court of Cassation. 1903.

Pasicrisie belge (1903) *Pt. I*, 295.

The complainant appeals from an application of the proposition that a foreign state, having dealt as a civil person (*personne civil*), may not be subjected to the jurisdiction of the Belgian courts, and that by reason of sovereignty. The contested judgment sustained that thesis.

Terlinden, *le premier avocat général*, supported the appeal as follows:

"Let us determine, in the first place, the precise capacity in which the Netherlands State has been summoned.

"It is not a case of the State exercising its governmental power, dismissing an official, expelling a disorderly alien, or taking other measures of police and general administration.

[1] In 1870 the same court, in annulling a judgment rendered by an inferior tribunal against the Czar of Russia, had said: "que l'indépendance réciproque des Etats est consacrée par le droit des gens; que chaque Etat est souverain sur son territoire, y exerce la justice, qui est un attribut de la souveraineté, et délègue à des tribunaux cette justice investie des droits de juridiction et de commandement nécessaires pour rendre et faire exécuter ses décisions;—Qu'il suit de ces principes qu'on ne peut citer devant les tribunaux d'un pays le souverain d'un autre pays, non plus que les agents de la puissance publique qui le représentent;—Que prétendre les soumettre à la justice, c'est-à-dire au droit de juridiction et de commandement, du juge d'un pays étranger, ce serait évidemment violer une souveraineté étrangère, et blesser en cette partie de droit des gens." Case of Masset, Sirey (1871) II, 6.

"Sovereign nations acknowledge no common tribunal on earth; their *bona fides* or their *mala fides* are questions not to be litigated in courts of justice." JAY, C. J., in Jones v. Walker, 2 Paine 688, 700.

"It might be asked whether it is not a derogation from the sovereignty of any state that it should feel constrained not to exercise its jurisdiction fully over all persons or objects within its territory; such would be at least as logical a conclusion from 'equality and independence' as exemption. If each state enforced its laws against all other states, there would be substantial equality. . . . But, whether justified, or merely the vestigial reminder of an outgrown period of uncivilization, the exemption remains." WATKINS, The State as a Party Litigant, 168–9.

Cf. Isabelle de Bourbon c. Mellerio, Dalloz (1872) II, 124.

"It is not even a case of the State acting with that power in view, contracting for goods destined to its army or its fleet, or negotiating loans intended for its expenditures in the public interest, which is presented here.

"It is a case of the State, as manufacturer or trader, effecting, for compensation, the transport of passengers and goods.

"It is a case of one entrepreneur of transport dealing with another entrepreneur of transport with respect to their trade.

"This is the important point: the State which engages in transportation (*Cass., ch. réunies*, 27 *Mai* 1852, *Pasic.*, 1852, *I*, 270) does not exercise an act of its executive power and, as Giron puts it [*Dict. de dr. admin., t. II, p.* 327], its operations in this respect 'are identical with those done in the ordinary course by public carriers.'

"To this first consideration it is appropriate to add a second: the judgment which we asked of the Court of Appeal of Brussels was a judgment in principle and did not admit of immediate execution. It may even appear to be what the contested judgment has called 'a barren declaration of right.' Therefore it escapes the very debatable argument, which may be easily refuted if necessary, which consists in saying that it is inadmissible that the judge of one state should be 'able to disturb the financial administration of another state.'

"For the moment that is not in question, however evident it may be that 'the power of execution is the consequence of the power of jurisdiction.'

"As the appeal remarks, the judgment asked of Belgian justice must, if the case arise, in order to become executory in Holland, be the object of a demand for an exequatur to be granted by the Holland courts, that is to say, of an act of *imperium*, thus showing that the decision of the Belgian tribunal could not constitute an encroachment upon the rights of the foreign sovereignty.

"'Sovereign nations,' says the contested judgment, 'recognize no foreign authority as having the power to command; the law of nations proclaims them independent one from the other; one of the consequences of this sovereignty and independence is that no nation can be compelled to accept the jurisdiction of another.'

"This theory which, until recent years, was so generally admitted that it must be recognized as indisputable for the nation as sovereign, is absolutely erroneous for the nation as a moral person (*personne morale*), acting in the latter capacity. This was maintained, in the earlier law, by Bynkershoek (*De Foro Legatorum, chap. IV*), reporting many instances of actual seizure, in divers countries, of funds or of ships belonging to foreign princes; by Barbeyrac, his translator (*la Haye*, 1723); by Ch. de Martens in his *Précis du droit des gens moderne de l'Europe*, §173 (*édition Ch. Vergé*). Later it was adopted by Legat, in his *Code des étrangers*

(1832, *p.* 306 *et* 307); in France, by Ch. Demangeat, Bonfils, Pradier-Fodéré, Hautefeuille, Bertauld, responding, in the name of the faculties of law, at the decision of the Court of Cassation of Jan. 22, 1849, of which I shall speak presently; by the conference of advocates at the Court of Appeal of Paris in its session of April 27, 1858; and finally, the members of the Institute of International Law, placing the question on the order of the day at Lausanne, in 1878, voted at Hamburg, Sept. 11, 1891, a project of international regulations on the competence of courts in suits against sovereign States or the heads of foreign States.

"We shall have to return to it.

"The principle of absolute sovereignty has been modified, finally, by so many exceptions that we may well ask if they have not become the rule.

"Bluntschli, in his *Droit international codifié*, refers to three of them (*art.* 140, 150, 218, 219 *et* 223): 1st, the foreign State summoned as owner of immovables situated within the jurisdiction of the court seized of the action; 2d, the State engaging in commerce in a foreign country; 3d, the State having, expressly or tacitly, recognized the competence of the foreign court, and this latter exception includes the case where the State, appearing as party plaintiff, is in consequence exposed to the counterclaims which may be directed against it.

"All these exceptions should be founded upon a presumed renunciation of their immunities which should be made by foreign States in these different situations. We shall see presently what to think of this, but I cannot refrain from asking whether, if this be the correct system, the same presumption ought not to apply also to the case with which we are concerned.

"Why should the foreign State, which would have accepted the jurisdiction of the Belgian courts in acquiring and possessing immovables in Belgium (*code civ., art.* 3, *al.* 2), in engaging in commerce there, or in bringing a suit there, thus have renounced more of its immunities than in contracting with a Belgian in Belgium an executory agreement subject, thenceforth, to the competence of our tribunals? The Netherlands Government cannot ignore (its laws, on this point, being the same as ours) that a Hollander who contracts with a Belgian may be summoned in Belgium. Why, under these conditions, has it made the agreement of 1866, and if there is renunciation in the cases cited by Bluntschli, why not also in the case presented by this litigation?

"However, it is very difficult to accept this system of renunciation: first, because a renunciation is not presumed, no more in the law of nations than in civil or private law; next, because a State may renounce neither its sovereignty nor its independence. Do not the exceptions which Bluntschli as well as others have been induced to recognize result, on the contrary, from the fact that in the cases of which they speak States are not exercising *imperium* and therefore, between them and

individuals, there are formed contractual relationships giving rise to civil rights and subject in like manner to the ordinary jurisdiction?

"This seems to me especially true when the foreign State is to be considered a trader.

"As M. Chavegrin, the annotator of Sirey (1886, *p.* 877), observes, undertakings of transport are included in the laws of all civilized countries among commercial undertakings (*les actes de commerce*). So it is with us, in Germany (*art.* 272, 3°), and in France (*art.* 632, 2°). When the State undertakes such an enterprise, it becomes in consequence, for the acts connected therewith, a trader. Now picture a trader, declared such by law, who has the pretension to escape from his engagements? The Khedive claimed it, May 7, 1873, before the High Court of Admiralty of England, on the occasion of a collision occurring in the Thames between one of his steamers and an English ship. Concluding his judgment, Sir Robert Phillimore said, "No principle of international law, and no decided case, and no dictum of jurists of which I am aware, has gone so far as to authorize a sovereign prince to assume the character of a trader, when it is for his benefit; and when he incurs an obligation to a private subject to throw off, if I may so speak, his disguise, and appear as a sovereign." (*Journal de Clunet*, 1874, *p.* 38.) . . .

[The rest of M. Terlinden's argument is omitted.]

THE COURT;—With respect to the sole ground of appeal, alleging violation of articles 52, 53 and 54 of the law of March 25, 1876, of article 14 of the civil code, and of article 92 of the Constitution, and erroneous application of the principles of the law of nations, in that the contested judgment decides that a foreign State, having dealt as a civil person, cannot be justiciable before Belgian tribunals, and this by reason of its sovereignty:

Considering that the rule of the law of nations, which proclaims the independence of nations, springs from the principle of their sovereignty; that it is, therefore, without application when sovereignty is not involved;

Considering that sovereignty is only involved in the transactions of the political life of the State;

That transactions in which the public power is asserted are governed within the country by constitutional law and escape, in consequence of the separation of powers, the control of the judicial authority; that their effects, outside the country, depend solely upon international law and are saved, by virtue of this, from the cognizance of the courts, domestic as well as foreign;

But considering that the State is not obliged to confine itself to its political rôle; that with a view to the general welfare it may acquire and possess goods, contract and become creditor and debtor; that it may even engage in commerce, reserving to itself monopolies or the direction of services of general utility;

That in the administration of such property or services the State does not employ the public power, but does what individuals may do, and consequently acts only as a civil or private person;

That when in that capacity it is involved in a dispute, after having dealt as equal to equal with its co-contracting party, or having incurred responsibility for a wrong outside the political order, the suit has for its object a civil right within the exclusive jurisdiction of the courts according to the terms of article 92 of the Constitution;

Considering that foreign States, as civil persons and by the same right as other foreigners, are justiciable in Belgian courts;

That for such States, as for the Belgian State, sovereignty is not in question when they are involved, not as a power, but only for the exercise or defense of a private right;

Considering that in this respect there is no distinction, such as the contested judgment attempts, between the suit which concerns as in this case the execution of a contract concluded by the foreign State and a suit with regard to an immovable which the foreign State possesses within the territory; that it makes no difference whether the foreign State has brought its complaint before the courts as plaintiff, or has responded to a cross-action, or when summoned as defendant has not excepted on the ground of incompetence, or has compromised the difficulties arising from the agreement which it has signed;

That indeed it is not evident how the State will abdicate its sovereignty by yielding to the jurisdiction of foreign courts for the adjudication of agreements which it has made freely, and will conserve that sovereignty intact when it submits to their jurisdiction or resorts to them in the other hypothetical situations mentioned above in which an almost unanimous doctrine and jurisprudence admits their competence;

That, therefore, in the case of contract, as in the other cases, there should be at least an implied renunciation, if there can be a question of renunciation in a matter which concerns inalienable prerogatives;

That, in reality, in all the hypothetical situations mentioned, competence is derived, not from the consent of the justiciable person, but from the nature of the act and the capacity in which the State has there intervened; that if the foreign State may invoke our courts for proceedings against its debtors, it ought to respond before them to its creditors;

Considering that the judgment relies in vain upon the preparatory work of the civil code; that in fact the generally recognized immunity of ambassadors rests upon their character as representative of the person of the sovereign and upon a fiction of exterritoriality which would be useless if that immunity depended, like that of the State, upon the notion of sovereignty; that the observation of Portalis had no other purpose than to prevent the introduction into a law of the municipal system, like the civil code, of a provision which belongs to the law of nations; indeed

that Portalis proposed no solution for the question of diplomatic immunities and that he did not even touch upon the exemption from jurisdiction of States, which was not under discussion;

That the suppression of article 11 in the project of the civil code sheds no light upon the interpretation of article 14 of the code nor of the law of 1876 on competence which replaced it;

Considering that by foreigner in articles 52, 53 and 54 of the latter law it is necessary to understand not only natural persons, but also foreign moral persons, and that it is necessary to include among the number of the latter, beside companies and moral bodies such as communes and public institutions, the most eminent of all, the State, to which the law accords, when it is recognized, the enjoyment of private rights, in permitting it to possess and contract, and to which it opens, the same as to individuals, recourse to justice even against nationals;

Considering that the contested judgment points out, finally, the difficulty, if not the impossibility, of executing a judgment obtained against a foreign government; but that the objection is in no respect decisive; that if it were necessary to concede to the foreign State in this regard a condition different from that of foreign private persons, it would not be necessary to conclude the incompetence of the Belgian courts; that the latter in fact do not cease to be competent to judge the Belgian State itself, although its goods are not liable to be seized, and that, on the other hand, the validity of a decision of courts of justice is independent of difficulties which may arise in putting it into execution;

Considering, moreover, that the objection is at fault in losing sight of the moral authority which attaches, in our modern society, to a decision rendered by independent judges; that a judgment based upon reasons of eternal and universal justice has in itself a powerful influence upon the public conscience aside from more forcible means of coercion;

Considering that, according to the statements of the contested judgment, the Netherlands State was summoned to reimburse a sum of 34,000 florins or 70,822 francs payed by the Liége-Luxemburg Railway Company for the expense of an extension of a common station;

That the agreement upon which the action was based had been signed by the Netherlands State, defendant, for the administration of one of its railway lines for the benefit of another railway administration; that that agreement appeared accordingly as an act of private interest, the interpretation of which cannot in any way impair its sovereignty;

Considering that it follows from the considerations developed above that, in declaring itself incompetent to take cognizance of a suit presented under these conditions, the Court of Appeal of Brussels has contravened the provisions of articles 52 and 53 of the law of March 25, 1876, noted in the appeal, and article 92 of the Constitution;

For these reasons, reverse . . . ; return the case to the Court of Appeal of Ghent.[2]

[2] See also Rau, Vanden Abeele et Cie c. Duruty, Pasicrisie belge (1879) II, 175 (Peruvian state guano exportation); Somigli c. État de Sao Paolo du Brésil, 6 Rev. de Dr. Int. Privé (Italy) 527 (Brazilian state periodical published in Italy to stimulate emigration); Banque roumaine de commerce et de crédit de Prague c. État polonais, 19 Rev. de Dr. Int. Privé (Roumania) 581 (Polish state tobacco monopoly). *Cf.* Mason v. Intercolonial Railway, 197 Mass. 349; Oliver American Trading Co. v. Government of Mexico, 5 F. (2d) 659; Bradford v. Director General of Railroads of Mexico, 278 S. W. (Tex.) 251.

"I. The question whether a State may, in any respect, be subject to the jurisdiction of the courts of another State is connected with the right of States to independence. In other words, are the Courts of one State competent to decide disputes to which another State is a party?

"That the courts of one State are not competent with regard to another State is unanimously recognised when the foreign State is called to justice on account of acts committed by it, in the exercise of its sovereignty, to ensure the general administration of the country and the working of its public services. To weigh and judge the consequences of such acts would be to interfere in the internal policy of the foreign State and deny its right of independence. As regards acts of its Government and public administration, a State ought to be—as, indeed it is—entirely immune from the jurisdiction of another State. In almost all countries this is the decision which has been reached, and it is followed by most writers on the subject.

"There is, however, some difference of opinion when we come to consider acts accomplished by a State, not in fulfilment of one of its sovereign functions or governmental duties, but in the same way as a private individual, and, so to speak, in a private capacity. A State may, for instance, have been engaged in commercial transactions; in many countries the State is responsible for transport by rail. If it fails to execute the contract of transport, may it not be sued abroad by the consignor or consignee who has suffered from the non-fulfilment of the contract?

"On this point there are two conflicting views.

"II. An imposing body of case law, which has received the general approval of the French, German, British and American courts, renders exemption from jurisdiction an absolute immunity attaching to the very person of the foreign State, independent of the character of particular acts and removable only by express or tacit waiver by the State itself. . . .

"Among writers who accept this theory we may mention: Chrétien, Valéry, Nys, de Louter, Koehler, Laband, Liszt and Anzilotti. . . .

"III. To the theory of absolute immunity from jurisdiction is opposed the Italo-Belgian system of immunity limited to acts that are true manifestations of sovereign authority and denied to acts in which the public power has no part and which should, therefore, be subject to the normal rules of jurisdiction. . . . The following authors are in favour of this conception: Pradier-Fodéré, Despagnet and de Boeck, Weiss, Mérignhac, de Lapradelle, Audinet, Laurent, von Bar, Paepe, Pasquale Fiore. . . .

"Thus, according to this theory, the State possesses two aspects and practically constitutes two persons. From one point of view it is a person politic: from the other, a private person. What the State does *jure imperii* is one thing, and what it does *jure gestionis* is another. As a public person, the foreign State is not subject to the jurisdiction of the judicial authorities; but it may become subject thereto as a private person like foreign private individuals—indeed by analogy thereto—and in accordance with the principles of private international law which apply to private

June 11, 1903.—First Chamber.—Presiding judge, van Maldeghem, puisne judge discharging the duties of presiding judge.—Rapporteur, van Maldeghem.—Arguments as presented by Terlinden, first advocate-general.—Counsel, Beernaert, Delacroix, Leclercq and Despret. [Editor's transl.]

HAHN H. HASSARD, PLAINTIFF, v. THE UNITED STATES OF MEXICO, ET AL., DEFENDANTS

United States. Supreme Court of New York, New York Special Term. 1899.

29 *Miscellaneous New York Reports* 511.

Motion to vacate attachment.

[The case is stated in the opinion. The names of counsel and part of the opinion are omitted.]

BOOKSTAVER, J. This motion is made by the United States Attorney for the Southern District of New York, under instructions from the Attorney-General of the United States, to vacate an attachment obtained by the plaintiff against the defendants and to dismiss the complaint upon the ground that this court has no jurisdiction of the subject-matter. The action is against the Republic of Mexico and States of Tamaulipas and San Luis Potosi, the latter two being subordinate divisions of the former. The amount claimed is $3,075,000, with interest at seven per cent from September 1, 1865, which is alleged to be the sum due upon 3,075 bonds of the amount of $1,000 each, issued by the defendants on or about July 4, 1865. The United States District Attorney disclaims appearing by any authority from the defendants, but only on instructions

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individuals in the matter of jurisdiction." MATSUDA, in Report on the Competence of the Courts in Regard to Foreign States, L. of N. Doc., V. Legal, 1927, V. 9, 22 Am. Jour. Int. L. Spec. Suppl. 117, 118. See BORCHARD, Diplomatic Protection, 157.

See also DE VISSCHER, "Les gouvernements étrangers en justice," 3 Rev. de Dr. Int., 3 sér., 149; FAIRMAN, "Some Disputed Applications of the Principle of State Immunity," 22 Am. Jour. Int. L. 566; WALTON, "State Immunity in the Laws of England, France, Italy, and Belgium," 2 Jour. Soc. Comp. Leg., 3d series, 252.

The Treaty of Versailles with Germany, June 28, 1919, art. 281, provides: "If the German Government engages in international trade, it shall not in respect thereof have or be deemed to have any rights, privileges or immunities of sovereignty." 13 Am. Jour. Int. L. Suppl. 151, 291. The identical provision appears also in the Treaty of St. Germain with Austria, Sept. 10, 1919, art. 233. 14 Am. Jour. Int. L. Suppl. 1, 105. See also Treaty between Germany and Russia, May 6, 1921, art. 13, 6 L. of N. T. S. 267, 283; Treaty between Austria and Russia, Dec. 7, 1921, art. 12, 20 L. of N. T. S. 153, 177. And see Convention on the Transport of Goods by Rail, Oct. 14, 1890, art. 15, 19 Martens, Nouv. Rec. Gén., 2 sér., 287, 303.

from the Attorney-General, and as *amicus curiae*, to call the attention of the court to its want of jurisdiction in the premises.

That the court is without jurisdiction seems to be a proposition beyond serious dispute. The principal defendant is an independent sovereign nation, having treaty relations with this country, and the other defendants are subordinate divisions thereof. It is an axiom of international law, of long-established and general recognition, that a sovereign State cannot be sued in its own courts, or in any other, without its consent and permission. For applications of this doctrine see Schooner Exchange v. McFaddon, 7 Cranch, 116; Manning v. State of Nicaragua, 14 How. Pr. 517; Beers v. State of Arkansas, 20 How. (U. S.) 527. . . .

So far as this doctrine is applied to foreign powers, it is obviously based upon sound considerations of international comity and peace, and it is significant that this country is so solicitous on this point that it has, by its Constitution, article 3, section 2, subdivision 2, conferred upon its highest judicial tribunal original jurisdiction in all cases affecting ambassadors or other public ministers and consuls, and by section 687 of the United States Revised Statutes, that jurisdiction is made exclusive and is extended even to domestics or domestic servants of such foreign representatives.

That State courts scrupulously recognize their own lack of jurisdiction is illustrated in Valarino v. Thompson, 7 N. Y. 576, where it was held that the exemption was a privilege, not of the representative, but of his sovereign, and that he could not waive it. It was also there stated that the court will put a stop to the proceedings at any stage on its being shown that they have no jurisdiction. So far as jurisdiction is concerned, there is no difference between suits against a sovereign directly and suits against its property. Stanley v. Schwalby, 147 U. S. 508; United States v. Lee, 106 *id.* 196.

The plaintiff's attorney strenuously combats the right of the district attorney to intervene, and points out that section 682 of the Code provides expressly the only methods by which a motion to vacate an attachment can be made, and that the district attorney has no standing under these provisions. The fault of this argument lies in the fact that section 682 makes no provision for vacating an attachment of this kind, because the legislators never contemplated the issuance of such an attachment. Properly speaking, this is not a proceeding to vacate a thing that ever had validity, but rather to revoke what was the result of an inadvertence in an *ex parte* proceeding and a nullity *ab initio* and to set the court right on its own records and in the eyes of the world. The motion should be granted.

Motion granted.

[The order was affirmed by the Appellate Division of the Supreme Court of New York, on the above opinion, 61 N. Y. Suppl. 939.][3]

THE JOHNSON LIGHTERAGE CO. NO. 24

United States. District Court, District of New Jersey. 1916.

231 *Federal Reporter* 365.

In Admiralty. Suit for salvage by the members of the firm of W. J. Scanlan Company against the deck scow Johnson Lighterage Company No. 24 and its cargo. On order to show cause why the cargo should not be released from seizure and delivered free and discharged thereof to its owner, the Russian government. . . .

[The names of counsel are omitted.]

HAIGHT, DISTRICT JUDGE. The persons composing the partnership firm of W. J. Scanlan Company filed a libel in this court against the deck scow Johnson Lighterage Company No. 24 and its cargo, to recover for salvage services, alleged to have been rendered to such vessel and cargo. Process was thereupon issued, and by virtue thereof the vessel and cargo were seized by the marshal. Subsequently certain affidavits were filed on behalf of the Russian government with the Department of State, the purport of which was that the cargo (which consisted of munitions of war) was its sole and exclusive property. Upon these affidavits being brought to the attention of the court an order was made, directing the libelants before mentioned, as well as the Seaboard Equipment Corporation (the alleged owner of the vessel which rendered the salvage services, and which had also filed a libel for the same services), to show cause why the cargo should not be released from seizure and delivered, free and discharged thereof, to the Russian government. Mr. John P. Murray, who made one of the affidavits and who was therein stated to be one of the counsel for the Russian government, was designated *amicus curiae.*

Upon the return of the order to show cause, testimony was taken respecting the character, ownership, and possession of the cargo at the times the salvage services were rendered and seizure made. I have no hesitancy in finding, as a fact, that the cargo was, at the times before mentioned, the property of the Russian government. In view of the conclusion which I have reached upon the whole matter, it seems unnecessary to state the reasons upon which this finding is based, especially since they were fully indicated to counsel at the conclusion of

[3] See also Le Gouvernement Espagnol c. Casaux, Sirey (1849) I, 81; von Hellfeld v. Russian Government, 5 Am. Jour. Int. L. (Germany) 490; Wadsworth v. Queen of Spain, 17 Ad. & El. N. S. 171; De Haber v. Queen of Portugal, 17 *ibid.* 196; Nathan v. Virginia, 1 Dall. 77 n. *Cf.* Manning v. State of Nicaragua, 14 How. Pr. (N. Y.) 517.

the hearing. It is also an uncontradicted fact that, at these times, the cargo was in the possession of the Johnson Lighterage Company (the charterer of the vessel upon which it was loaded) for the purpose of transportation from a railroad terminus in Jersey City to a vessel or vessels in New York Harbor, which latter were under the control of the Russian government. The transportation was undertaken by the Johnson Lighterage Company pursuant to a contract theretofore made between it and the commercial attaché of the Russian general embassy, whereby the former undertook, for certain prices, to transport and lighter such freight as the latter might desire to be carried from incoming railroads to ships of the Russian volunteer fleet, or any other line loading at a certain place in New York Harbor. As the cargo consisted of munitions of war, it will, of course, be presumed that it was destined for the public use of the Russian government.

It is undoubtedly the general rule that the courts of this country are without jurisdiction to entertain, except by consent, either an action *in personam* against our own government or that of a friendly foreign nation or sovereign, or an action against its property in its possession and devoted or destined to be devoted to the public use. The Siren, 7 Wall. 152, 154, 19 L. Ed. 129; Stanley v. Schwalby, 147 U. S. 508, 512, 13 Sup. Ct. 418, 37 L. Ed. 259; The Exchange, 7 Cranch, 116, 3 L. Ed. 287; Tucker v. Alexandroff, 183 U. S. 424, 440, 463, 22 Sup. Ct. 195, 46 L. Ed. 264; Hassard v. United States of Mexico, 46 App. Div. 623, 61 N. Y. Supp. 939; Briggs v. Light Boats, 11 Allen (Mass.) 157. But there is what may be termed an exception to this rule, although it is probably not strictly such, which was enunciated and applied by the Supreme Court, so far as our own government is concerned, in The Davis, 10 Wall. 15, 19 L. Ed. 875, and followed and applied as to a foreign government by Judge Brown, in the Southern district of New York, in Long v. The Tampico (D. C.) 16 Fed. 491. This so-called exception, I think, must control the questions to be decided in the case at bar. In the former of these cases it was held that personal property of the United States on board a private vessel for transportation from one point to another was liable to a lien for services rendered in saving it, and although such lien could not be enforced by a suit against the United States, or by a proceeding *in rem*, when the possession of the property could only be had by taking it out of the actual possession of an officer of the government, yet it could be enforced by a proceeding *in rem* where the process of the court could be enforced without disturbing the possession of the government. In that case a treasury agent of the United States had shipped a quantity of cotton from Savannah on a schooner belonging to and under the control of a private individual, consigned to another agent of the government in New York. During the voyage the vessel met with disaster, and she and her cargo were saved from total loss by the

libelants. Before any of the cotton was delivered to the agent in New York, the vessel was libeled for the salvage services and taken possession of by the marshal. It was held that it was the duty of the court to enforce the lien of the libelants for the salvage before it restored the cotton to the custody of the officers of the government. The facts respecting the possession of the property at the time the salvage services were rendered and the seizure made by the marshal were thus stated by Mr. Justice Miller, who delivered the opinion of the court (10 Wall. 21, 19 L. Ed. 875):

"Bringing the facts of the case before us to the test of these principles, the case was the usual one of a common carrier contracting to deliver goods on his own responsibility, and not the case, as alleged by the United States, of a charter of the vessel. The goods were then delivered to the master, and he contracted to deliver them to the agent of the United States in New York. Immediately on her arrival, and before any of the cotton was delivered to the agent, the vessel and cargo were libeled and taken possession of by the marshal under the writ which issued on the libel being filed. The possession of the master of the vessel was not the possession of the United States. He was in no sense an officer of the government. He was acting for himself, under a contract which placed the property in his possession and exclusive control for the voyage. His obligation was to deliver possession in New York to the agent of the government. This he had not done when the process was served on the cotton. The marshal served his writ and obtained possession without interfering with that of any officer or agent of the government."

In Long v. The Tampico two vessels which were built for the Mexican government were saved from burning at the dock at which they were moored in New York, and the libel was filed for the services thus rendered. It appeared that the agent of the Mexican government who had caused them to be built had, before the salvage services were rendered, entered into a contract with two independent sea captains to navigate the respective boats to Vera Cruz, Mexico, for delivery to the public authorities there. The captains had gone aboard the vessels and taken command before the fire. Judge Brown held (following the case of The Davis) that, assuming that the vessels had become the property of the Mexican government and were in its legal possession before the fire, still, as the salvage service had been rendered after delivery of the boats to the bailees, who were not officers of the Mexican government, for transportation and delivery to the government officers at Vera Cruz, and as the attachment had been made while the vessels were in the charge of the former, that the action *in rem* would lie, and the libels were sustained.

There is no essential difference between the material facts in the case at bar and those which were presented in The Davis and in Long

v. The Tampico. It is true that in the Davis Case the person in whose possession the goods were at the time of the seizure was described therein as a "common carrier;" but I cannot conceive that this fact would make any difference. He was none the less a bailee for hire. The Johnson Lighterage Company, while it may not be strictly a common carrier, in the sense that it is subject to all of the peculiar liabilities which attach to a common carrier, was no more an officer of the Russian government than were the master of the vessel in the Davis Case and the captains in the Tampico Case. The Johnson Company contracted to deliver the goods on its own responsibility; the Russian government had not chartered the vessel upon which the munitions were loaded, nor, for that matter, any vessel of the Johnson Company. The latter was acting for itself under a contract which, necessarily, during the time of the transportation, placed the property in its possession and control. The Russian government, doubtless, could direct to what vessel or vessels the cargo was to be delivered; but this fact in no respect took the property out of the possession and control of the Lighterage Company during the time of transportation.

In the absence of treaty provisions, I know of no principle which, in a case such as this, would afford a foreign government greater immunity from judicial process than that which is enjoyed by our own government. The immunity granted to friendly foreign governments rests upon international comity (The Exchange, *supra;* The Santissima Trinidad, 7 Wheat. 253, 352, 5 L. Ed. 454); but the underlying principle upon which the immunity is granted is, nevertheless, the same in both cases, namely, that the exercise of jurisdiction is inconsistent with the independence of sovereign authority and public policy. See The Siren, *supra;* Stanley v. Schwalby, The Parliament Belge, 5 Prob. Div. 197; Long v. The Tampico, *supra.*

I therefore conclude that the property in question, although it belonged to the Russian government and was destined to its public use, was subject to a lien for salvage services rendered in saving it, and that as it was not at that time, or at the time of its seizure by the marshal, in the actual possession of an officer of the Russian government, the lien may be enforced in this court by a proceeding *in rem.* I understand that an interlocutory decree has been entered by default (the time in which to file a claim and answer having expired). I feel, however, that because of the peculiar circumstances of this case the decree should be opened in order to permit a claim and answer to be filed by any one duly authorized to do so, provided that a motion to that effect is made within a reasonable time.

The order to show cause will accordingly be discharged.[4]

[4] *Accord:* The Davis, 10 Wall. 15 (*semble*); Long v. Tampico, 16 Fed. 491. *Contra:* Young v. S. S. Scotia [1903] A. C. 501 (*semble*).

Vavasseur v. Krupp

Great Britain. High Court of Justice; Chancery Division. 1878.

Law Reports 9 *Chancery Division* 351.

Josiah Vavasseur, the Plaintiff in this case, had brought an action against F. Krupp, of Essen, in Germany, Alfred Longsden, his agent in England, and Ahrens & Co., described as agents for the Government of Japan, claiming an injunction and damages for the infringement of the Plaintiff's patent for making shells and other projectiles. The shells in question had been made at Essen, in Germany, had been there bought for the Government of Japan, had been brought to this country and landed here in order to be put on board three ships of war which were being built here for the Government of Japan, and to be used as ammunition for the guns of those ships.

On the 18th of January, 1878, an injunction was, without prejudice to any question, granted, restraining the Defendants and the owners of the wharf where the shells lay from selling or delivering the shells to the Government of Japan, or to any person on their behalf, or otherwise from parting with, selling, or disposing of the shells and projectiles.

On the 11th of May an application to the Court was made on behalf of the Mikado of Japan and his Envoy Extraordinary in this country, that, notwithstanding the injunction, the Mikado and his agents might be at liberty to remove the shells, and that if and so far as might be necessary the Mikado and his Envoy should for the purposes of making and being heard upon such application be added as Defendants in the suit. Upon this application an order was made by the Master of the Rolls that on the Mikado by his counsel submitting to the jurisdiction of this Court and desiring to be made a Defendant, and on payment into Court by the Mikado of £100 as security for costs, the name of the Mikado be added as a party Defendant in the action.

Notice of motion was then given on the part of the Mikado that the injunction might be dissolved, and that the Mikado might be at liberty to take possession, and remove out of the jurisdiction of the Court the shells in question the property of his Imperial Majesty.

The motion was heard before the Master of the Rolls on the 29th of June. . . .

[Jessel, M. R., made an order permitting the Mikado to remove the shells and plaintiff appealed. The opinion of Jessel, M. R., and the arguments of counsel are omitted.]

James, L. J.:—I am of opinion that this attempt on the part of the Plaintiff to interfere with the right of a foreign sovereign to deal with his public property is one of the boldest I have ever heard of as made in any Court in this country.

It is an undoubted and admitted fact that the Mikado of Japan, who is a sovereign prince, bought in Germany a certain quantity of shells, which shells were lawfully made in Germany, although they were, as alleged, made upon the same principle as something which is the subject of a patent in this country. Those shells were bought by the Mikado for the purpose of his government. He brought them into this country on the way to Japan, and he asks to be allowed to remove them from this country, that is to say, he asks that he shall not, by reason of something which was done between the Plaintiff and some other persons, be interfered with in his removal of them to his own country. It seems to me that to refuse him that leave would be a very dangerous proceeding. If a tribunal of any foreign country were to deal with the ammunition of a British man of war under those circumstances, or refuse to permit the captain of a British man of war to remove his ammunition and shells, or anything else, I think that our country would consider it a very serious matter, and possibly demand reparation.

The objection made is this. The Plaintiff says, "True it is that these shells were your property; you had brought them to this country *in transitu* to Japan, and you had no doubt a right so to bring them. But some persons in this country, either with or without your authority—with your authority it may be, but at all events having possession of these things as your agents—were minded to make, and did make, a use of these shells which was inconsistent with our patent, that is to say, they were making a profitable use of them." If they were doing so, then they are liable in an action for damages, and the Plaintiff may recover any damages that he may be entitled to. But that does not interfere with the rights of the sovereign of Japan, who now asks to be allowed to take his property. It was his property. It is now in the shape in which it was when he lawfully bought it in Germany, where it was lawfully made, and he asks to be allowed to take it out of this country in that shape.

I cannot conceive it possible how any doubt could arise or could be suggested as to the right of the Mikado to do this. I suppose that there is a notion that in some way these shells became tainted or affected through the breach or attempted breach of the patent; but even then a foreign sovereign cannot be deprived of his property because it has become tainted by the infringement of somebody's patent. He says, "It is my public property, and I ask you for it." That seems to me to be the whole of the case.

It is, however, said that the Mikado has submitted to the jurisdiction. No doubt he submitted to the jurisdiction, but in this way only, and for this purpose only. In certain circumstances (which it is not necessary for us now to inquire into) Mr. Ahrens and others were ordered by a Court of municipal jurisdiction not to deliver certain shells and other

things to the Mikado, that is to say, treating them as property, these persons were ordered not to deliver them to the Mikado, but entirely without prejudice. It could never be supposed that that order was to deprive him of any right or property which he had in them. Then when he himself applied to these persons and said, "Give me my property, let me take my property out of this country to my own country," they said, "We do not claim the property, we know it is yours, but there is an injunction of this Court, and we may be liable to punishment by this Court if we give you up your property." Upon which the Mikado, for the purpose of making an application to relieve his own property from a fetter which had been put upon it (I think inadvertently, if I may venture to say so), by the injunction of the Court, does come and say, "I will submit to the jurisdiction of the Court," which means "I will submit to the jurisdiction of the Court as to discovery, as to process, and as to costs." He never meant "I shall submit my public property to be dealt with by a Court of municipal jurisdiction in another country, and in violation of my rights." The whole effect of that proceeding was that he made himself a suitor liable to the ordinary consequences, so far as they can be enforced against a sovereign as to costs and otherwise, and in that character he made a deposit of £100 to provide for the costs of the proceedings. The order he obtained does not prevent his saying, as is the truth, "This is my property, it was lawfully bought by me and paid for by me, and it is public property. Whether anybody else has done anything right or wrong with it, is a question with which I have nothing to do. No Court of municipal jurisdiction has any right to interfere with my property, and be good enough to remove your hands from it." The Master of the Rolls, who granted the injunction, and heard the whole matter, as soon as he learnt what was the state of things, said of course that he could not keep hands on a property which he had no right to interfere with; and he made the order which is complained of.

[The opinion of Brett, L. J., is omitted.]

Cotton, L. J.:—We have not got the order appealed from, because it has not been drawn up, but in substance it is either that the Mikado should be at liberty, notwithstanding the injunction, to take away the shells in question, or that some Defendants to the suit should, notwithstanding that injunction, be at liberty to deliver them to the Mikado, thus leaving the injunction against the Defendants to stand as it was, though doing away with the effect of the injunction, in so far that the particular goods in question are no longer stopped.

The point, therefore, which has been a great deal argued does not arise, whether the Defendants can justify an act which would otherwise be an infringement of the Plaintiff's patent rights, on the ground that they were acting as agents for a foreign sovereign. That question does not arise, but undoubtedly if parties in England are doing that which is

an infringement of a patent, they cannot justify it by saying that some one who has no power to authorize them to use the patent has authorized them to do so. Certainly, my judgment in this case in no way depends upon any such proposition. After that injunction had been granted, and assuming that the injunction was properly granted against the Defendants in the suit, the Mikado came in and said, "These shells are public property of the country of which I am sovereign, and therefore I ought not to be prevented by that injunction from taking these shells. The injunction is not against me, but there may be a question whether the Defendants could allow me to take these goods away without committing a breach of the injunction; therefore I come in and state that the shells are public property of the country of which I am sovereign, and I ask the Court to give them over to me." In that proposition he is, I apprehend, clearly right. This Court has no jurisdiction, and, in my opinion, none of the Courts in this country have any jurisdiction, to interfere with the property of a foreign sovereign, more especially with what we call the public property of the state of which he is sovereign as distinguished from that which may be his own private property. The Courts have no jurisdiction to do so, not only because there is no jurisdiction as against the individual, but because there is no jurisdiction as against the foreign country whose property they are, although that foreign country is represented, as all foreign countries having a sovereign are represented, by the individual who is the sovereign.

Then, what besides was argued? I think one argument was very much this, that if the foreign sovereign had been a private individual he could have had no property in these goods, because they were violations of the Plaintiff's patent, or rather I should say more correctly, because they were to violate the Plaintiff's patent. Now there, I venture to say, is a fallacy. The property in articles which are made in violation of a patent is, notwithstanding the privilege of the patentee, in the infringer if he would otherwise have the property in them. The Court in a suit to restrain the infringement of a patent does not proceed on the footing that the Defendant proved to have infringed has no property in the articles; but, assuming the property to be in him, it prevents the use of those articles, either by removing that which constitutes the infringement, or by ordering, if necessary, a destruction of the articles so as to prevent them from being used in derogation of the Plaintiff's rights, and does this as the most effectual mode of protecting the Plaintiff's rights—not on the footing that there is no property in the Defendant. The Court cannot proceed to give that relief and interfere with the articles unless it has before it the person entitled to the articles in question, and has as against this person power to adjudicate that the articles are made or used in infringement of the Plaintiff's rights. As against a foreign sovereign, how could that be done? If these things, as

on the evidence we must take them to be, are the property of the State of which the Mikado is sovereign, I can see no possible ground for interfering on any such principle as that on which the Court acts when a Defendant subject to its jurisdiction having been shewn to have infringed the Plaintiff's rights, the Plaintiff gets this relief, that either the articles are destroyed or the objectionable portion is removed.

The only other point which we really have to consider is this. It is said that although under ordinary circumstances there is no jurisdiction as against a foreign sovereign, yet that in this particular case there is jurisdiction in consequence of the Mikado having come in and obtained the order of the 11th of May. It is said that a sovereign suing submits himself to the Court as an ordinary Plaintiff, and that the Mikado, in consequence of having obtained this order and acted upon it, puts himself in the position of an ordinary Plaintiff. In the first place, there is this fallacy: the Mikado is not now in any way suing in the ordinary sense of the word, nor has he come to the Court to establish as against an adverse claim his title to the property, which is really what is meant by a foreign sovereign coming here to sue to establish his rights. He is simply coming and saying, "The order of the Court, possibly inadvertently, interferes with my sovereign rights. To prevent any question as to the Defendants' committing a breach of the injunction by allowing me to remove the property, make an order that they be at liberty, notwithstanding the injunction, to hand them over to me." So that, in my opinion, the very foundation for the suggestion fails. But again, even if the Mikado had brought himself into Court as an ordinary Defendant, that, in my opinion, would not give the Court jurisdiction as against the subject-matter, namely, jurisdiction to interfere with the public property of Japan, which is represented here by the Mikado. But when one comes to look at the form of the order, the Mikado does not by it come in as an ordinary Defendant. By it he simply says, "I wish to bring before the Court the facts: that these are my property, that the Defendants were not constructing them under a contract for me, or using them under a contract with me. I wish to shew that they are my property. I wish to apply for liberty to remove them as the public property of the State of Japan, and for that purpose, if necessary, I ask to come in." In my opinion, the order taken fairly must be read with reference to the purpose for which the Mikado applied, and that being so, although possibly the form is not very happy, it is like a conditional appearance entered where a Defendant who considers himself improperly served with any proceeding has entered a conditional appearance, in order to contest the question, which he could not do without an appearance of some sort. It cannot, in my opinion, be said that the order puts the Mikado in the position of a Plaintiff or of a person who is made *simpliciter* a Defendant. He came in for the particular purpose of raising this

question, and the form of the order, in my opinion, ought not in any way to prejudice the rights which he would have had independently of that order.

JAMES, L. J.:—

This appeal is dismissed with costs.

GLADSTONE v. MUSURUS BEY

Great Britain. High Court of Chancery. 1862.

1 *Hemming and Miller's Reports* 495.

In 1858 the Plaintiffs and others projected a Company to carry on banking business at Constantinople, under the name of the Bank of Turkey.

Proposals were submitted to the Turkish Government resulting in a firman, or concession, which received the Sultan's assent on the 18th of May, 1858, and was accepted by the concessionaires on the 15th of February, 1859, on the understanding, as the Plaintiffs alleged, that the Sultan would withdraw all the existing kaimes, or paper-money, in his dominions, and that no further issue should be made during the existence of the Bank.

The firman granted the privilege of forming the Bank, and stipulated among other things that the Bank should not commence operations until the capital of £2,000,000 was paid; that that should be done within six months from the delivery of the firman; that the Bank should have the exclusive privilege of issuing Bank notes, to be a legal tender at Constantinople; and the Government engaged not to issue any description of paper-money, nor to accord or permit the exercise of any similar privilege in the empire to any persons or Company during the existence of the concession to the Bank. Other articles stipulated, that, in exchange for the firman, the grantees should pay as security for the perfect execution of the contract £20,000 in money or Ottoman securities to the Turkish Ambassador in London, to be deposited in the Bank of England on account of the Ottoman Government; the said security to be replaced at the disposal of the grantees, directly the Bank commenced its operations at Constantinople, in conformity with the stipulations contained in the firman; that the Bank should commence operations within six months, at latest, after the delivery of the firman, and in default thereof the security of £20,000 should be confiscated in favour of the Ottoman Government.

After the settlement of the terms of the firman, but before its acceptance by the grantees, an additional article was insisted on by the grantees, as follows:—"The operations of the Bank shall commence three months after the withdrawal of all paper-money." This was indorsed on the

firman, and signed by Musurus Bey, the Turkish Ambassador in London; and thereupon the Plaintiffs deposited £20,000 in Ottoman Bonds in the Bank of England in the name of Musurus, and proceeded to form a Company.

Ultimately, the Sultan refused to ratify the additional article, and, the kaimes not having been withdrawn, the majority of the shareholders in the Company had their money returned.

The directors of the Bank declined to commence business until the kaimes were withdrawn, and Musurus thereupon threatened to withdraw the deposited bonds as forfeited, unless the concessionaires would give up their firman.

This bill was filed by the Plaintiffs on behalf of themselves and all other persons interested in the £20,000 Bonds as concessionaires or as shareholders in the Bank of Turkey against Musurus Bey, the Bank of England, and the Sultan, and prayed a declaration that the £20,000 deposit had not become forfeited, and for an injunction against Musurus and the Bank of England to restrain the delivering of the £20,000 Turkish Bonds to any persons other than the Plaintiffs.

Notices of motion for injunction were served on the Bank of England and on the Turkish Ambassador.

[The arguments of counsel and part of the opinion are omitted.]

Vice-Chancellor Sir W. Page Wood:—

I have no doubt that I ought to grant an interim injunction, because the real question is, whether there is such a case to be tried at the Hearing that this fund ought to be kept safe in the meantime. If there is, I am bound to keep the fund safe, unless, by so doing, and under the very peculiar circumstances of this case, I should be making an order against the Bank of England, from the consequences of which I am unable to protect them. The Bank of England are brought here as the holders of a fund, which, it certainly must be taken on the Bill (and there is no doubt of it, I apprehend, in point of law), could be withdrawn from them by an order signed by the Turkish Ambassador. The Bill is then filed, stating what the facts are with relation to this deposit. If the bonds were the absolute unqualified property of the Sultan—that is to say, of the Turkish Government, there might be some difficulty in attempting to enforce any claim against the Sultan by attaching this fund. You cannot proceed against the Sultan's property by way of arrest, so as to bring the Sovereign within the jurisdiction of the Court, or by way of execution or the like. But that is not what this Bill asks. The shape in which the case is put by the Bill is, that this property in the eye of the Court is not the property of the Sultan, that it is a fund *in medio*, which is in one contingent event to become the Sultan's property, and in another contingency to become the Plaintiffs', that it is, therefore, a fund in which both the Sultan and they have contingent interests. It is, in

fact, exactly analogous to the case put by Lord Langdale in his judgment in Duke of Brunswick v. King of Hanover, though arising in a different form. There is a fund which may in event A. become the property of the Plaintiffs, and in event B. become the property of the Sultan; and if the Sultan should think fit to appear, the Court may ultimately have to determine which of the two has the better right. That is how the case stands.

. . . The case may well be supposed of a foreign Ambassador here accepting the trusts of a marriage settlement, it may be as sole trustee. If the trust funds were invested in his name in the Bank of England, it is quite true I could not deal with him on account of the impossibility of any process being had against an Ambassador. But the funds being in the Bank of England, it appears to me clear that I could in such a state of circumstances (this being a fund vested in the Ambassador absolutely, and accepted by him upon certain trusts) prevent the Bank of England from handing it over to the Ambassador, upon a distinct intimation on his part that he intended to apply it to his own use. I assume such a fact hypothetically, because we are entitled to assume any fact to try the validity of the argument founded on the absence of the Ambassador. So also in this case, it appears to me, that though I cannot hold this gentleman here, because he is an Ambassador, yet the fund being here, this Court has jurisdiction to prevent that fund being wasted, and perhaps all the more on account of the impossibility of withdrawing the fund from the hands of the Ambassador if once it reaches them. Therefore, all that remains is to consider whether the Bank of England will be protected by this order. It appears to me that the Bank will be amply protected, because, if the Turkish Ambassador should present his cheque, the Bank, under the order of this Court, would decline to honour it; and the only mode in which the Ambassador could compel payment, would be by taking some process of his own. I feel a very strong opinion, that, if he chose to take that course, the position of things would be entirely altered. He would be submitting himself to the jurisdiction of our tribunals; and in that case English tribunals would have the power of saying, for that purpose only, that they would administer justice between all parties concerned in a litigation which he had himself commenced.

Where the intention to commit a breach of trust is charged against a person who happens to be out of reach of the process of the Court, the Court does not hesitate, on a proper case being made, to preserve the trust fund *in medio* by an interim order until the hearing of the cause. The holder of the fund would be protected by the interim order in such a case, and I think the Bank will be equally protected in this case, though the absence of the alleged trustee is due to his privilege as an Ambassador. I think, therefore, I ought to make an order restraining the Bank of

England until the Hearing or further order, in the terms of the prayer of the Bill, except that the injunction must be against payment to any one, without adding the words, "other than the Plaintiffs," it being clear that the money ought not to be delivered to them, otherwise than under the direction of this Court.

Minute. Injunction to restrain the Bank of England from delivering the £20,000 Turkish Bonds to any person or persons whomsoever until the Hearing or further order.[5]

Gladstone v. Ottoman Bank

Great Britain. High Court of Chancery. 1863.

1 *Hemming and Miller's Reports* 505.

This case came on upon demurrer. The Bill was filed against the Ottoman Bank and its directors and the Sultan of Turkey. The material statements of the Bill were as follows:—

The Plaintiffs and others, in the year 1858, projected the formation of a Bank to carry on business in the Turkish empire under the style of the Bank of Turkey, and proposed that the Sultan should concede to them the exclusive privilege of issuing notes in his dominions, and should withdraw from circulation all the kaimes or paper money then in existence in Turkey.

The scheme was approved by the Turkish Government; and the approval was communicated to the Plaintiffs, with an assurance that the Sultan would undertake, as a condition precedent to the Company commencing business, to withdraw all the kaimes from circulation.

On the 18th of May, 1858, the Sultan gave his assent to a firman, by which the exclusive privilege of issuing notes, to be a legal tender at Constantinople, was granted to the Bank of Turkey; and the Turkish Government engaged not to issue any paper money, nor to concede or permit the exercise of any similar privilege in the empire to any person or Company during the existence of the concession to the said Bank. . . .

The Bank of Turkey was formed, but the paper money had not been withdrawn, and the Bank had not commenced business.

The breach complained of was stated in the 34th paragraph as follows:—

The Plaintiffs have lately discovered, as the fact is, that the Defendants, the Ottoman Bank, who are a Joint Stock Company incorporated by charter, and who carry on business in Bank Buildings, in the City of London, have recently concerted a scheme for supplanting the Bank of Turkey, and obtaining for their own use the sole privilege of issuing notes or paper money within the Turkish dominions, and of depriving

[5] See Larivière v. Morgan, 7 Ch. App. 550.

the Plaintiffs and the shareholders in the Bank of Turkey of the benefit of the concession granted to them as aforesaid; and with that view the Ottoman Bank and the directors thereof have applied to the Turkish Government for a concession to enable them, in conjunction with other persons whose names are unknown to the Plaintiffs, to establish a Company for the purpose of carrying on banking business at Constantinople and in London, which Company is intended to be formed with a joint stock capital of £2,700,000 in 135,000 shares, under the style of the Imperial Bank of Turkey; and the Turkish Government has, at the instance of the Ottoman Bank, agreed to grant to them a concession for the purpose, together with the sole and exclusive privilege of issuing paper and bank notes, which are to be a legal tender within the Turkish dominions; and a concession with such sole and exclusive privilege as aforesaid has been already granted by the said Government to the Ottoman Bank or their nominees, which concession confers or purports to confer on the Ottoman Bank privileges identical with those granted by the concession to the Plaintiffs.

The Bill prayed a declaration, that, so long as the Plaintiffs' concession was in existence, the Bank of Turkey was entitled to the exclusive privilege of issuing bank notes or paper money in the Empire of the Sultan, and that the concession of the Ottoman Bank was inoperative against the Plaintiffs; and also an injunction to restrain the Ottoman Bank and its directors from issuing notes or paper money for circulation in the Sultan's dominions.

No consequential relief was prayed against the Sultan.

Both the Ottoman Bank and the Defendants, the directors, demurred to the Bill.

[Part of the statement of the case, the arguments of counsel, and part of the opinion are omitted.]

Vice-Chancellor Sir W. Page-Wood:—

I cannot entertain any doubt upon this Bill. It is rather a bold attempt, and has been supported very ably indeed by the arguments on behalf of the Plaintiffs; but I think it is quite clear that an engagement entered into with a foreign Government such as that upon which the Plaintiffs' rights depend, is not an engagement which the Court can enforce, or against the breach of which it can give any relief. The Bill states throughout—consistently no doubt with the fact—that this grant, upon which the Plaintiffs rest their claim to relief, is the act of a foreign Government. The first statement of it is, that a scheme was entered into for establishing a Company for circulating notes in the dominions of the Sultan of Turkey; that the scheme was approved by the Government in the name and on behalf of his Imperial Majesty about the month of March, 1858; that such approval was communicated, on behalf and with the authority of his Imperial Majesty, to the Plaintiffs, the pro-

jectors of the Bank, with an assurance that the Sultan would undertake, as a condition precedent to the Company's commencing the business of the Bank, to withdraw from circulation the whole of the kaimes or paper money which were then current in his kingdom. The Government, it is said, communicated to the projectors of the Bank, that his Imperial Majesty would secure to certain concessionaires who are represented by the Plaintiffs such rights and privileges as were required for the purposes of the projected Company by an Imperial firman or concession. Then follows the concession which was granted by the Sultan, giving to these Plaintiffs the exclusive privileges which they now claim. Now standing upon that right, the Plaintiffs raise this case: They say, that this Court, acting upon the jurisdiction which it always exercises over contracts, will not suffer anyone to do anything in derogation of his contract; and it is further contended on the authority of Lumley v. Wagner and other like cases, that the Court, acting upon the same jurisdiction, will prevent a third person, with knowledge of the contract, from assisting either of the parties to it to defeat his own engagements. Without expressing any opinion on this point, it is enough to say, that these are the principles on which the Court is now asked to act in a case where the agreement is with a foreign sovereign.

Now, unless the Court is prepared to hold that this is a contract which it can enforce against the principal, it seems to me impossible (inasmuch as all the rights of the Plaintiffs stand upon the contract) to hold that, if the same sovereign power chooses to act in derogation of the right granted by the first sovereign act, I can interfere with the sovereign power itself to prevent an act in derogation of it. But if I cannot interfere with the principal, how can I interfere with the accessory, namely, the person who is alleged to be aiding in defeating the rights which the sovereign power has granted by the first concession. That the grant operates through the medium of the sovereign power of the Ottoman Empire acting for state purposes there can be no question. Mr. Rolt attempted to draw a distinction between the act of a sovereign doing something for his own benefit, and the act of what is called the legislature, where a legislature exists; but the fact that the sovereign has the control of the money current in his kingdom only amounts to this: that it is a privilege enjoyed by him for the public purposes of his country. The right of ascertaining what shall be the current coin of the kingdom is vested in the sovereign of the country, but that right, like every other right which he holds *qud* sovereign, is presumed to be exercised for the benefit of the community upon public grounds. This is not a contract for the private benefit of the sovereign, of which this Court might take cognizance, but simply a grant of the sole right of issuing notes as part of the current coin of his realm, made by the Sultan in his public capacity as the sovereign of the country. . . .

I do not think, in the view I take of the case, that it is necessary to inquire whether the first grant has been annulled or not by subsequent proceedings. I will assume that it is still in force, and that a second grant has been made inconsistent with it, by the same Sovereign power which granted the first. Suppose there was an Act of Parliament granting to the Bank of England the exclusive right of issuing bank notes which should be a legal tender throughout the country; and suppose another Act of Parliament was passed which granted the same privileges to some other Company. In such a case as that, this Court could not possibly interfere. It is not as it was put in argument, that individuals are to be protected in breaking the law, with the assistance of foreign authority, and by force of the grant of a foreign sovereign; but that those who depend upon the grant of a foreign sovereign cannot obtain the aid of this Court against the act of the foreign sovereign in making a second grant inconsistent with the first. It is the act of a foreign sovereign power which overrides everything. In reading the charges of fraud or impropriety contained in the thirty-fourth paragraph, *viz.*, that the Defendants concocted a scheme for obtaining a concession from the Turkish Government, one's mind is brought back to those cases in which this Court has been asked to restrain persons from applying for an Act of Parliament inconsistent with some rights vested in the Plaintiffs. The Court always says, it cannot interfere to prevent persons from applying to the Legislature, the sovereign power, to grant anything they please; nor is it competent to this Court to restrain any gentleman from applying to the Sultan of Turkey for a concession, any more than I could restrain them from applying to our own Legislature for an Act of Parliament; nor, after the grant is made, can I interfere to prevent them from using the grant made by the same sovereign authority. I cannot conceive where applications of this description would end, if they were once acceded to. Railroad concessions would come within the same principle. Assuming, for the sake of argument, that the Bill sufficiently avers that the concession to the Plaintiffs has never been revoked, or, if we suppose in an analogous case, that our Legislature has made two inconsistent enactments, has granted the right to one English railway company to make a railway from one place to another, and has afterwards granted the same right to a second railway company, how could I restrain that second railway company from constructing the railway? I might go much further, and take the case of a country like Turkey, or any other sovereign power which might choose to give to English merchants in general the sole right of trading to any port of their dominions; could the Attorney-General of this country proceed against some Italian or Frenchman residing in this country, and subject to the jurisdiction of the Court, to prevent him from sending a ship to that country? It seems to me it is impossible to hold, that this Court

has jurisdiction to interfere with any step which the Ottoman Government may take in this matter according to its own sole will and discretion. Therefore I am bound to allow the demurrers.[6]

ADOLPH PILGER, COMPLAINANT-RESPONDENT, v. UNITED STATES STEEL CORPORATION AND PUBLIC TRUSTEE, DEFENDANTS-APPELLANTS

United States. Court of Errors and Appeals of New Jersey. 1925.

98 *New Jersey Equity Reports* 665.

On appeal from a decree in chancery advised by Vice-Chancellor Foster, whose opinion is reported in 97 N. J. Eq. 102.

[The names of counsel are omitted.]

The opinion of the court was delivered by

GUMMERE, CHIEF-JUSTICE.

The complainant, a resident of Germany, filed his bill in this cause praying a decree against the defendant public trustee, adjudging that certain shares of stock of the United States Steel Corporation of New Jersey, purchased by him, the complainant, in 1914, and which were held for him by the Dresdner Bank, at its branch office in London, and which had been seized by the said defendant, a corporation sole of the United Kingdom of Great Britain and Ireland, and which, he avers, are wrongfully and unlawfully detained by said defendant, who refuses to deliver them to him, be surrendered and transferred to him by said defendant. To the complainant's bill the defendant, public trustee, filed an answer in the nature of a plea to the jurisdiction of the court, setting up that in seizing the stock certificates of the complainant and retaining them in his possession he was and is acting as the *alter ego* of the sovereign of Great Britain and Ireland; that the suit against him is, in its legal aspect, a suit against the sovereign himself; that a sovereign cannot be sued in any court without his consent; that the British sovereign has not consented to the prosecution of this present suit, and that, therefore, the court of chancery is without jurisdiction to hear and determine it. The complainant thereupon moved to strike out the answer on the ground that the fundamental allegation contained therein, namely, that the suit in its essence is against the British government, was contrary to the fact and unsound in law; and, upon the conclusion of the hearing had upon this motion, an order was made striking out the answer for the reason that the claim of the public trustee was without legal merit. The appeal now before us is taken to review the validity of that order.

The contention made by the appellant, both in the court of chancery and before us, necessarily is that, although his present retention of the stock is not justified by the statute under which he was appointed public

[6] See Smith v. Weguelin, 8 Eq. 198.

trustee or by the rules and regulations adopted thereunder (this being the conclusive inference to be drawn from the averment of the complainant's bill), and although the legal title thereto and the right of possession thereof is in the complainant, nevertheless, the doors of the courts of this state and of every other state and nation are closed against the latter, he cannot enforce his legal rights by judicial procedure, unless the public trustee or some other duly authorized representative of the British government consents that he shall do so.

Not only is this contention repugnant to the sense of judgment which dwells in the mind of every fair-minded man, but it is, in our opinion, without legal support. The public trustee is undoubtedly a governmental agency, and, to the extent that his acts are within the scope of the powers vested in him as such agent, it must be conceded that he is the representative of his government; that suits brought against him for the commission of such acts are, in legal effects, suits brought against the government itself, and that such suits cannot be maintained in the absence of governmental consent. In the present case, however, the averment of the bill is that the appellant wrongfully and unlawfully detains the stock certificates referred to therein and refuses to deliver them to the complainant, and this, as we view it, is tantamount to a declaration that he is not only acting outside of the scope of his authority, but in direct violation of the duties imposed upon him as such governmental agent. An instrumentality of government, whether corporate or not, although created for purposes of the very greatest importance, does not cease to be personally answerable for acts done under color of the authority conferred upon it, but, in fact, in excess of that authority and without legal justification. The immunity of a sovereign against suits arising out of the unlawful acts of its representatives does not extend to those who acted in its name, and cannot be set up by them as a bar to suits brought against them for the doing of such unlawful acts. It was so held in the case of Sloan Shipyard v. United States Fleet Corporation, 258 U. S. 567, 568, and neither the research of counsel, nor our own examination of the later decisions of that tribunal, has brought to our attention any criticism of the doctrine there laid down. Its soundness, to our minds, is apparent.

We are not unmindful of the fact that counsel for the appellant, in his argument before us, asserted that the action of the public trustee in refusing to deliver the stock in question to the complainant, is not unlawful, but is fully justified, for the reason that in doing so he is acting within the powers conferred upon it by the British statute and the rules and regulations adopted thereunder, which have already been referred to. We are not, however, presently concerned with the legality of the appellant's action. Whether or not it is in fact justified is a matter to be determined on a final hearing on the merits, and has no

bearing upon the single question presented by this appeal—that is, whether, on the basic fact exhibited in the bill of complaint, the court of chancery has jurisdiction to determine as against the appellant, the right of the respondent to the certificates of stock which are subject of the present litigation.

The order under review will be affirmed.

For affirmance—The Chief-Justice, Trenchard, Parker, Minturn, Kalisch, Black, Campbell, White, Gardner, Van Buskirk, McGlennon, Kays, JJ. 12.

For reversal—Katzenbach, Lloyd, JJ. 2.

Mighell v. Sultan of Johore

Great Britain. Court of Appeal. 1893.

Law Reports [1894] 1 *Queen's Bench Division* 149.

Motion to set aside an order for substituted service of a writ of summons in an action for breach of promise of marriage, and to stay all proceedings therein, on the ground that the Court had no jurisdiction over the defendant, who was described in the writ as "The Sultan of the State and Territory of Johore, otherwise known as Albert Baker."

The order for substituted service was obtained *ex parte* from a master in chambers on August 30, 1893. The motion to set aside that order having come before Wright, J., sitting as vacation judge, on September 7, 1893, the learned judge adjourned the hearing of the motion, and caused a communication to be made to the Secretary of State for the Colonies, in order to ascertain the status of the defendant. In answer to that communication a letter was written to Wright, J., by an official at the Colonial Office, purporting to be written by direction of the Secretary of State for the Colonies, and informing him that Johore was an independent state and territory in the Malay Peninsula, and that the defendant was the present sovereign ruler thereof; that the relations between the Sultan and Her Majesty the Queen, which were relations of alliance and not of suzerainty and dependence, were regulated by a treaty made on December 11, 1885, of which a copy was enclosed; that the Sultan had raised and maintains armed forces by sea and land, had organised a postal system, dispenses justice through regularly constituted courts, had founded orders of knighthood, confers titles of honour; and, generally speaking, exercised without question the usual attributes of a sovereign ruler. By the treaty it was agreed that the Governor of the Straits Settlements should protect the Sultan's territory from external hostile attack, and for that purpose Her Majesty's officers were to have access at all times to the waters of the State of Johore; and by art. 6

of the treaty the Sultan bound himself not to negotiate treaties or to enter into any engagement with any foreign state.

The motion was referred by Wright, J., to the Divisional Court, who were furnished with the letter from the Colonial Office. An affidavit made by the plaintiff, and used on the hearing of the motion, contained the following material statements: The plaintiff was introduced to the defendant in August, 1885, as "Mr. Baker," and she had known him by the name of "Albert Baker," under which name he passed and was generally known, ever since. The defendant promised her marriage in 1885. About September, 1885, he took a furnished house at Goring in the name of Albert Baker, and was known by that name, and no other, in the district and neighbourhood. He always represented himself as a private individual and an ordinary subject of the Queen, and was always treated as such. In October, 1885, the plaintiff accidentally discovered that the defendant was the Sultan of Johore, and thereupon he made her promise never to reveal who he was, nor to call him by any other name than that of Albert Baker, saying that he wished to conceal his real position, and to preserve his *incognito*. He remained in this country, living at various places, for some time, and always represented himself, and was treated by servants, tradesmen, and others, as a private individual and a subject of the Queen, and always passed under the name of Albert Baker. He returned to this country, after several years absence, in 1891, and again passed, represented himself, and was treated as "Mr. Baker," and as a private individual and subject of the Queen, living *incognito* as before in a private house in the Isle of Wight.

[The motion was granted by the Queen's Bench Division and the plaintiff appealed. The opinions of the justices of the Queen's Bench Division and the arguments of counsel are omitted.]

Lord Esher, M. R. For the purposes of my judgment I must assume that the Sultan of Johore came to this country and took the name of Albert Baker, and that the plaintiff believed that his name was Albert Baker, and I will go so far as to assume for the present purpose that he deceived her by pretending to be Albert Baker, and then promised to marry her, and that he broke his promise. Whether these matters could be proved, if the case went further, is entirely another matter; but at the present stage of the case I will assume them to be true. At length, when he is sued, he alleges that he is a sovereign prince, and that no action can be maintained against him in the municipal Courts of this country for anything which he has done. An elaborate argument has been presented to us on behalf of the plaintiff which was not altogether new, for I remember to have heard something very like it in the case of The Parlement Belge. [5 P. D. 197.] In this argument there was only one point which appeared to have much weight, *viz.*, that very great

judges in the House of Lords and in the Queen's Bench had formerly declined to determine the principal point now raised. If the matter had stood there, I should have thought that it might be necessary for us to look into all the authorities on the subject. But I think that we did so in the case of The Parlement Belge, and that the point in this case is not now before the Court of Appeal for the first time, but was really decided in that case, which decision would, of course, be binding on us in the present case, even if any of us did not agree with it.

The first point taken was that it was not sufficiently shewn that the defendant was an independent sovereign power. There was a letter written on behalf of the Secretary of State for the Colonies, on paper bearing the stamp of the Colonial Office, and which clearly came from the Secretary of State for the Colonies in his official character. He is in colonial matters the adviser of the Queen, and I think the letter has the same effect for the present purpose as a communication from the Queen. It was argued that the judge ought not to have been satisfied with that letter, but to have informed himself from historical and other sources as to the status of the Sultan of Johore. It was said that Sir Robert Phillimore did so in the case of The Charkieh. [L. R. 4 A. & E. 59.] I know he did; but I am of opinion that he ought not to have done so; that, when once there is the authoritative certificate of the Queen through her minister of state as to the status of another sovereign, that in the Courts of this country is decisive. Therefore this letter is conclusive that the defendant is an independent sovereign. For this purpose all sovereigns are equal. The independent sovereign of the smallest state stands on the same footing as the monarch of the greatest.

It being established that the defendant is in that position, can he be sued in the Courts of this country? It is not contended that he could, unless by coming into this country, and living there under a false name, and—I will assume for the present purpose—by so deceiving the plaintiff, he has lost his privilege as an independent sovereign and made himself subject to the jurisdiction. In the case of The Parlement Belge the whole subject was carefully considered. As I have pointed out, great judges in the House of Lords and the Queen's Bench had in previous cases declined to decide this point, but I think that this Court was there called upon to decide the point, and did decide it. I said, in giving the judgment of the Court in that case, after citing passages from various authorities, and a minute examination of the cases on the subject (see p. 214 of the report), "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign

or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction." It appears to me that, by the authority of this Court, the rule was thus laid down absolutely and without any qualification. We had not then to deal with the question of a foreign sovereign submitting to the jurisdiction; everybody knows and understands that a foreign sovereign may do that. But the question is, How? What is the time at which he can be said to elect whether he will submit to the jurisdiction? Obviously, as it appears to me, it is when the Court is about or is being asked to exercise jurisdiction over him, and not any previous time. Although up to that time he has perfectly concealed the fact that he is a sovereign, and has acted as a private individual, yet it is only when the time comes that the Court is asked to exercise jurisdiction over him that he can elect whether he will submit to the jurisdiction. If it is then shewn that he is an independent sovereign, and does not submit to the jurisdiction, the Court has no jurisdiction over him. It follows from this that there can be no inquiry by the Court into his conduct prior to that date. The only question is whether, when the matter comes before the Court, and it is shewn that the defendant is an independent sovereign, he then elects to submit to the jurisdiction. If he does not the Court has no jurisdiction. It appears to me that this is the result of the principles laid down in The Parlement Belge. Therefore, I think the Court has no jurisdiction to enter into any inquiry into the matters alleged by the plaintiff, the defendant being an independent sovereign, and not submitting himself to the jurisdiction. For these reasons the appeal must be dismissed.

Lopes, L. J. It was contended for the plaintiff that the status of the defendant had not been satisfactorily established; but I am clearly of opinion that it was, and that the defendant is an independent sovereign. That such a sovereign is entitled to immunity from the jurisdiction of our Courts is beyond all question. That proposition was established, if it needed to be further established, by the case of The Parlement Belge. The law on the subject is clearly laid down by Vattel. He says (Law of Nations—Translation by J. Chitty —ed. 1834, p. 485): "We cannot introduce in any more proper place an important question of the law of nations which is nearly allied to the right of embassies. It is asked what are the rights of a sovereign, who happens to be in a foreign country, and how is the master of that country to treat him? If that prince be come to negotiate, or to treat about some public affair, he is doubtless entitled, in a more eminent degree, to enjoy all the rights of ambassadors. If he be come as a traveller, his dignity alone, and the regard due to the nation which he represents and governs, shelters him from all insult,

gives him a claim to respect and attention of every kind, and exempts him from all jurisdiction." But there is no doubt that a foreign sovereign may submit to the jurisdiction of the Courts of this country, and it was contended that in this particular case he had so submitted, because he had taken an assumed name and acted as a private individual. We are asked from that to infer the fact of submission to the jurisdiction. I am of opinion that no such inference can be drawn. In my judgment, the only mode in which a sovereign can submit to the jurisdiction is by a submission in the face of the Court, as, for example, by appearance to a writ. That he intends to waive his rights by taking an assumed name cannot be inferred. On this point I will again refer to Vattel's Law of Nations, p. 485, where he says: "On his making himself known, he cannot be treated as subject to the common laws; for it is not to be presumed that he has consented to such a subjection; and, if a prince will not suffer him in his dominions on that footing, he should give him notice of his intentions."

It seems to me clear, therefore, that in this case there was no submission to the jurisdiction, and nothing from which such submission could be inferred. For these reasons I agree that the appeal should be dismissed.

[The concurring opinion of Kay, L. J., is omitted.]

Appeal dismissed.[7]

[7] "Who, except the defendant, can be satisfied with the decision in Mighell v. Sultan of Johore?" WALTON, in 2 Jour. Soc. Comp. Leg., 3d series, 252, 253.

"As to the position of a president when abroad, writers on the Law of Nations do not agree. Some maintain that, since a president is not a sovereign, his home State can never claim for him the same privileges as for a monarch, and expecially that of exterritoriality. Others distinguish between a president staying abroad in his official capacity as Head of a State and one who is abroad for his private purposes, and they maintain that his home State could only in the first case claim exterritoriality for him. Others again will not admit any difference in the position of a president abroad from that of a monarch abroad. With regard to ceremonial honours due to a president when abroad on official business, when the President of the United States visited England in December 1918 he received such ceremonial honours as are due to a monarch. As regards exterritoriality, I believe that future contingencies will create the practice on the part of the States of granting this privilege to presidents and members of their suite as in the case of monarchs. I cannot see that there is any danger in such a grant. And nobody can deny that, if exterritoriality is not granted, all kinds of friction and even conflicts might arise. Although not sovereigns, presidents of republics fill, for the time being, a sublime office, and the grant of exterritoriality to them is a tribute paid to the dignity of the States they represent." OPPENHEIM, 4th ed., I, §356. See also FAUCHILLE, I, Pt. III, 11.

COALE ET AL. v. SOCIÉTÉ CO-OPERATIVE SUISSE DES CHARBONS, BASLE, ET AL

United States. District Court, Southern District of New York. 1921.

21 *Federal Reporter, 2d Series*, 180.

At Law. Action for breach of contract brought by William F. Coale and another against the Société Co-operative Suisse des Charbons, Basle, and another. On demurrer to the answer. . . .

[The names of counsel are omitted.]

AUGUSTUS N. HAND, DISTRICT JUDGE. This is an action for failure to take and pay for coal sold to the defendants under a written contract. The Swiss government did not appear, but service of the summons and complaint was made upon the defendant Société Co-operative Suisse des Charbons, a foreign corporation chartered by the government of Switzerland. On July 17, 1917, the Federal Council of Switzerland delegated to the Department of Commerce the power to control the importation and distribution of coal. This department caused the Société to be organized on March 17, 1919, to purchase coal in foreign countries and import it into Switzerland. Persons of Swiss nationality, who had imported coal in considerable quantities, were eligible for membership. The capital was fixed at 10,000,000 francs, interest was to be paid to the subscribers at 6 per cent., and the further net earnings, if any, were to pass to the government, in order to reduce the price of coal for home consumption. Seven out of 17 directors were to be appointed by the government. The charter and amendments and the rules made by the directors were to have no validity until approved by the government. The contract with the plaintiff was signed by the Swiss minister on behalf of the Société and the Swiss Federation. The foregoing facts are set up in defendant's answer, to which plaintiff demurs.

If the Swiss government chose to do its business by means of the Société, the latter, as a corporate entity, was liable for its corporate obligations. I find no case which holds otherwise. If the Société had contracted as agent for the Swiss government, the case might have been different; but in this instance the Swiss minister signed the contract for the corporation. The interest of the government in any balance after those contributing the capital received 6 per cent. interest is like the case of a bank where the government owns all the stock. The decisions hold that the corporation is liable under such circumstances.

Various cases might be cited, but the opinion of Judge Mayer in Commercial Pacific Cable Co. v. Phillipine National Bank (D. C.) 263 F. 218, which has been affirmed in the Circuit Court of Appeals (269 F. 1022), is entirely conclusive. In that case the president and vice

president of the Phillipine Bank were by statute required to be appointed by the Governor General of the Senate, and the insular auditor was by law auditor of the bank. By the same governmental authority various officers could be removed. The Supreme Court in United States v. Strang, 254 U. S. 491, 41 S. Ct. 165, 65 L. Ed. 368, reached a similar conclusion in dealing with the United States Shipping Board Emergency Fleet Corporation. The joinder of the Swiss government will not defeat the cause of action. That is a proper, if not necessary, party; but, as it has not appeared, the action may proceed against the party served (Judicial Code, §50 (Comp. St. §1032)), and relief may be given without affecting it. Any profits which might become due to the government after payment of 6 per cent. to those furnishing capital would resemble dividends; property of the corporation taken on execution would not be property of the Swiss Federation.

The demurrer is sustained.[8]

Resolution with Respect to the Competence of Courts in Suits against Foreign States or Sovereigns

Institute of International Law. Hamburg, 1891.

Tableau Général de L'Institut de Droit International, 1893, *page* 116.

Art. 1. Movable property, including horses, carriages, wagons, and vessels, belonging to a foreign sovereign or head of State, and intended directly or indirectly for the actual use of that sovereign or head of State or of persons accompanying him in his service, is exempt from seizure.

Art. 2. Likewise exempt from any seizure are movable property and immovable property belonging to a foreign State and intended, with the express or tacit approval of the State in whose territory it is, for the service of the foreign State.

Art. 3. Nevertheless a creditor for whose benefit something belonging to a foreign State, sovereign, or head of State is expressly pledged or hypothecated by that State, sovereign, or head of State, can, when the occasion arises, retain it or have it seized.

Art 4. The only actions cognizable against a foreign State are:

1. Real actions, including possessory actions relating to real or personal property within the territory;[9]

[8] See also Molina v. Comision Reguladora del Mercado de Henequen, 91 N. J. L. 382. See Kunglig Jarnvagsstyrelsen v. Dexter, 300 Fed. 891. *Cf.* Compania Mercantil Argentina v. United States Shipping Board, 93 L. J. K. B. 816.

[9] "There seem to have been few cases where a state has presumed to claim immunity from judicial process in actions incident to real estate owned abroad. This prob-

2. Actions based upon the capacity of the foreign State as an heir or legatee of a *ressortissant* of the territory or as entitled to an inheritance taking effect in the territory;[10]

3. Actions relating to a commercial or industrial establishment or a railroad, when exploited by the foreign State on the territory;[11]

4. Actions for which the foreign State has expressly admitted the competence of the tribunal. The foreign State which itself lays a complaint before a court is deemed to have admitted the competence of this court as regards judgment for costs of the suit and as regards a counter-claim arising out of the same affair; likewise, a foreign State which, when making answer to an action brought against it, does not take exception to the jurisdiction of the court, is deemed to have admitted it to be competent to hear the case;[12]

5. Actions arising out of contracts entered into by a foreign State on the territory, if the complete execution on the same territory may be required of it according to an express clause or according to the very nature of the action;

6. Actions in damages founded on a tort or quasi-tort committed on the territory.

Art. 5. Actions brought for acts of sovereignty are not cognizable, nor acts arising out of a contract of the plaintiff as an official of the State, nor actions concerning the debts of the foreign State contracted through public subscription.

Art. 6. Actions brought against foreign sovereigns or heads of States are subject to the rules laid down in Articles 4 and 5.

Art 7. Nevertheless, actions resulting from obligations contracted before the accession of the sovereign or the appointment of the head of State are governed by the ordinary rules of competence.

Art. 8. The summons, both for sovereigns or heads of States and for States themselves, are made through the diplomatic channel.

Art. 9. It is desirable that in each State the laws of procedure accord sufficient time so that in cases of action brought or seizure demanded or effected against a sovereign or head of State or a foreign State, a report

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ably means that there is a realization that no such pretension would be admitted. The writers of authority are of opinion that rights to real property are a matter so intimately connected with the very independence of the state that none other than the local courts could be permitted to pass upon them." FAIRMAN, "Some Disputed Applications of the Principle of State Immunity," 22 Am. Jour. Int. L. 566, 567.

[10] "It is contended by the writers, and seemingly acquiesced in by the courts, that where a state appears in a litigation as claimant of an inheritance it is on the plane of a mere private person and as such subject to the local law." FAIRMAN, *op. cit.*, 22 Am. Jour. Int. L. 566, 568.

[11] See Société Anonyme des Chemins de Fer c. État Néerlandais, *supra*, 527, and note 2, *supra*, 533.

[12] On waiver by submission to local courts, see §4, *infra*, 621.

may be made to the government of the country in which the action has been brought or the seizure demanded or effected.[13] [SCOTT's transl.]

SECTION 2. FOREIGN STATE REPRESENTATIVES

GREAT BRITAIN, AN ACT FOR PRESERVING THE PRIVILEGES OF AMBASSADORS, AND OTHER PUBLICK MINISTERS OF FOREIGN PRINCES AND STATES

1708.

7 *Anne c.* 12.

Whereas several turbulent and disorderly persons having in a most outragious manner insulted the person of his excellency Andrew Artemonowitz Mattueof, ambassador extraordinary of his Czarish Majesty, Emperor of Great Russia, her Majesty's good friend and ally, by arresting him, and taking him by violence out of his coach in the publick street, and detaining him in custody for several hours, in contempt of the protection granted by her Majesty, contrary to the law of nations, and in prejudice of the rights and privileges which ambassadors and other publick ministers, authorized and received as such, have at all times been thereby possessed of, and ought to be kept sacred and inviolable; be it therefore declared by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in parliament assembled, and by the authority of the same, That all actions and suits, writs and processes commenced, sued, or prosecuted against the said ambassador, by any person or persons whatsoever, and all bail bonds given by the said ambassador, or any other person or persons on his behalf, and all recognizances of bail given or acknowledged in any such action or suit, and all proceedings upon or by

[13] "It seems difficult at the present time to defend the principle of state immunity. But if the principle is to be perpetuated at all there seems no ground on which the courts can deny immunity to property commercially used. The border line between public and commercial use is bound to become more shadowy as the expansion of state activity continues, and it will be both safer and wiser for the courts to leave the question of immunity to the legislatures. These have shown a desirable tendency to exempt various kinds of state activity from immunity. It might also be possible to incorporate in treaties or international conventions, similar restrictions on the immunity of commercially used property of foreign states." FRAENKEL, "Juristic Status of Foreign States," 25 Col. L. Rev. 544, 569.

On the immunities, in general, of foreign states or sovereigns, see FÉRAUD-GIRAUD, États et Souverains devant les Tribunaux Etrangers, I, 25, 155; League of Nations, Committee of Experts on Codification, Questionnaire on the Competence of Courts in Regard to Foreign States, L. of N. Doc., V. Legal, 1927, V. 9, 22 Am. Jour. Int. L. Spec. Suppl. 117.

pretext or colour of any such action or suit, writ or process, and all judgments had thereupon, are utterly null and void, and shall be deemed and adjudged to be utterly null and void, to all intents, constructions, and purposes whatsoever.

II. And be it enacted by the authority aforesaid, That all entries, proceedings, and records against the said ambassador, or his bail, shall be vacated and cancelled.

III. And to prevent the like insolencies for the future, be it further declared by the authority aforesaid, That all writs and processes that shall at any time hereafter be sued forth or prosecuted, whereby the person of any ambassador, or other publick minister of any foreign prince or state, authorized and received as such by her Majesty, her heirs or successors, or the domestick, or domestick servant of any such ambassador, or other publick minister, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever.

IV. And be it further enacted by the authority aforesaid, That in case any person or persons shall presume to sue forth or prosecute any such writ or process, such person and persons, and all attornies and solicitors prosecuting and soliciting in such case, and all officers executing any such writ or process, being thereof convicted, by the confession of the party, or by the oath of one or more credible witness or witnesses, before the lord chancellor, or lord keeper of the great seal of Great Britain, the chief justice of the court of Queen's Bench, the chief justice of the court of Common Pleas for the time being, or any two of them, shall be deemed violators of the laws of nations, and disturbers of the publick repose, and shall suffer such pains, penalties, and corporal punishment, as the said lord chancellor, lord keeper, and the said chief justices, or any two of them shall judge fit to be imposed and inflicted.

V. Provided, and be it declared, That no merchant or other trader whatsoever, within the description of any of the statutes against bankrupts, who hath or shall put himself into the service of any such ambassador or publick minister, shall have or take any manner of benefit by this act; and that no person shall be proceeded against as having arrested the servant of an ambassador or publick minister, by virtue of this act, unless the name of such servant be first registered in the office of one of the principal secretaries of state, and by such secretary transmitted to the sheriffs of London and Middlesex for the time being, or their under sheriffs or deputies, who shall, upon the receipt thereof, hang up the same in some publick place in their offices, whereto all persons may resort, and take copies thereof, without fee or reward.

VI. And be it further enacted by the authority aforesaid, That this act shall be taken and allowed in all courts within this kingdom as a

publick act; and that all judges and justices shall take notice of it without special pleading; and all sheriffs, bailiffs, and other officers and ministers of justice, concerned in the execution of process, are hereby required to have regard to this act, as they will answer the contrary at their peril.[14]

THE MAGDALENA STEAM NAVIGATION COMPANY v. MARTIN

Great Britain. Court of Queen's Bench. 1859.

2 *Ellis and Ellis' Reports* 94.

[This was an action to recover from a shareholder the amount of a stock assessment levied upon the shares of a company in liquidation. The defendant pleaded that he was the public minister of a friendly foreign state. Plaintiff demurred. Joinder in demurrer.]

[The above statement is substituted for the statement of the case in the report. The arguments of counsel are omitted.]

LORD CAMPBELL C. J. now delivered the judgment of the Court.

The question raised by this record is, whether the public minister of a foreign state, accredited to and received by Her Majesty, having no real property in England, and having done nothing to disentitle him to the privileges generally belonging to such public minister, may be sued, against his will, in the Courts of this country, for a debt, neither

[14] See Triquet v. Bath, 3 Burr. 1478, *supra*, 55; MARTENS, Causes Célèbres, 2d ed., I, 73; STOWELL and MUNRO, I, 3. With the Mattueof Case, which led to the enactment of the Act of 7 Anne c. 12, *cf.* the Gyllenborg Case, SATOW, Diplomatic Practice, 2d ed., I, 254, and the Cellamare Case, *ibid.*, I, 256. That the Act of Anne was merely declaratory of the law of nations, which is part of the common law, see Barbuit's Case, Cas. t. Talb. 281, 282, *infra*, 587, 588; Triquet v. Bath, *supra;* and the cases cited in paragraph one of note 28, ch. 1, §4, *supra*, 56.

See also Respublica v. De Longchamps, 1 Dall. 111, *infra*, 810; United States, Act of 1790, c. 9, §§25–28, 1 U. S. Stat. L. 112, 117; U. S. Rev. Stat., §§4062–4065, *infra*, 813; United States v. Benner, Baldw. 234.

"It was formerly held in England, as we see in March's case, reported by Rolle, in the time of James I, that, 'although an ambassador is privileged by the law of nature and of nations, yet, if he commit any offence against the law of nature or reason, he shall lose his privilege, but not if he offend against a positive law of any realm.' (Rolle's R., p. 175.) No such distinction between *mala prohibita* and *mala in se*, as respects ambassadors, is now admitted: and their exterritoriality is the unanimous doctrine of all publicists, and is recognised in England, as it is in the United States, by statute." ATTORNEY-GENERAL CUSHING, in 7 Op. Atty. Gen. 367, 386.

"Of course, an agent cannot expect to enjoy inviolability when he commits an illegal act necessitating the immediate application of personal restraint; for instance, if curiosity induced him to break through the cordon of police drawn round a burning building, or if he exceeded the legal limit of speed when motoring on a high road or through the streets. It may be generally said that the condition of his personal inviolability is the correctness of his own conduct, just as if he were a private individual." SATOW, Diplomatic Practice, 2d ed., I, 252.

his person nor his goods being touched by the suit, while he remains such public minister. The defendant is accredited to and received by Her Majesty as Envoy Extraordinary and Minister Plenipotentiary for the Republics of Guatemala and New Granada respectively; and a writ has been sued out against him and served upon him, to recover an alleged debt, for the purpose of prosecuting this action to judgment against him whilst he continues such public minister. He says, by his plea to the jurisdiction of the Court, that, by reason of his privilege as such public minister, he ought not to be compelled to answer. We are of opinion that his plea is good, and that we are bound to give judgment in his favour. The great principle is to be found in Grotius *de Jure Belli et Pacis, lib.* 2, c. 18. s. 9., "*Omnis coactio abesse a legato debet.*" He is to be left at liberty to devote himself body and soul to the business of his embassy. He does not owe even a temporary allegiance to the Sovereign to whom he is accredited, and he has at least as great privileges from suits as the Sovereign whom he represents. He is not supposed even to live within the territory of the Sovereign to whom he is accredited, and, if he has done nothing to forfeit or to waive his privilege, he is for all juridical purposes supposed still to be in his own country.[15] For these reasons, the rule laid down by all jurists of authority who have written upon the subject is, that an ambassador is exempt from the jurisdiction of the Courts of the country in which he resides as ambassador. Whatever exceptions there may be, they acknowledge and prove this rule. The counsel for the plaintiffs, admitting that the person of an ambassador cannot be lawfully imprisoned in a suit, and that his goods cannot be taken in execution, contended that he might be cited and impleaded; and he referred to the decision of the tribunal at the Hague, in 1720, which is reported by Bynkershoek, and was the cause of that great jurist writing his valuable treatise *De Foro Legatorum.* But this case is to be found in chap. xiv., entitled "*De Legato Mercatore,*" in which is explained the exception of an ambassador engaging in commerce for his private gain. The Envoy Extraordinary of the Duke of Holstein to the States General, leaving the Hague, where he ought to have resided, "*Amsterdamum se confert, et strenuè mercatorem agit. Plurium debitor factus, Hagam revertitur, sed et plures curiam Hollandiæ adeunt, et impetrant mandatum arresti et in jus vocationis.*" The arrest was granted to operate on all goods, money and effects within the jurisdiction of the tribunal, with the exception of the movables, equipages and other things belonging to him in his character of ambassador. But this citation was entirely in respect of his having engaged in commerce,

[15] "It is perfectly clear that ex-territoriality is a fiction which has no foundation either in law or in fact." DIENA, in Report on Diplomatic Privileges and Immunities, L. of N. Doc., C. 45. M. 22, 1926, V, 20 Am. Jour. Int. L. Spec. Suppl. 148, 151, 153.

and shews that otherwise he would not have been subject to the jurisdiction of the Dutch Courts. Lord Coke's authority (4 Inst. 153) was cited, where, writing of the privileges of an ambassador, having said that "for any crime committed *contrà jus gentium*, as treason, felony, adultery, or any other crime which is against the law of nations, he loseth the privilege and dignity of an ambassador, as unworthy of so high a place," he adds, "and so of contracts that be good *jure gentium* he must answer here." There does not seem to be anything in the contract set out in this declaration contrary to the laws of nations; but Lord Coke, who is so great an authority as to our municipal law, is entitled to little respect as a general jurist.

Mr. Bovill, being driven from his supposition that the writ in this case might be sued out only to save the Statute of Limitations, by the fact that it had been served upon the defendant, and by the allegation in the plea that it was sued out for the purpose of prosecuting this action to judgment, strenuously maintained that at all events the action could be prosecuted to that stage, with a view to ascertain the amount of the debt, and to enable the plaintiffs to have execution on the judgment when the defendant may cease to be a public minister. But although this suggestion is thrown out in the discussion which took place in the Common Pleas, in Taylor v. Best,[16] it is supported by no authority; the proceeding would be wholly anomalous; it violates the principle laid down by Grotius; it would produce the most serious inconvenience to the party sued; and it could hardly be of any benefit to the plaintiffs. In the first place, there is great difficulty in seeing how the writ can properly be served, for the ambassador's house is sacred, and is considered part of the territory of the sovereign he represents; nor could the ambassador be safely stopped in the street to receive the writ, as he may be proceeding to the Court of our Queen, or to negotiate the affairs of his Sovereign with one of her ministers. It is allowed that he would not be bound to answer interrogatories, or to obey a subpœna requiring him to be examined as a witness for the plaintiffs. But he must defend the action, which may be for a debt of 100,000 *l.*, or for a libel, or to recover damages for some gross fraud imputed to him. He must retain an attorney and counsel, and subpœna witnesses in his defence. The trial may last many days, and his personal attendance may be necessary to instruct his legal advisers. Can all this take place without "*coactio*" to the ambassador? Then, what benefit does it produce to the plaintiffs? There can be no execution upon it while the ambassador is accredited, nor even when he is recalled, if he only remains a reasonable time in this country after his recall.[17] In countries where there may be a citation

[16] *Infra*, 571.

[17] On the period allowed after termination of mission for winding up official business, see Musurus Bey v. Gadban [1894] 2 Q. B. 352; Dupont v. Pichon, 4 Dall. 321.

by seizure of goods, if an ambassador loses his privilege by engaging in commerce, he not only may be cited, but all his goods unconnected with his diplomatic functions may be arrested to force him to appear, and may afterwards, while he continues ambassador, be taken in execution on the judgment.

Reference was frequently made during the argument to stat. 7 Anne. c. 12.; but it can be of no service to the plaintiffs. The 1st and 3d sections are only declaratory of the law of nations, in conformity with what we have laid down; and the other sections, which regulate procedure, do not touch the extent of the immunity to which the ambassador is entitled. The Russian ambassador had been taken from his coach and imprisoned; but the statute cannot be considered as directed only against bailable process. The writs and processes described in the 3rd section are not to be confined to such as directly touch the person or goods of an ambassador, but extend to such as, in their usual consequences, would have this effect. At any rate, it never was intended by this statute to abridge the immunity which the law of nations gives to ambassadors, that they shall not be impleaded in the Courts of the country to which they are accredited. An argument was drawn from the course pursued in some instances of setting aside bail bonds given by persons having the privilege of ambassadors, or their servants, on filing common bail. This, perhaps, is as much as could reasonably be asked on a summary application to the Court, but does not shew that the action may not be entirely stopped by a plea regularly pleaded to the jurisdiction of the Court.

Some inconveniences have been pointed out as arising from this doctrine, which, we think, need not be experienced. If the ambassador has contracted jointly with others, the objection that he is not joined as a defendant may be met by shewing that he is not liable to be sued. As to the difficulty of removing an ambassador from a house of which he unlawfully keeps possession, DeWicquefort, and other writers of authority on this subject, point out that in such cases there may be a specific remedy by injunction. Those who cannot safely trust to the honour of an ambassador, in supplying him with what he wants, may refuse to deal with him without a surety, who may be sued; and the resource is always open of making a complaint to the government by which the ambassador is accredited. Such inconveniences are trifling, compared with those which might arise were it to be held that all public ministers may be impleaded in our municipal Courts, and that judgment may be obtained against them in all actions, either *ex contractu* or *ex delicto*. It certainly has not hitherto been expressly decided that a public minister duly accredited to the Queen by a foreign state is privileged from all liability to be sued here in civil actions; but we think that

this follows from well established principles, and we give judgment for the defendant.

Judgment for the defendant.[18]

[18] It has been held by a British court that civil process may not be sued out or renewed against the diplomatic representative of a foreign state, even though it be not served, Musurus Bey v. Gadban [1894] 2 Q. B. 352, and by a French court that the immunity extends even to suits on private obligations contracted prior to appointment as diplomatic representative, Procureur général c. Nazare Aga, 48 Jour. du Dr. Int. Privé 922.

A national received as the diplomatic representative of a foreign state enjoys the usual immunities. Macartney v. Garbutt, 24 Q. B. D. 368. But a state may decline to receive a national in such capacity. On United States practice, see In re Baiz, 135 U. S. 403; HYDE, I, §425.

Subordinate secretaries or members of an embassy or legation staff, the official personnel, enjoy immunities. Parkinson v. Potter, 16 Q. B. D. 152; Assurantie Compagnie Excelsior v. Smith, 40 T. L. R. 105. "The statute of Ann is only explanatory of the law of nations; and the words 'domestic and domestic servant' are only put by way of example." Hopkins v. De Robeck, 3 T. R. 79, 80. On special agents and representatives whose status is defined by special agreement, see Service v. Castaneda, 2 Coll. 56; Fenton Textile Association v. Krassin, 38 T. L. R. 259.

"Italian jurisprudence contains two judgments by the Rome Supreme Court of Cassation—one dated April 20th, 1915 (*Rivista di diritto internazionale*, 1915, page 217; *Foro Italiano*, 1915, I, 1330); the other dated December 9th, 1921, and published on January 31st, 1922 (*Rivista di diritto internazionale*, 1924, page 173; *Foro italiano*, 1922, I, 334)—pronounced when this Supreme Court was not yet the only final Court of Cassation in the Kingdom—which affirmed the principle that the immunity of diplomatic agents from jurisdiction in civil questions only extends to acts performed in the exercise of their official functions, and accordingly does not apply to obligations contracted by them in their private capacity. These judgments of the Courts have been strongly criticised, however, even in Italy, from the point of view of international law as it exists to-day, and it cannot be said that in Italy the law is definitely settled in this sense." DIENA, in Report on Diplomatic Privileges and Immunities, L. of N. Doc., C. 45. M. 22, 1926, V, 20 Am. Jour. Int. L. Spec. Suppl. 151, 156.

"The person of a diplomatic agent, his personal effects, and the property belonging to him as representative of his sovereign, are not subject to taxation. Otherwise he enjoys no exemption from taxes or duties as of right. By courtesy however, most, if not all, nations permit the entry free of duty of goods intended for his private use." HALL, 8th ed., 235.

United States prohibition regulations of June 2, 1923, §6, provide:

"No seizure shall be made of liquor in the possession of any person in the following classes . . .

"(a) Diplomatic officers duly accredited by a foreign Government to the Government of the United States.

"(b) Diplomatic officers of a foreign Government duly accredited to another foreign Government and temporarily within the United States or its possessions.

"(c) Persons attached to or employed by any diplomatic mission whose names have been registered with the Department of State in accordance with the provisions of section 4065 of the Revised Statutes of the United States."

25 U. S. Treasury Decisions, Internal Revenue, 144, 145 (T. D. 3484).

Novello v. Toogood

Great Britain. Court of King's Bench. 1823.

1 *Barnewall and Cresswell's Reports* 554.

[The statement of the case and the arguments of counsel are omitted. The facts are stated sufficiently in the opinion of Abbott, C. J.]

Abbott C. J. This was an action for breaking and entering the plaintiff's house, and seizing and distraining his goods. The defendant's case rested upon a warrant to distrain for the non-payment of poor-rates. It is found by the case, that the plaintiff is a British-born subject; that he occupied a house, of which he let out a part in lodgings; that he was a teacher of languages, and prompter at the Opera-house. My opinion is founded upon one point only, *viz.* that the action is for taking the plaintiff's goods, and not for arresting his person; as to which, I give no opinion. The question arises upon an act of parliament, framed in very general terms, "That all writs and processes, whereby the person of any ambassador, or other public minister of any foreign prince or state, authorised and received as such, or the domestic or domestic servant of any such ambassador or other public minister, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be utterly void." The expression is certainly large, but the act itself was only declaratory and in confirmation of the common law. It must, therefore, be construed according to the common law, of which the law of nations must be deemed a part. Adopting this rule of construction, I am of opinion, that whatever is necessary to the convenience of an ambassador, as connected with his rank, his duties, and his religion, ought to be protected; but that an exemption from the burthens borne by other British subjects ought not to be granted, in a case to which the reason of the exemption does not apply. I do not say that the servant must reside in the ambassador's house. I do not say that he may not have an house fit and convenient for his situation as the servant of an ambassador, nor that the furniture in such an house will not be privileged. But the facts of this case are widely different from those which I have mentioned. In this instance, the servant let a part of the house in lodgings. Such an house was not necessary for the personal convenience of the plaintiff; and, therefore, could not be necessary for that of the ambassador, his master. If we should decide that the privilege given by the law of nations extends to such a case as this, every servant of an ambassador might take a large house, for the purpose of letting it out in lodgings, and enjoy an exemption from the payment of taxes. Such a privilege is absurd in itself, and not at all within the reason upon which the rights of ambassadors are founded. I am very sure that it cannot be the wish of any ambassador that his servant

should, by colour of those rights, inhabit such an house for such purposes, without contributing to the public taxes of the country where he resides. And I think that there is nothing in the law of nations, or the statute of the 7 Ann. c. 12., which entitles the plaintiff to recover in this action. Judgment of nonsuit must, therefore, be entered.

Bayley J. This is not the case of an arrest of the person of an ambassador's servant, nor are the goods seized such as were necessary in a residence of that description which the plaintiff's service to the ambassador required. The plaintiff's counsel claims an unrestrained exemption of all goods, without entering into the question of their being necessary or not. The consequence of such a doctrine would be to enable the servant to abuse that privilege which was intended for the ambassador's convenience and not his own. Notwithstanding our decision in favour of the defendant, the plaintiff will still be able to execute all the necessary functions of his office. For these reasons, I concur in thinking that the plaintiff is not entitled to recover.

Holroyd J. I am of opinion that the plaintiff is not privileged under the circumstances of this case. It is contended, that, by serving the ambassador, he is entitled to an unqualified exemption of all his goods from seizure for taxes or otherwise. Even supposing him to be a domestic servant, he cannot have a privilege to that extent. The privilege is conferred by the law of nations, in order that the ambassador may not be prejudiced in his dignity or personal comfort; it is not given for the benefit of the servant. If the debt for which the seizure was made had arisen out of the plaintiff's situation, as servant to an ambassador, the result of this case might have been different. But that was not so, nor can the ambassador be at all prejudiced by that which has been done. The reason of the privilege, then, does not apply in this instance; the plaintiff, therefore, cannot have the benefit of it, and judgment of nonsuit must be pronounced.

Judgment of nonsuit.[19]

[19] It seems that in Italy immunities from local jurisdiction are denied employees or servants, the unofficial personnel, of embassies or legations. In Germany immunities are granted, provided the employees or servants are not of German nationality. Diena, Report on Diplomatic Privileges and Immunities, L. of N. Doc., C. 45. M. 22, 1926, V, 20 Am. Jour. Int. L. Spec. Suppl. 151, 162.

In Great Britain, while interpretation of the Act of 7 Anne c. 12 has extended immunity to employees or servants without distinction of nationality, they must prove an actual, not a mere nominal, employment. Crosse v. Talbot, 8 Mod. 288; Wigmore v. Alvarez, Fitzg. 200. The employment must be *bona fide*. Seacomb v. Bowlney, 1 Wils. 20; Poitier v. Croza, 1 Wm. Bl. 48; Triquet v. Bath, 3 Burr. 1478, *supra*, 55; Lockwood v. Coysgarne, 3 Burr. 1676; Fountainier v. Heyl, 3 Burr. 1731; Darling v. Atkins, 3 Wils. 33; Delvalle v. Plomer, 3 Camp. 47; Fisher v. Begrez, 4 Tyrwhitt 35; In re Cloete, 65 L. T. R. 102. Nor will subsequent employment relieve from prior arrest. "The process of the law shall not, indeed, take a person out of the service of a public minister: but, on the other hand, a public minister can not take a

PROJECT OF A CONVENTION ON DIPLOMATIC AGENTS

American Institute of International Law. Article 27. Havana, 1925.

American Journal of International Law, Supplement, Volume XX, Special Number, pages 350, 354.

A diplomatic agent shall not be exempt from local jurisdiction even during the exercise of his functions:

1. For real actions, including possessory actions, relative to immovable property situated in the territory where the agent is accredited, and which is neither the house he occupies nor that of the legation.

2. For actions connected with his capacity as heir or legatee of an estate settled on the territory of the country to which the diplomatic agent is accredited.

3. For actions resulting from contracts executed by the diplomatic agent which do not refer to the seat or furnishings of the legation, if it has been expressly stipulated that the obligation must be fulfilled in the country where the agent is accredited.[20]

4. In case of waiver of diplomatic immunity, which, however, can not occur without the consent of the government which the agent represents.

TAYLOR v. BEST, DROUET, SPERLING, AND CLARKE

Great Britain. Court of Common Pleas. 1854.

14 *Common Bench Reports* 487.

[This was an action brought by plaintiff against four defendants as directors of a company, alleged to have been formed in Belgium, to recover 250*l.* paid as a deposit on shares in the intended company. Best, Drouet, and Sperling pleaded severally never indebted and Clarke suffered judgment by default. The cause being at issue, and notice of trial given, defendant Drouet obtained a rule for a special jury. Later a summons was taken out on behalf of defendant Drouet calling upon the plaintiff and the defendants Best and Sperling to show cause why

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person out of the custody of the law." ASTON, J., in Heathfield v. Chilton, 4 Burr. 2015, 2017.

On the appropriate procedure for determining whether a person is entitled to immunity as member of staff, employee, or servant of embassy or legation, see Musmann v. Engelke [1928] 1 K. B. 90.

[20] The draft Regulations on Diplomatic Immunities, voted by the Institute of International Law in 1895, art. 16, stipulate that immunity may not be invoked, *inter alia*, "In case of proceedings instituted as a result of engagements contracted by the exempt person, not in his official capacity, but in the exercise of a profession carried on by him in the country concurrently with his diplomatic duties." 14 Inst. de Dr. Int. 240, 244; SCOTT, Resolutions, 119, 123. *Cf.* note 18, *supra*, 568.

all further proceedings should not be stayed or the name of Drouet struck from the proceedings. This summons was sought to be supported by Drouet's affidavit that for fifteen years past he had been secretary of legation and public minister of Belgium to Great Britain. The learned judge, after hearing, ordered all proceedings stayed until the fifth day of the present term.]

[The above statement is substituted for the statement of the case in the report. The arguments of counsel and part of the opinion of Jervis, C. J., are omitted.]

Jervis, C. J. This case was very elaborately argued yesterday, and the importance of the subject induced the court to take time to look into the various authorities which were referred to. I am of opinion that the rule should be discharged. There is no doubt that the defendant Drouet fills the character of a public minister to which the privilege contended for is applicable: and I think it is equally clear, that, if the privilege does attach, it is not, in the case of an ambassador or public minister, forfeited by the party's engaging in trade, as it would, by virtue of the proviso in the 7 Anne, c. 12, s. 5, in the case of an ambassador's servant. If an ambassador or public minister, during his residence in this country, violates the character in which he is accredited to our court, by engaging in commercial transactions, that may raise a question between the government of this country and that of the country by which he is sent; but he does not thereby lose the general privilege which the law of nations has conferred upon persons filling that high character,—the proviso in the statute of Anne limiting the privilege in cases of trading applying only to the servants of the embassy. For this Barbuit's Case, Cas. Temp. Talbot, 281, is an authority.

Admitting, then, that M. Drouet is a person entitled to the privileges and immunities which the law of England accords to ambassadors from foreign friendly courts, and that he does not forfeit them by engaging in commercial ventures,—the question is, whether he is, under all the circumstances disclosed by the affidavit before us, entitled to the privilege which he claims. Although it is admitted that no process can be available against the person or the goods of a foreign ambassador or minister, no case has been cited to shew that an application in the present form, to stay all proceedings, is available in the courts of this country. On the contrary, in the case of ambassadors' servants, it appears that the practice has been, not to stay the proceedings altogether, but to discharge the party from custody, on entering a common appearance. The case of Crosse v. Talbot, 8 Mod. 288, recognises that as the true principle. . . . The course, therefore, seems to have been in these cases, not to move to stay all proceedings, but to move to set aside or cancel the bail-bond, upon the defendant's filing common bail. No case has been cited, of a motion to stay the proceedings, where the personal liberty of the applicant has

not been interfered with. Further, I am aware of no case in which, where there are several defendants, and the action has been allowed to go on to the verge of trial, the proceedings have been stayed upon the application of one of the defendants. Such a course would be obviously unjust to the other defendants, seeing that the expense they had already incurred would thereby be rendered useless. Without, however, dwelling upon that, it seems to me that this motion must fail, upon the merits.

The action is brought against four defendants,—the writ being sued out against M. Drouet and the three others as joint-contractors. No doubt, the plaintiff was bound, at the peril of a plea in abatement, to sue all. The writ being issued, nothing is done upon it which can at all interfere with the exercise by M. Drouet of his diplomatic functions, or with his personal comfort or dignity. But, knowing that a writ has issued, or having reason to believe that it is about to issue, he causes his attorney to write to the plaintiff's attorney, desiring that the process may be sent to him for an undertaking to appear. He, therefore, voluntarily attorns and submits himself to the jurisdiction of the court. Under these circumstances, I think he cannot be permitted now to complain that the suit has been improperly instituted against him. On the contrary, I think, that, by analogy to the doctrine cited from the learned jurists whose works have been so laboriously consulted, the action may well be maintained.

It is said,—and perhaps truly said,—that an ambassador or foreign minister is privileged from suit in the courts of the country to which he is accredited, or, at all events, from being proceeded against in a manner which may ultimately result in the coercion of his person, or the seizure of his personal effects necessary to his comfort and dignity; and that he cannot be compelled, *in invitum*, or against his will, to engage in any litigation in the courts of the country to which he is sent. But all the foreign jurists hold, that, if the suit can be founded without attacking the personal liberty of the ambassador, or interfering with his dignity or personal comfort, it may proceed. Various passages have been cited to shew, that, in countries where the Civil law prevails, and where jurisdiction can be founded by a proceeding *in rem* in the first instance, where there are houses or lands, which are immoveable, that may be taken to found the jurisdiction, the suit may proceed. Moveable goods, too, which are unconnected with the personal comfort and dignity of the ambassador, may be taken for the same purpose. And, when we consider the effect of the proceeding, and what may be done by the party sued, there seems to be no substantial distinction between the two modes: because, although it is true, that, in countries where the Civil law prevails, the proceeding is *in rem*, and the means of litigation between the parties incidentally established without any molestation or interference with the person of the defendant; yet, if the defendant chooses to appear, for

the purpose of protecting his goods and investigating the matter in dispute, he may convert that which was originally a proceeding *in rem* into a proceeding *in personam*. And such is commonly the course in the Scotch courts. If, therefore, as in Holland, and in some other countries, where goods may be taken for the purpose of founding jurisdiction, the defendant may come in and convert the proceeding *in rem* into a proceeding *in personam*, and so attorn or submit himself to the jurisdiction, it seems to me that there is no distinction between that case and the present, where there has been no attempt on the part of the plaintiff to disturb the comfort or interfere with the personal liberty of the foreign minister, but where there has been the mere issuing of a writ to which he has voluntarily appeared, and thus submitted himself to the jurisdiction. I do not feel myself at all pressed by the argument urged by Mr. Willes, that the privilege in question, being the privilege of the sovereign, cannot be abandoned or waived by the ambassador: for, when the authorities upon which that argument is sought to be sustained, come to be examined, they do not shew that the ambassador may not submit himself to the jurisdiction, for the purpose of having the matter in difference investigated and ascertained; but only that the sacred character of the person of the ambassador cannot be affected by any act or consent on his part; and that, by interfering with the person of the ambassador, or with the goods which are essential to the personal comfort and dignity of his position, you are in effect attacking the privilege of his master. That, however, is not the case here: for any thing that appears, M. Drouet is sued,—he being a joint-contractor, and so a necessary party to the action,—merely for the purpose of ascertaining the liability of the other defendants. If he had not thought fit to attorn to the jurisdiction, but had allowed judgment to go against him by default, *non constat* that anything would have been done upon the judgment, otherwise than by enforcing it against the other defendants. If any *ca. sa.* or *fi. fa.* were issued against him upon the judgment, the statute of Anne would have applied, and the court might have been called upon to interfere to prevent its being put in force against him. It seems to me that M. Drouet here has courted the jurisdiction, and that we ought not to interfere.

Maule, J. I am of opinion, that, as M. Drouet has voluntarily appeared to the action, and allowed it to go on through several stages, so that the application could not be granted without prejudice to the rights of the other defendants, as well as to those of the plaintiff, the present motion ought not to succeed. Whether an ambassador or public minister duly accredited to the Queen,—which M. Drouet undoubtedly is,—is so far privileged as to be free from all liability to be sued in the courts of this country, is a very grave question, and one which does not seem to have been settled by any judicial determination in our courts, or

indeed elsewhere. In the cases of applications on behalf of domestic servants of ambassadors, for the special remedy given by the 3rd section of the statute of Anne, the form of the application has always been, to cancel the bail-bond, and to discharge the party, on filing common bail. That having been the extent of the relief asked, it may be a question whether more would have been granted if more had been asked. Probably not. But there is a manifest distinction between the case of an ambassador and that of the domestic servant of an ambassador. The privilege is not that of the servant, but of the ambassador. It is based on the assumption, that, by the arrest of any of his household retinue, the personal comfort and state of the ambassador might be affected. Where these are not interfered with, the ambassador is not affected by the suit, and consequently the servant has no privilege. These cases do not in any degree determine the point which has been attempted to be raised on the present occasion,—and undoubtedly it is a point which is very fit to be considered whenever it may be properly presented for decision,—*viz.* Whether an ambassador or public minister can be brought into court against his will, by process not immediately affecting either his person or his property, and have his rights and liabilities ascertained and determined.[21] Unquestionably it must to a certain extent interfere with the ambassador's comfort to have his rights in any way made the subject of litigation; and therefore it may well be that the privilege he enjoys is as large and extensive as Mr. Justice Blackstone affirms it to be. But it is unnecessary to determine that question upon the present occasion, because, whatever may be the extent of the ambassador's privilege in that respect, I think, that, where he is sued jointly with others, and appears to the process, and allows the suit to go on to an advanced stage without offering any objection, and where there does not appear to be any intention on the part of the plaintiff to interfere with either the person or the property of the ambassador, and where the action may proceed to its ultimate termination without any such molestation or interference, we should do wrong to give effect to a claim of privilege which has been so abandoned by the voluntary act of the party. For these reasons, I agree with my Lord Chief Justice that this rule ought to be discharged.

CRESSWELL, J. I entirely agree with my Lord and my brother Maule, and for the reasons given by the latter, that the rule should be discharged.

WILLIAMS, J., concurred.

Pearson, for the plaintiff, asked for costs.

Per Curiam. We say nothing about costs.

Rule discharged.

[21] The query of Maule, J., was answered emphatically in the negative, five years later, in Magdalena Steam Navigation Co. v. Martin, 2 E. & E. 94, *supra*, 564. See also Musurus Bey v. Gadban [1894] 2 Q. B. 352.

IN RE REPUBLIC OF BOLIVIA EXPLORATION SYNDICATE, LIMITED

Great Britain. High Court of Justice; Chancery Division. 1913.

Law Reports [1914] 1 *Chancery Division* 139.

Misfeasance summons.

On May 7, 1912, the liquidator of the above company issued this summons against the directors T. H. Myring, R. E. Lembcke, and Paul E. Vanderpump (since deceased), and the auditors Woodington and Bubb, claiming damages for various acts of misfeasance.

On the hearing of the summons R. E. Lembcke took the preliminary objection that as a second secretary of the Peruvian Legation he was entitled to diplomatic privilege.

The liquidator admitted that R. E. Lembcke was entitled to diplomatic privilege, but contended that he had waived it.

The facts relating to this point were as follows. On May 15, 1912, R. E. Lembcke entered an unconditional appearance to the summons, and on October 14, 1912, he issued a summons for further time to file evidence. On October 31, 1912, he swore an affidavit on the merits, stating his official position, but not raising any objection to the jurisdiction. On June 10, 1913, the case was mentioned in Court on an application by the liquidator to fix a time for hearing, and R. E. Lembcke's counsel then stated that he should insist on his diplomatic privilege. The objection was taken with the sanction and at the wish of the Peruvian Legation.

The preliminary point was argued and decided before the rest of the summons was opened.

[The arguments of counsel and part of the opinion are omitted.]

ASTBURY J. (after stating the facts). The liquidator admits that apart from the question of waiver R. E. Lembcke is privileged, and the question I have to decide is whether the summons shall proceed against him under the special circumstances of this case.

Whether diplomatic privilege can be waived is a point of considerable difficulty. Sect. 3 of the Diplomatic Privileges Act, 1708, which section is merely declaratory of the common law, provides that "All writs and processes that shall at any time hereafter be sued forth or prosecuted, whereby the person of any ambassador, or other publick minister of any foreign prince or state, authorized and received as such by her majesty, her heirs or successors, or the domestick, or domestick servant of any such ambassador, or other publick minister, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be deemed and adjudged to be utterly null and void, to all intents, constructions, and purposes whatsoever."

The exact point, namely, whether a public minister sued individually and not as one of several joint contractors, as in Taylor v. Best, can

waive his privilege, has not been directly determined; but in Barbuit's Case[22] Talbot L. C. expressed an opinion to the contrary, although the privilege was not claimed until ten years after action brought. . . .

[In an omitted part of the opinion the court reviewed Barbuit's Case, Cas. t. Tal. 281; Triquet v. Bath, 3 Burr. 1478; Hopkins v. De Robeck, 3 T. R. 79; Taylor v. Best, 14 C. B. 487; Magdalena Steam Navigation Co. v. Martin, 2 E. & E. 94; Musurus Bey v. Gadban [1894] 1 Q. B. 533, 2 Q. B. 352; Mighell v. Sultan of Johore [1894] 1 Q. B. 149; and Fisher v. Begrez, 2 Cr. & M. 240.]

It seems to me that both at common law and under the statute all writs against foreign public ministers accredited to the Court of this country are absolutely null and void, and that if and so far as waiver of that diplomatic privilege is possible it must be confined to cases of some very special nature as was the case in Taylor v. Best. The question is whether R. E. Lembcke's conduct brings him within that decision. I have felt considerable difficulty as to this. No doubt he entered an unconditional appearance, asked for further time to file evidence, and filed evidence on the merits stating his official position, but not raising any question of privilege. Has he thereby waived his privilege? It seems to me that on this question there are three matters to be considered. In the first place, having regard to the earlier cases as to the absolute nullity of proceedings against foreign public ministers I am satisfied that waiver, if it be possible, must be strictly proved. It implies a knowledge of the rights waived, and I am not satisfied that R. E. Lembcke when he entered appearance and took the subsequent steps was aware of his privilege. Secondly, knowledge of our common and statute law cannot be imputed to a foreign subject residing here as diplomatic agent of a foreign State. Thirdly, I am far from satisfied that a subordinate secretary can effectually waive his privilege without the sanction of his Sovereign or Legation, and it is clear that, whatever knowledge R. E. Lembcke possessed, the objection on the ground of privilege is now taken with the sanction and at the instigation of the Peruvian Legation.[23] . . .

There is one other matter to be considered. Whatever be the true view of R. E. Lembcke's conduct in entering appearance and taking the subsequent steps, it is clear that the summons must prove abortive against him. No judgment or execution can be enforced or levied against him, and the authorities shew the impropriety of allowing the action to go on merely for the purpose of defining his liability.[24]

On the grounds above stated I am of opinion that there has been no effective waiver established in this case and that the plea of privilege

[22] *Infra*, 587.

[23] Immunity may be waived with the consent of the accrediting state. In re Suarez [1918] 1 Ch. 176.

[24] *Cf.* Société Anonyme des Chemins de Fer c. État Néerlandais, *supra*, 527.

must prevail with costs since June 10, 1913, when the objection was first taken.

OSCAR W. HERMAN AND ANOTHER, PLAINTIFFS, v. EDA APETZ AND ANOTHER, DEFENDANTS

United States. Supreme Court of New York, New York County. 1927.

130 *Miscellaneous New York Reports* 618.

Motion by the plaintiff to strike out the defense of immunity from process in an action to set aside a conveyance on the ground of fraud against creditors.

[The names of counsel are omitted.]

FRANKENTHALER, J. Plaintiffs have brought this action against defendants Apetz and Gonzalez to set aside a conveyance from the former to the latter on the ground of fraud against creditors. Defendant Gonzalez, who is a sister of the other defendant, after pleading on the merits in a general appearance, has interposed a separate defense to the effect that she is the wife of the Secretary of Legation of the Republic of Costa Rica and as such immune from process. There is no doubt that the personal immunity of envoys and their attaches extends to members of their domestic suite on the ground that their protection is necessary for the peace of mind of the envoy in discharging his official duties. (Foulke International Law, §180.) But it is urged by the plaintiffs that the defendant has waived immunity by appearing to defend on the merits, and accordingly a motion has been made to strike out this defense. There is no doubt that an envoy may not waive his diplomatic immunity without consent of the sending state. Whether this inability to waive also applies to his wife, family and domestic servants is a matter of conflict among text writers. The better view seems to be that waiver on the part of such persons does not require the consent of the home state and is, therefore, effective. Has the defendant Gonzalez waived her privilege? The action involves real property and requires the determination of title to it. Such an action, being largely one *in rem*, should not be delayed by reason of the fact that one of the parties entitled to defend claims privilege. And even if such a claim were well founded, it is very likely that the defendant Gonzalez has waived her privilege by her general appearance. The following language of the English courts in Taylor v. Best (14 C. B. 487, 522) has peculiar application in aid of this view: "If, therefore, as in Holland, and in some other countries, where goods may be taken for the purpose of founding jurisdiction, the defendant may come in and convert the proceeding *in rem* into a proceeding *in personam*, and so attorn or submit himself to the jurisdiction, it seems to me that there is no distinction between that

case and the present, where there has been no attempt on the part of the plaintiff to disturb the comfort or interfere with the personal liberty of the foreign minister, but where there has been the mere issuing of a writ to which he has voluntarily appeared, and thus submitted himself to the jurisdiction." While it is true that the defendant Gonzalez during the period of diplomatic immunity cannot be proceeded against by execution *in personam*, she has, nevertheless, by her voluntary appearance and defense on the merits, invited a judicial determination of the controversy. The motion is granted. Settle order.

HOLBROOK, NELSON & CO. v. HENDERSON

United States. Superior Court of the City of New York. 1839.

4 *Sandford's New York Superior Court Reports* 619.

This was a motion to discharge the defendant from arrest, brought on at chambers, and by the direction of the judge sitting there, argued before the full bench. . . .

[The statement of the case and the arguments of counsel are omitted. The facts are stated sufficiently in the opinion.]

OAKLEY, J., delivered the decision of the court.

The defendant in this case is the ambassador of the republic of Texas, sent by his government on a mission to the courts of France and England, and received and accredited as such at those courts. Having negotiated a treaty with France, he is now on his return to Texas, with the treaty, to lay it before the Congress of that country, now in session, for its ratification; and he has with him the regular credentials of his official station, which are to be considered as laid before us. On his arrival in this city he has been arrested and held to bail on civil process, issued out of this court, at the suit of the plaintiffs. It does not appear when or where the debt, on which the suit is founded, was contracted, nor is it necessary to inquire, according to the view I take of the case, any further than to infer, as I presume the fact is, that it has not been contracted since his late arrival in the United States.

Upon this state of the case, the question is submitted to us, whether the defendant is entitled to be discharged from this arrest, and whether the process against him ought to be set aside. The defendant contends that he is entitled to such discharge, because he is privileged from arrest, as an ambassador of a sovereign power, travelling through the country, in the execution of the duties assigned to him by his sovereign. On the other hand, it is contended, that such privilege applies only to an ambassador or public minister deputed to this country by a foreign state, and residing here as such.

It is not questioned that a resident minister, received and acknowledged by the executive of the United States, is not subject to the civil jurisdiction of our courts. It is clear that this privilege is founded, not on any municipal law of this country, but on the law of nations. The act of Congress of April, 1790, (which is in substance like the English act,) cannot be construed as intended to *confer* this privilege. Its object is to enforce it, first, by declaring all process issued by any court against such minister void, and secondly, by inflicting punishment upon all persons who may be instrumental in violating the minister's privilege. That such must be the construction of the act, it is to my mind clear, from the fact that its provisions are confined to the case of a minister who has been received and acknowledged by the executive authority; from which it would follow, if the act is considered as creating or granting the exemption, that a public minister arriving on a mission to our government and residing here would not be entitled to any of the privileges of a minister until he should present his credentials, and be publicly received by the president. Now that a minister, thus situated, is entitled to the most important privileges which attach to him after his public reception, is clear, both from the opinions of the most approved writers on the law of nations, and from the reasons on which such privileges are founded. It was proper that the act of Congress should be confined to the case of a minister after his public reception, inasmuch as it makes penal the acts of our own citizens, which may be in violation of his privileges, and this could not be done with justice, until the existence of those privileges should be made known by his public acknowledgment by the government.

I cannot, therefore, yield my assent to the argument, which has been pressed upon us, that the act of Congress has limited the extent to which the privilege of a foreign minister may be enjoyed. I do not suppose that it was intended to abrogate any part of the generally received and acknowledged principles of international law on that subject.

Assuming, then, that the privileges of a foreign minister have their origin and support in the law of nations, it becomes necessary to inquire into the reasons on which that law is founded. They are, in substance, as I find them laid down in Vattel, that it is necessary for nations to treat with each other for the good of their affairs—that each has a right of free communication with others for that purpose—that such communication must, of necessity, be carried on by ministers or agents who are the representatives of their sovereign, and that each sovereign state has, therefore, a right to send and receive public ministers; that such being the rights of nations, a sovereign attempting to hinder another from sending or receiving a minister, does him an injury and offends against the law of nations. That, the minister representing the sovereign by whom he is deputed, the respect rendered to the minister is not personal,

merely, but is, in truth, the respect due from one sovereign to another; and to withhold it is, therefore, an insult which may justly be resented, and thus the peace of nations may be endangered.

It is further laid down that the right of embassies being thus established, the inviolability of ambassadors is a certain consequence of that right, and is indispensable to the perfect enjoyment of it. That such inviolability may be complete, it is necessary that the ambassador should be free from the control or operation of the laws of the country to which he is sent, and from the jurisdiction of its courts, as without such freedom he might not be able to discharge his duty to his own sovereign with firmness and fidelity. It is further laid down that inasmuch as the minister is the representative of the dignity and independence of the sovereign, it is impossible to conceive that such sovereign in sending an ambassador intends to submit or subject him to the authority or jurisdiction of a foreign power.

Without dwelling further on this summary of the law of nations, relative to the rights and privileges of public ministers, it is sufficient to observe that the principles contained in it are not only obviously just, but that all the approved writers on international law, both before and since Vattel, concur fully with him as to their nature and extent.

Vattel, following out these principles, to what, I think, is their legitimate result, holds that an ambassador, passing through the territory of a friendly power, on a mission from his sovereign to another friendly power, is entitled to at least some of the rights and privileges of ambassadors. He says that, although the prince to whom the minister is sent, is under a particular obligation that he shall enjoy all the rights annexed to his character, yet others, through whose dominions he passes, are not to deny him those regards to which the minister of a sovereign is entitled, and which nations owe to each other. They especially owe him an entire safety. To insult him would be injuring his master, and the whole nation; to arrest him and offer violence to him, would be hurting the right of embassy which belongs to all sovereigns. According to Vattel's opinion, then, the principles of international law on which the rights and privileges of resident ministers rest, apply to a case like the one now before us, so far as to secure to the minister an entire personal safety, and freedom from arrest, and violence, or, in other words, from all restraint of his personal liberty, whereby he may be prevented from discharging his duties to his own sovereign.

This view of Vattel recommends itself very strongly to my judgment. It is founded in good sense and sound reason. It is difficult to designate any principle among those before stated, as sustaining the rights of a resident minister to be exempted from arrest or a restraint of his personal liberty, which does not apply to the case of one standing in the situation of this defendant. The ambassador of the republic of Texas, is travelling

through our country, which is in amity with his own, in the actual discharge of a special duty, assigned to him by his sovereign. He is the representative of the dignity and independence of Texas as a sovereign state. Passing through our territory, on his route to his own country, to complete the mission with which he has been charged, he cannot be presumed to have laid aside his official character, and to have voluntarily submitted himself to the jurisdiction of our courts, as he could not do that without failing in his duty to his own sovereign. His arrest and detention, and, perchance, his personal imprisonment for an indefinite period, might seriously interfere with the successful termination of his mission. The free right of embassy which Texas, in common with all other nations, enjoys, may thus be impaired, and she may feel that an insult has been offered to her dignity, and an injury to her rights, and thus a state of things may arise, which may endanger the national peace. It seems to me, that every principle of national courtesy, of a just observance of the rights and dignity of independent sovereign powers, and of a due regard to the preservation of public peace and of the maintenance of friendly intercourse with other nations, calls upon us to extend to the present case, the established rules of that law of nations, which, by the consent of all, secures the inviolability of a resident ambassador. The two cases seem to me to be equally within the reason of the law.

In thus adopting the doctrine of Vattel, I, of course, have not overlooked the fact, that most, perhaps all the other writers on international law, to which we have been referred, have advanced different views. The most distinguished amongst them, Grotius and Wicquefort, unite in the opinion, that a public minister, passing through the territory of a third power, is not entitled to any privileges as such, and if my decision were to be governed by the mere weight of the opinions of learned men, I should probably arrive at a conclusion different from that which has resulted from my examination of the subject. But, as mere opinions, they do not address themselves to us with the authority of judicial decisions, and are to be regarded only as they seem consonant with sound reason. I am not satisfied with the grounds on which these writers sustain their opinions, or with the cases to which they refer for their support. Those cases cannot be considered, according to any reasonable view of the subject, as amounting to satisfactory evidence of the practice and usage of nations. The most that can be said of them is, that they are instances of violence, apparently acquiesced in, or to speak more properly, submitted to, in some cases after remonstrances against their legality, and, in all, from motives which cannot be known. They may have been motives of expediency merely, or motives springing from the necessary submission of the weak to the powerful. But in no case happening in times sufficiently modern to be entitled to respect as a precedent, do I find, that the violation of the person of an ambassador,

travelling through the territory of a power at peace with his sovereign, has been acknowledged by that sovereign not to be a breach of the general law of nations. And after all, the practice of nations at a remote period, and the opinions of the old writers on national law, seem to me to be entitled of themselves to little weight with us. The law of nations, like other systems of law, is progressive. Its principles are expanded and liberalized by the spirit of the age and country in which we live. Cases, as they arise under it, must be brought to the test of enlightened reason and of liberal principles; and I should as soon think of going back to the times of the English star chamber, to search for the rules that ought to govern us in the protection of the personal liberty or rights of the private citizen, as of referring to the age of Charles V. or of Elizabeth, for the principles which ought to regulate the intercourse of nations.

It was urged, on the argument by the counsel for the plaintiffs, that the exemption claimed in this case could not rest on that necessity of preferring the free intercourse of nations, which alone can justify it, inasmuch as it was not necessary that the Texian ambassador should have entered our territory, on his return from Europe. And that therefore, his coming into our country was in fact voluntary, and a virtual submission, on his part, to the ordinary operation of our laws while within our borders.

It is true that the defendant might have returned to his own country without passing through ours; but we cannot but see that such a course would have been unusual, and probably highly inconvenient. He is returning by the ordinary and established route—that which, in practice, is adopted by almost all men, both public and private. There is at present little or no direct intercourse between Texas and Europe, and it would be treating the subject in a point of view altogether too narrow, to hold that the defendant, by adopting the ordinary and convenient mode of travelling to and from his place of destination, had thereby intended to abandon his official character, and to enter our territory as a mere private individual. It may happen, as in the case of some of the German states and of the Swiss Cantons, that a public minister, deputed to them, must, from absolute necessity, pass through the territory of a third power. In such a case, the refusal of a free passage through such territory would be a clear violation of that free right of embassy spoken of by Vattel. The obligation to permit such passage would therefore seem to be positive, and in the exercise of national courtesy it ought to be permitted by the usual and most convenient route. Any unnecessary impediment thrown in the way of the free passage of the minister impairs the right of embassy possessed by his sovereign. The same principle will justly apply to the case now before us. The right of free communication between nations, which has its

foundation in public necessity, is in truth a right to be enjoyed according to a convenience exercised in good faith, and in reference to the usual and established modes of intercourse.

It was further contended on the argument, that the privilege claimed by the defendant is in conflict with the well-established right of every nation to exclude from its territories all persons at its pleasure. I do not so consider it. Our government may undoubtedly, if it should see fit, send out of the country any resident minister. So may they do with the present defendant. They may direct him to leave our territory, but they cannot arrest and imprison him. In the one case he may return to his own country and complete the objects of his mission, in the other his mission would be interrupted, and, perchance, entirely defeated.

It is also contended, that before an ambassador, passing through our country, on a mission to another power, can claim an exemption from the ordinary operation of our laws, it should at least appear, that he had entered our territory by the permission of our government; and most of the writers on international law, who deny the right of a minister, in the situation of the present defendant, to the privilege claimed for him, seem to agree that if a minister thus situated obtain a passport or safe conduct, as such, from the sovereign of the territory through which he is about to pass, his right of protection by such sovereign becomes absolute. This must be so, according to every sound view of the case. If a sovereign invite or permit the representative of another power to enter his territory for any purpose, it is clear that he cannot, without a violation of all good faith, withhold from such representative all necessary protection. Now, may it not fairly be said that the present case falls within this principle? The practice of granting passports, or a safe conduct, to any person, except in time of war, is, as far as I am informed, unknown to our government. No man, I believe, being about to enter our country, either to reside in it or pass through it, ever thinks of applying for permission to do so. Passports, though they may be named in our laws, are either entirely unknown in practice, or of extremely rare occurrence. The truth is, that every subject or citizen of a foreign power finds a passport for entrance into our country, in the nature and character of our political institutions. We hold out a standing invitation to all men to come freely among us, and it is doing no violence to good sense or sound reason to say, that foreigners enter our country by, at least, the implied invitation of our government. The defendant, then, could not, in reason, be required to obtain any express consent of the government to come within our territory, in order that he might, when here, enjoy the privileges claimed by him as appertaining to his representative character; so long, at least, as that government permits him to remain.

In coming to the result at which I have arrived in this case, I have not considered, nor do I intend to say, what is the extent of the privileges which may be justly claimed by the defendant. It may be that many privileges clearly secured to a resident minister, as for example, those which refer to his domestic establishment, may not be necessary for the protection of a minister merely passing through the country, in the enjoyment of his personal freedom.

Nor do I intend to say whether the defendant may not, by his continuance in the country, or by his conduct while in it, divest himself of his representative character, so far as by his voluntary act to subject himself to the ordinary operation of our laws. These are questions not involved necessarily in the present inquiry.

I am of opinion, that the motion to set aside the process issued in this case and that the defendant be discharged, be granted.

JONES, CH. J., said, that as the case first came before Judge Oakley, it was thought proper that he should deliver the opinion of the court. Each of the judges had also prepared a short opinion on the subject, but he considered that every thing they could say on the question was embraced in the opinion of Judge Oakley, which was the unanimous opinion of the court.

Defendant discharged.[25]

ESTELLE CARBONE, PLAINTIFF, v. CARLOS CARBONE, JR., DEFENDANT

United States. Supreme Court of New York, New York County Special Term. 1924.

123 *Miscellaneous New York Reports* 656.

Motion to vacate order of arrest and service of summons in action for divorce.

[The names of counsel are omitted.]

PROSKAUER, J. Defendant moves to vacate the order of arrest and the service of summons in an action for absolute divorce upon the ground that he is a diplomatic attache of the republic of Panama attached to its legation in Italy.

He can take no advantage of the provisions of the Federal Judicial Code, which apply only to those of diplomatic status accredited to the government of the United States. There are, however, certain immunities accorded by international law and custom. The immunities of an ambassador extend to members of his official household. 2 C. J. 1303, §25. An ambassador while "passing through the territory of a friendly power" is entitled "to at least some of the rights and privileges

[25] *Accord:* Wilson v. Blanco, 56 N. Y. Super. Ct. 582. See New Chile Gold Mining Co. v. Blanco, 4 T. L. R. 346.

of ambassadors" accredited to that country. Holbrook v. Henderson, 6 N. Y. Super. Ct. 619, 629. In that case Oakley, J., writes (p. 630): "According to Vattel's opinion, then, the principles of international law on which the rights and privileges of resident ministers rest, apply to a case like the one now before us, so far as to secure to the minister an entire personal safety, and freedom from arrest, and violence, or, in other words, from all restraint of his personal liberty, whereby he may be prevented from discharging his duties to his own sovereign."

In Wilson v. Blanco, 4 N. Y. Supp. 714, the General Term of the City Court erroneously states that the court in Holbrook v. Henderson "expressed the opinion that the privilege of an ambassador extended to immunity against all civil suits sought to be instituted against him in the courts of the country to which he was accredited, as well as in those in a friendly country through which he was passing on his way to the scene of his diplomatic labors." There is a clear distinction between immunity from the service of civil process and immunity from arrest or other interference with personal freedom. The principle of international law which grants an ambassador immunity from suit in the country to which he is accredited rests upon the reason that the ambassador is not to be interfered with or coerced by any of the powers inherent in the sovereignty to which he is accredited. A country through which he is merely passing to or from the country to which he is accredited owes him only the duty not to prevent him from discharging his diplomatic function by restraint on his personal liberty. As stated by Oppenheim (1 Internat. Law (3d ed.), 574): " . . . there ought to be no doubt that such third State must grant the right of innocent passage to the envoy . . . . But other privileges . . . need not be granted to the envoy."

The same opinion is expressed by Mr. Baron Huddleston in New Chile Gold Mining Co. v. Blanco, 4 T. L. Rep. 349.

For these reasons the motion to vacate the order of arrest and discharge the bond is granted. Motion to vacate the service of summons is denied.

Ordered accordingly.[26]

[26] See FAUCHILLE, I, Pt. III, 68; HALL, 8th ed., 363; HYDE, I, §432; OPPENHEIM, 4th ed., I, §398; WHEATON, Dana's 8th ed., §§244–247.

The Hague Convention for the Pacific Settlement of International Disputes, Oct. 18, 1907, art. 46, provides that members of an arbitration tribunal constituted under the Convention, "in the performance of their duties and when outside their own country, enjoy diplomatic privileges and immunities." The League of Nations Covenant, art. 7, provides: "Representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities. The buildings and other property occupied by the League or its officials or by Representatives attending its meetings shall be inviolable." The Statute for the Permanent Court of International Justice, art. 19, stipulates that

Barbuit's Case

Great Britain. Court of Chancery. 1735.

Cases in Equity during the Time of Lord Chancellor Talbot, 281.

Barbuit had a commission, as agent of commerce from the King of Prussia in Great Britain, in the year 1717, which was accepted here by the Lords Justices when the King was abroad. After the late King's demise his commission was not renewed until 1735, and then it was, and allowed in a proper manner; but with the recital of the powers given him in the commission, and allowing him as such. These commissions were directed generally to all the persons whom the same should concern and not to the King: and his business described in the commissions was, to do and execute what his Prussian Majesty should think fit to order with regard to his subjects trading in Great Britain; to present letters, memorials, and instruments concerning trade, to such persons, and at such places, as should be convenient, and to receive resolutions thereon; and thereby his Prussian Majesty required all persons to receive writings from his hands, and give him aid and assistance. Barbuit lived here near twenty years, and exercised the trade of a tallow-chandler, and claimed the privilege of an ambassador or foreign minister, to be free from arrests. After hearing counsel on this point,

Lord Chancellor. A bill was filed in this Court against the defendant in 1725, upon which he exhibited his cross bill, stiling himself merchant. On the hearing of these causes the cross bill was dismissed; and in the other, an account decreed against the defendant. The account being passed before the master, the defendant took exceptions to the master's report, which were over-ruled; and then the defendant was taken upon an attachment for non-payment, &c. And now, ten years after the commencement of the suit, he insists he is a public minister, and therefore all the proceedings against him null and void. Though this is a very unfavourable case, yet if the defendant is truly a public minister, I think he may now insist upon it; for the privilege of a public minister is to have his person sacred and free from arrests, not on his own account, but on the account of those he represents, and this arises from the necessity of the thing, that nations may have intercourse with one another in the same manner as private persons, by agents, when they cannot meet themselves. And if the foundation of this privilege is for the sake

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"the members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities."

On the immunities of state representatives, in general, see Féraud-Giraud, États et Souverains devant les Tribunaux Étrangers, I, 247; League of Nations, Committee of Experts on Codification, Questionnaire on Diplomatic Privileges and Immunities, L. of N. Doc., C. 45. M. 22, 1926, V, 20 Am. Jour. Int. L. Spec. Suppl. 148; Satow, Diplomatic Practice, 2d ed., I, chs. 17–20.

of the prince by whom an ambassador is sent, and for sake of the business he is to do, it is impossible that he can renounce such privilege and protection: for, by his being thrown into prison the business must inevitably suffer. The question is, whether the defendant is such a person as 7 Anne, cap. 10, describes, which is only declaratory of the antient universal *jus gentium;* the words of the statute are ambassadors or other public Ministers, and the exception of persons trading relates only to their servants; the parliament never imagining that the ministers themselves would trade. I do not think the words ambassadors, or other public ministers, are synonymous. I think that the word ambassadors in the act of parliament, was intended to signify ministers sent upon extraordinary occasions, which are commonly called ambassadors extraordinary; and public ministers in the act take in all others who constantly reside here; and both are intitled to these privileges. The question is, whether the defendant is within the latter words? It has been objected that he is not a public minister, because he brings no credentials to the King. Now although it be true that this is the most common form, yet it would be carrying it too far to say, that these credentials are absolutely necessary; because all nations have not the same forms of appointment. It has been said, that to make him a public minister he must be imployed about state affairs. In which case, if state affairs are used in opposition to commerce, it is wrong: but if only to signify the business between nation and nation the proposition is right: for, trade is a matter of state, and of a public nature, and consequently a proper subject for the imployment of an ambassador. In treaties of commerce those imployed are as much public ministers as any others; and the reason for their protection holds as strong: and it is of no weight with me that the defendant was not to concern himself about other matters of state, if he was authorised as a public minister to transact matters of trade. It is not necessary that a minister's commission should be general to intitle him to protection; but it is enough that he is to transact any one particular thing in that capacity, as every ambassador extraordinary is; or to remove some particular difficulties, which might otherwise occasion war. But what creates my difficulty is, that I do not think he is intrusted to transact affairs between the two crowns: the commission is, to assist his Prussian Majesty's subjects here in their commerce; and so is the allowance. Now this gives him no authority to intermeddle with the affairs of the King: which makes his employment to be in the nature of a consul. And although he is called only an agent of commerce, I do not think the name alters the case. Indeed there are some circumstances that put him below a consul; for, he wants the power of judicature, which is commonly given to consuls. Also their commission is usually directed to the prince of the country; which is not the present case: but at most he is only a consul.

It is the opinion of Barbeyrac, Wincquefort and others, that a consul is not intitled to the *Jus Gentium* belonging to ambassadors.

And as there is no authority to consider the defendant in any other view than as a consul, unless I can be satisfied that those acting in that capacity are intitled to the *Jus Gentium*, I cannot discharge him.[27]

Treaty between Germany and the United States

Articles 17, 18, 19, 20, and 27. Washington, December 8, 1923.

44 *United States Statutes at Large* 2132, 2147, 2155.

Art. 17. Each of the High Contracting Parties agrees to receive from the other, consular officers in those of its ports, places and cities, where it may be convenient and which are open to consular representatives of any foreign country.

Consular officers of each of the High Contracting Parties shall, after entering upon their duties, enjoy reciprocally in the territories of the other all the rights, privileges, exemptions and immunities which are enjoyed by officers of the same grade of the most favored nation. As official agents, such officers shall be entitled to the high consideration of all officials, national or local, with whom they have official intercourse in the state which receives them.

[27] "Notwithstanding the somewhat vague speculations of Vattel and some other continental authors on the question whether consuls are quasi ministers or not, (Vattel, Droit des Gens, 1. iv, ch. 8; De Cussy, Réglements Consulaires, sec. 6; Moreuil, Agents Consulaires, p. 348; Borel, Des Consuls, ch. 3,) it is now fully established by judicial decisions on the Continent, and by the opinions of the best modern authorities there, that consuls do not enjoy the diplomatic privileges accorded to the ministers of foreign powers; that in their personal affairs they are justiciable by the local tribunals for offences, and subject to the same recourse of execution as other resident foreigners; and that they cannot pretend to the same personal inviolability and exemption from jurisdiction as foreign ministers enjoy by the law of nations. (Fœlix, 1. ii, tit. 2, chap. 2, s. 4; Dalloz, Dic. de Jurispr., tit. Agents Diplomatiques, no. 35; Ch. de Martens, Guide Diplomat., s. 83)" Attorney-General Cushing, in 7 Op. Atty. Gen. 18, 21.

See also Heathfield v. Chilton, 4 Burr. 2015, 2016; Viveash v. Becker, 3 M. & S. 284; United States v. Ravara, 2 Dall. 297; Commonwealth v. Kosloff, 5 Serg. & Rawle (Pa.) 545; The Anne, 3 Wh. 435, 445; State v. De La Foret, 2 Nott & Mc. (S. C.) 217; Valarino v. Thompson, 7 N. Y. 576; U. S. Consular Regulations (1896) §71; Stewart, Consular Privileges and Immunities, 15; 1 Op. Atty. Gen. 41, 77, 406; 2 *ibid.* 725; 7 *ibid.* 367, 384; 45 L. R. A. 579.

Cf. Parkinson v. Potter, 16 Q. B. D. 152; In re Baiz, 135 U. S. 403; Musmann v. Engelke [1928] 1 K. B. 90.

"Although consuls have no right to claim the privileges and immunities of diplomatic representatives, they are under the special protection of international law, and are regarded as the officers both of the state which appoints and the state which receives them." U. S. Consular Regulations (1896) 27.

The Government of each of the High Contracting Parties shall furnish free of charge the necessary exequatur of such consular officers of the other as present a regular commission signed by the chief executive of the appointing state and under its great seal; and it shall issue to a subordinate or substitute consular officer duly appointed by an accepted superior consular officer with the approbation of his Government, or by any other competent officer of that Government, such documents as according to the laws of the respective countries shall be requisite for the exercise by the appointee of the consular function. On the exhibition of an exequatur, or other document issued in lieu thereof to such subordinate, such consular officer shall be permitted to enter upon his duties and to enjoy the rights, privileges and immunities granted by this treaty.

Art. 18. Consular officers, nationals of the state by which they are appointed, shall be exempt from arrest except when charged with the commission of offenses locally designated as crimes other than misdemeanors and subjecting the individual guilty thereof to punishment.[28] Such officers shall be exempt from military billetings, and from service of any military or naval, administrative or police character whatsoever.

In criminal cases the attendance at the trial by a consular officer as a witness may be demanded by the prosecution or defense. The demand shall be made with all possible regard for the consular dignity and the duties of the office; and there shall be compliance on the part of the consular officer.

Consular officers shall be subject to the jurisdiction of the courts in the state which receives them in civil cases, subject to the proviso, however, that when the officer is a national of the state which appoints him and is engaged in no private occupation for gain, his testimony shall be taken orally or in writing at his residence or office and with due regard for his convenience. The officer should, however, voluntarily give his

[28] "In the absence of treaty provision no record has been found where a state has recognized the exemption of consuls from criminal arrest." STEWART, Consular Privileges and Immunities, 158.

"In endeavoring to ascertain what should be the governing principle it must be borne in mind that the exemption, if any is to exist, is that of the government in order that the consular functions may be performed and is not personal to the consul and so to be imposed by the consul to shield himself from the effects of his actions unconnected with his official position." *Op. cit.*, 155.

"Though it may be inadvisable to restrict the territorial state's right of jurisdiction to the point of giving exemption from arrest in case of crimes, that objection is not so strong in case of offenses fairly to be designated as misdemeanors. If the offense is not of sufficient gravity to amount to more than a misdemeanor, it would seem that it is hardly of sufficient seriousness to warrant an interruption of the consular business. In the balancing of the interests of the two states the uninterrupted continuance of the consular business would seem to outweigh the necessity for an immediate punishment of an infraction of a minor nature." *Op. cit.*, 167.

testimony at the trial whenever it is possible to do so without serious interference with his official duties.[29]

Art. 19. Consular officers, including employees in a consulate, nationals of the State by which they are appointed other than those engaged in private occupations for gain within the State where they exercise their functions shall be exempt from all taxes, National, State, Provincial and Municipal, levied upon their persons or upon their property, except taxes levied on account of the possession or ownership of immovable property situated in, or income derived from property of any kind situated or belonging within the territories of the State within which they exercise their functions. All consular officers and employees, nationals of the State appointing them shall be exempt from the payment of taxes on the salary, fees or wages received by them in compensation for their consular services.[30]

Lands and buildings situated in the territories of either High Contracting Party, of which the other High Contracting Party is the legal or equitable owner and which are used exclusively for governmental purposes by that owner, shall be exempt from taxation of every kind, National, State, Provincial and Municipal, other than assessments levied for

[29] "When in August of 1916 the American consul at Newcastle, Australia, was constrained to obey a peremptory subpoena to give evidence in a petty case, the clearance of an American vessel was delayed one day as a result. In reply to the protest of the government of the United States that 'international practice concedes to consular officials such privileges and immunities as are necessary to enable them properly to discharge the duties of their office and that peremptory summons such as complained of by the consul at Newcastle do not seem to accord with such international practice,' the British government sent its regrets, stating that no discourtesy was intended, but said nothing of discontinuing the practice. On March 19, 1918 the consul was again served with a summons in the usual form; being extremely busy with a departing ship, he did not immediately attend court. Nothing was done." STEWART, Consular Privileges and Immunities, 140 n.

[30] "There is no rule of international law under which consuls may claim exemption from taxation. Such a statement standing alone, however, would come far from indicating the actual position of the consular officer. Theorists writing on the subject of consular privileges have questioned the place of exemption from taxation among those privileges, on the ground that such an exemption is not essential to the conduct of the consular business. The trend has been quite different: exemption from taxation, hardly granted at first, is now unquestioned. Consular regulations regularly state that, as a matter of local legislation and custom, consuls are accorded exemption from certain types of taxation, whereas the earlier regulations were silent upon the subject. The custom of exempting consuls from taxation is becoming firmly fixed; and the list of taxes from which those officers are to be exempt tends to become increasingly greater." STEWART, Consular Privileges and Immunities, 102.

"The United States has entered into forty-one treaties to secure for its consuls exemption from taxation. Not all of the treaties have the same specifications; quite the contrary, for at least thirteen distinct types of provisions are ascertainable, and an exemption accorded in one treaty is sometimes specifically refused in another. No logical reason for this, either the dates of the treaties or the standing of the contracting states, is apparent." *Op. cit.*, 110.

services or local public improvements by which the premises are benefited.

Art. 20. Consular officers may place over the outer door of their respective offices the arms of their State with an appropriate inscription designating the official office. Such officers may also hoist the flag of their country on their offices including those situated in the capitals of the two countries. They may likewise hoist such flag over any boat or vessel employed in the exercise of the consular function.

The consular offices[31] and archives shall at all times be inviolable. They shall under no circumstances be subjected to invasion by any authorities of any character within the country where such offices are located. Nor shall the authorities under any pretext make any examination or seizure of papers or other property deposited within a consular office. Consular offices shall not be used as places of asylum. No consular officer shall be required to produce official archives in court or testify as to their contents.[32]

Upon the death, incapacity, or absence of a consular officer having no subordinate consular officer at his post, secretaries or chancellors,

[31] "Perhaps the most conclusive answer to the statement made by some writers that the consulate is inviolable is that, with rare exceptions, the governments of the world have not claimed such an immunity in the absence of treaty. A fair test of this is afforded by a consideration of the provisions of consular regulations which in most cases give the consul information as to what privileges he may claim to enjoy by virtue of his position; in the lists thus set out, a claim for the inviolability of the consulate is not included." STEWART, Consular Privileges and Immunities, 81.

[32] "Inviolability of the consular archives is almost universally considered as essential to the discharge of the consular office. The question of what constitutes the archives does not present much difficulty; consular regulations frequently go into considerable detail in the specification of the exact titles of the records which are included in that category. Generally, it may be said that all official papers, records and documents in the possession of the consul in the discharge of his duties form a part of the archives. More specifically, the following are clearly stamped with this character: communications between the consul and his government; correspondence on official matters with the diplomatic and other consular officers of his government; communications with the central (where permitted) and the local authorities of the receiving state; correspondence with the officers of third states when on official matters; correspondence with private individuals in furtherance of the consular functions; information acquired and put on record by the consul in the discharge of his duties; and the various books and records which his government requires him to keep. The distinguishing characteristic of this group of papers is that all have come into the possession of the consul by virtue of his consular office, as distinguished from his position as a private individual." STEWART, Consular Privileges and Immunities, 35.

"What can not be accomplished directly by opening the archives to persons not authorized by the consul's government to examine them, can not be accomplished indirectly by compelling the consul to testify before a court as to their contents. In cases where consuls are properly before local courts, either as defendants or as witnesses, their testimony must be confined to those facts of which they are in possession in an individual capacity, and may not include those of which they are possessed by virtue of their office. This rule applies whether a subpoena *duces tecum* has issued to compel the consul to produce the books of the consulate or whether the attempt is merely to secure such information as the consul may be able to recall." *Op. cit.*, 38.

whose official character may have previously been made known to the government of the State where the consular function was exercised, may temporarily exercise the consular function of the deceased or incapacitated or absent consular officer; and while so acting shall enjoy all the rights, prerogatives and immunities granted to the incumbent.

Art. 27. Each of the High Contracting Parties agrees to permit the entry free of all duty and without examination of any kind, of all furniture, equipment and supplies intended for official use in the consular offices of the other, and to extend to such consular officers of the other and their families and suites as are its nationals, the privilege of entry free of duty of their baggage and all other personal property, whether accompanying the officer to his post or imported at any time during his encumbency thereof; provided, nevertheless, that no article, the importation of which is prohibited by the law of either of the High Contracting Parties, may be brought into its territories.

It is understood, however, that this privilege shall not be extended to consular officers who are engaged in any private occupation for gain in the countries to which they are accredited, save with respect to governmental supplies.[33]

[33] "The practice of exempting consuls from the payment of certain customs duties is sufficiently widespread to call for separate treatment. Yet it is not so uniform as to permit the statement of a general rule. Here as in the whole field of taxation, no rule of law guarantees the exemption. Treaties, and in their absence varying practices, govern. A few states refuse to admit any exception in favor of tariff exemptions; most states permit some exemptions, but their exact scope varies. Thus while several states restrict the privilege to stationery, others extend it to all official supplies, and still others add personal effects brought in upon arrival. The key note of most of the exemptions is reciprocity within the limits set out in laws, executive ordinances, or customs regulations." STEWART, Consular Privileges and Immunities, 116.

In the United States, prior to 1875, the federal courts had exclusive jurisdiction of suits against consuls. Act of 1789, c. 20, §§9, 11, 13, 1 U. S. Stat. L. 73, 76, 78, 80. After the amendment of the Judicial Code in that year it was generally held that state courts had concurrent jurisdiction, in civil cases at least, with the federal courts. U. S. Rev. Stat., §711; Act of 1875, c. 80, 18 U. S. Stat. L. 316, 318; In re Iasigi, 79 Fed. 751; 19 Ann. Cas. 915, 916; 45 L. R. A. 579, 582. The exclusive jurisdiction of the federal courts was restored by the Act of 1911, c. 231, §256, 36 U. S. Stat. L. 1087, 1161; 28 U. S. Code Ann. §371; Puente, "Amenability of Foreign Consuls to Judicial Process in the United States," 77 U. of Pa. L. Rev. 447, 452; but the Act has been construed to exclude state courts only where jurisdiction of the subject-matter has been vested in the federal courts; Popovici v. Agler, 280 U. S. 379 (suit for divorce and alimony).

On consuls, in general, see FÉRAUD-GIRAUD, États et Souverains devant les Tribunaux Étrangers, II, 48; PILLAUT, Manuel de Droit Consulaire; STEWART, Consular Privileges and Immunities; STOWELL, Consular Cases and Opinions; STOWELL, Le Consul; United States Consular Regulations.

On state representatives, in general, including consuls, see FAUCHILLE, I, Pt. III, 3; HALL, 8th ed., 351; HYDE, I, §§407–488; MARTENS, Guide Diplomatique; OPPENHEIM, 4th ed., I, §§341–438; PRADIER-FODÉRÉ, Cours de Droit Diplomatique; SATOW, Guide to Diplomatic Practice.

SECTION 3. FOREIGN STATE INSTRUMENTALITIES

The Schooner Exchange v. M'Faddon & Others

United States. Supreme Court. 1812.

7 *Cranch's Reports* 116.

This being a cause in which the sovereign right claimed by Napoleon, the reigning emperor of the French, and the political relations between the United States and France, were involved, it was, upon the suggestion of the Attorney General, ordered to a hearing in preference to other causes which stood before it on the docket. . . .

[Part of the statement of the case, the arguments of counsel, and part of the opinion are omitted.]

The case was this—on the 24th of August, 1811, John M'Faddon & William Greetham, of the State of Maryland, filed their libel in the District Court of the United States, for the District of Pennsylvania, against the Schooner Exchange, setting forth that they were her sole owners, on the 27th of October, 1809, when she sailed from Baltimore, bound to St. Sebastians, in Spain. That while lawfully and peaceably pursuing her voyage, she was on the 30th of December, 1810, violently and forcibly taken by certain persons, acting under the decrees and orders of Napoleon, Emperor of the French, out of the custody of the libellants, and of their captain and agent, and was disposed of by those persons, or some of them, in violation of the rights of the libellants, and of the law of nations in that behalf. That she had been brought into the port of Philadelphia, and was then in the jurisdiction of that court, in possession of a certain Dennis M. Begon, her reputed captain or master. That no sentence or decree of condemnation had been pronounced against her, by any court of competent jurisdiction; but that the property of the libellants in her, remained unchanged and in full force. They therefore prayed the usual process of the court, to attach the vessel, and that she might be restored to them. . . .

On the 20th of September, Mr. Dallas, the Attorney of the United States, for the District of Pennsylvania, appeared, and (at the instance of the executive department of the government of the United States, as it is understood,) filed a suggestion, to the following effect: . . .

That in as much as there exists between the United States of America and Napoleon, emperor of France and king of Italy, &c. &c. a state of peace and amity; the public vessels of his said Imperial and Royal Majesty, conforming to the law of nations, and laws of the said United States, may freely enter the ports and harbors of the said United States, and at pleasure depart therefrom without seizure, arrest, detention or molestation. That a certain public vessel described, and known as the

Balaou, or vessel, No. 5, belonging to his said Imperial and Royal Majesty, and actually employed in his service, under the command of the Sieur Begon, upon a voyage from Europe to the Indies, having encountered great stress of weather upon the high seas, was compelled to enter the port of Philadelphia, for refreshment and repairs, about the 22d of July, 1811. That having entered the said port from necessity, and not voluntarily; having procured the requisite refreshments and repairs, and having conformed in all things to the law of nations and the laws of the United States, was about to depart from the said port of Philadelphia, and to resume her voyage in the service of his said Imperial and Royal Majesty, when on the 24th of August, 1811, she was seized, arrested, and detained in pursuance of the process of attachment issued upon the prayer of the libellants. That the said public vessel had not, at any time, been violently and forcibly taken or captured from the libellants, their captain and agent on the high seas, as prize of war, or otherwise; but that if the said public vessel, belonging to his said Imperial and Royal Majesty as aforesaid, ever was a vessel navigating under the flag of the United States, and possessed by the libellants, citizens thereof, as in their libel is alleged, (which nevertheless, the said Attorney does not admit) the property of the libellants, in the said vessel was seized and divested, and the same became vested in his Imperial and Royal Majesty, within a port of his empire, or of a country occupied by his arms, out of the jurisdiction of the United States, and of any particular state of the United States, according to the decrees and laws of France, in such case provided. And the said Attorney submitting, whether, in consideration of the premises, the court will take cognizance of the cause, respectfully prays that the court will be pleased to order and decree, that the process of attachment, heretofore issued, be quashed; that the libel be dismissed with costs; and that the said public vessel, her tackle, &c. belonging to his said Imperial and Royal Majesty, be released, &c. And the said Attorney brings here into court, the original commission of the said Sieur Begon, &c. . . .

On the 4th of October, 1811, the District Judge dismissed the libel with costs, upon the ground, that a public armed vessel of a foreign sovereign, in amity with our government, is not subject to the ordinary judicial tribunals of the country, so far as regards the question of title, by which such sovereign claims to hold the vessel.

From this sentence, the libellants appealed to the Circuit Court, where it was reversed, on the 28th of October, 1811.

From this sentence of reversal, the District Attorney, appealed to this Court. . . .

Marshall, Ch. J. Delivered the opinion of the Court as follows:

This case involves the very delicate and important inquiry, whether an American citizen can assert, in an American court, a title to an armed national vessel, found within the waters of the United States.

The question has been considered with an earnest solicitude, that the decision may conform to those principles of national and municipal law by which it ought to be regulated.

In exploring an unbeaten path, with few, if any, aids from precedents or written law, the court has found it necessary to rely much on general principles, and on a train of reasoning, founded on cases in some degree analogous to this.

The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power.

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory.

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage.

A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or

its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to wave the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

1st. One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory.[34]

If he enters that territory with the knowledge and license of its sovereign, that license, although containing no stipulation exempting his person from arrest, is universally understood to imply such stipulation.

Why has the whole civilized world concurred in this construction? The answer cannot be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation, and it is to avoid this subjection that the license has been obtained. The character to whom it is given, and the object for which it is granted, equally require that it should be construed to impart full security to the person who has obtained it. This security, however, need not be expressed; it is implied from the circumstances of the case.

Should one sovereign enter the territory of another, without the consent of that other, expressed or implied, it would present a question which does not appear to be perfectly settled, a decision of which, is not necessary to any conclusion to which the Court may come in the cause under consideration. If he did not thereby expose himself to the territorial jurisdiction of the sovereign, whose dominions he had entered, it would seem to be because all sovereigns impliedly engage not to avail themselves of a power over their equal, which a romantic confidence in their magnanimity has placed in their hands.

2d. A second case, standing on the same principles with the first, is the immunity which all civilized nations allow to foreign ministers.[35]

Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction suppose him to be extra-territorial, and, therefore, in point of law, not within the jurisdiction of the sovereign at whose

[34] See Mighell v. Sultan of Johore, *supra*, 554.

[35] See §2, *supra*, 562.

Court he resides; still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of exterritoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it.

This consent is not expressed. It is true that in some countries, and in this among others, a special law is enacted for the case. But the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess.

The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain—privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

In what cases a minister, by infracting the laws of the country in which he resides, may subject himself to other punishment than will be inflicted by his own sovereign, is an inquiry foreign to the present purpose. If his crimes be such as to render him amenable to the local jurisdiction, it must be because they forfeit the privileges annexed to his character; and the minister, by violating the conditions under which he was received as the representative of a foreign sovereign, has surrendered the immunities granted on those conditions; or, according to the true meaning of the original assent, has ceased to be entitled to them.

3d. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.[36]

In such case, without any express declaration waving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be

[36] See Tucker v. Alexandroff, 183 U. S. 424, 434–5.

withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage therefore implies a waver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.

But if, without such express permit, an army should be led through the territories of a foreign prince, might the jurisdiction of the territory be rightfully exercised over the individuals composing this army?

Without doubt, a military force can never gain immunities of any other description than those which war gives, by entering a foreign territory against the will of its sovereign. But if his consent, instead of being expressed by a particular license, be expressed by a general declaration that foreign troops may pass through a specified tract of country, a distinction between such general permit and a particular license is not perceived. It would seem reasonable that every immunity which would be conferred by a special license, would be in like manner conferred by such general permit.

We have seen that a license to pass through a territory implies immunities not expressed, and it is material to enquire why the license itself may not be presumed?

It is obvious that the passage of an army through a foreign territory will probably be at all times inconvenient and injurious, and would often be imminently dangerous to the sovereign through whose dominion it passed. Such a practice would break down some of the most decisive distinctions between peace and war, and would reduce a nation to the necessity of resisting by war an act not absolutely hostile in its character, or of exposing itself to the stratagems and frauds of a power whose integrity might be doubted, and who might enter the country under deceitful pretexts. It is for reasons like these that the general license to foreigners to enter the dominions of a friendly power, is never understood to extend to a military force; and an army marching into the dominions of another sovereign, may justly be considered as committing an act of hostility; and, if not opposed by force, acquires no privilege by its irregular and improper conduct. It may however well be questioned whether any other than the sovereign power of the state be capable of deciding that such military commander is without a license.

But the rule which is applicable to armies, does not appear to be equally applicable to ships of war entering the ports of a friendly power. The injury inseparable from the march of an army through an inhabited country, and the dangers often, indeed generally, attending it, do not ensue from admitting a ship of war, without special license, into a friendly port. A different rule therefore with respect to this species of military

force has been generally adopted. If, for reasons of state, the ports of a nation generally, or any particular ports be closed against vessels of war generally, or the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports and to remain in them while allowed to remain, under the protection of the government of the place.

In almost every instance, the treaties between civilized nations contain a stipulation to this effect in favor of vessels driven in by stress of weather or other urgent necessity. In such cases the sovereign is bound by compact to authorize foreign vessels to enter his ports. The treaty binds him to allow vessels in distress to find refuge and asylum in his ports, and this is a license which he is not at liberty to retract. It would be difficult to assign a reason for withholding from a license thus granted, any immunity from local jurisdiction which would be implied in a special license.

If there be no treaty applicable to the case, and the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of foreign friendly powers, the conclusion seems irresistable, that they enter by his assent. And if they enter by his assent necessarily implied, no just reason is perceived by the Court for distinguishing their case from that of vessels which enter by express assent.

In all the cases of exemption which have been reviewed, much has been implied, but the obligation of what was implied has been found equal to the obligation of that which was expressed. Are there reasons for denying the application of this principle to ships of war?

In this part of the subject a difficulty is to be encountered, the seriousness of which is acknowledged, but which the Court will not attempt to evade.

Those treaties which provide for the admission and safe departure of public vessels entering a port from stress of weather, or other urgent cause, provide in like manner for the private vessels of the nation; and where public vessels enter a port under the general license which is implied merely from the absence of a prohibition, they are, it may be urged, in the same condition with merchant vessels entering the same port for the purposes of trade who cannot thereby claim any exemption from the jurisdiction of the country. It may be contended, certainly with much plausibility if not correctness, that the same rule, and same principle are applicable to public and private ships; and since it is admitted that private ships entering without special license become subject to the local jurisdiction, it is demanded on what authority an exception is made in favor of ships of war.

It is by no means conceded, that a private vessel really availing herself of an asylum provided by treaty, and not attempting to trade, would become amenable to the local jurisdiction, unless she committed some act forfeiting the protection she claims under compact. On the contrary, motives may be assigned for stipulating, and according immunities to vessels in cases of distress, which would not be demanded for, or allowed to those which enter voluntarily and for ordinary purposes. On this part of the subject, however, the Court does not mean to indicate any opinion. The case itself may possibly occur, and ought not to be prejudged.

Without deciding how far such stipulations in favor of distressed vessels, as are usual in treaties, may exempt private ships from the jurisdiction of the place, it may safely be asserted, that the whole reasoning upon which such exemption has been implied in other cases, applies with full force to the exemption of ships of war in this.

"It is impossible to conceive," says Vattel, "that a Prince who sends an ambassador or any other minister can have any intention of subjecting him to the authority of a foreign power; and this consideration furnishes an additional argument, which completely establishes the independency of a public minister. If it cannot be reasonably presumed that his sovereign means to subject him to the authority of the prince to whom he is sent, the latter, in receiving the minister, consents to admit him on the footing of independency; and thus there exists between the two princes a tacit convention, which gives a new force to the natural obligation."

Equally impossible is it to conceive, whatever may be the construction as to private ships, that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this cannot be presumed, the sovereign of the port must be considered as having conceded the privilege to the extent in which it must have been understood to be asked.

To the Court, it appears, that where, without treaty, the ports of a nation are open to the private and public ships of a friendly power, whose subjects have also liberty without special license, to enter the country for business or amusement, a clear distinction is to be drawn between the rights accorded to private individuals or private trading vessels, and those accorded to public armed ships which constitute a part of the military force of the nation.

The preceding reasoning, has maintained the propositions that all exemptions from territorial jurisdiction, must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that when implied, its extent must be regulated

by the nature of the case, and the views under which the parties requiring and conceding it must be supposed to act.

When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter can never be construed to grant such exemption.

But in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity. The implied license therefore under which such vessel enters a friendly port, may reasonably be construed, and it seems to the Court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality.

Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the laws of the place; but certainly in practice, nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception. . . .

[In an omitted part of the opinion Chief Justice Marshall discussed certain cases cited by Bynkershoek.]

It seems then to the Court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.

Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. Those general statutory provisions therefore which are descriptive of

the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country, in which it is found, ought not, in the opinion of this Court, to be so construed as to give them jurisdiction in a case, in which the sovereign power has impliedly consented to wave its jurisdiction.

The arguments in favor of this opinion which have been drawn from the general inability of the judicial power to enforce its decisions in cases of this description, from the consideration, that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic, rather than legal discussion, are of great weight, and merit serious attention. But the argument has already been drawn to a length, which forbids a particular examination of these points.

The principles which have been stated, will now be applied to the case at bar.

In the present state of the evidence and proceedings, the Exchange must be considered as a vessel, which was the property of the Libellants, whose claim is repelled by the fact, that she is now a national armed vessel, commissioned by, and in the service of the emperor of France. The evidence of this fact is not controverted. But it is contended, that it constitutes no bar to an enquiry into the validity of the title, by which the emperor holds this vessel. Every person, it is alleged, who is entitled to property brought within the jurisdiction of our Courts, has a right to assert his title in those Courts, unless there be some law taking his case out of the general rule. It is therefore said to be the right, and if it be the right, it is the duty of the Court, to enquire whether this title has been extinguished by an act, the validity of which is recognized by national or municipal law.

If the preceding reasoning be correct, the Exchange, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.

If this opinion be correct, there seems to be a necessity for admitting that the fact might be disclosed to the Court by the suggestion of the Attorney for the United States.

I am directed to deliver it, as the opinion of the Court, that the sentence of the Circuit Court, reversing the sentence of the District

Court, in the case of the Exchange be reversed, and that of the District Court, dismissing the libel, be affirmed.[37]

[37] See United States v. Peters, 3 Dall. 121; L'Invincible, 1 Wh. 238. *Cf.* The Santissima Trinidad, 7 Wh. 283. And see also The Constitution, 4 P. D. 39; The Parlement Belge, 5 P. D. 197; Young v. S. S. Scotia [1903] A. C. 501; The Jassy [1906] P. 270; The Pampa, 245 Fed. 137.

The Air Navigation Convention, Oct. 13, 1919, art. 32, provides that the military aircraft of one contracting state, when specially authorized to fly over or land on the territory of another, shall enjoy, in the absence of special stipulation, "the privileges which are customarily accorded to foreign ships of war." 11 L. of N. T. S. 173, 195.

"In general the commission of a public ship, signed by the proper authorities of the nation to which she belongs, is complete proof of her national character. A bill of sale is not necessary to be produced. Nor will the Courts of a foreign country inquire into the means by which the title to the property has been acquired. It would be to exert the right of examining into the validity of the acts of the foreign sovereign, and to sit in judgment upon them in cases where he has not conceded the jurisdiction, and where it would be inconsistent with his own supremacy. The commission, therefore, of a public ship, when duly authenticated, so far at least as foreign courts are concerned, imports absolute verity, and the title is not examinable. The property must be taken to be duly acquired, and cannot be controverted. This has been the settled practice between nations; and it is a rule founded in public convenience and policy, and cannot be broken in upon, without endangering the peace and repose, as well of neutral as of belligerent sovereigns." Story, J., in The Santissima Trinidad, 7 Wh. 283, 335.

When does a warship, under construction for a foreign state in local shipyards, become a state instrumentality entitled to immunity? See Tucker v. Alexandroff, 183 U. S. 424.

"No state can be supposed, by permitting a foreign ship of war to enter its harbour, to have consented that its own subjects should be able to free themselves from its own laws by going on board that ship. It may, perhaps, be inferred from such a permission that the state which gave it meant in certain cases to rely for the due observance of its laws upon the assistance and good offices of the officers of the ship, but this is quite a different matter from giving up the laws themselves. An illustration will make this plain. Two Italians, resident in Portsmouth, go on board a French ship of war in Portsmouth harbour, and one stabs the other. Conceding for the sake of argument that if the French captain chose to carry off the offender to France, the Mayor of Portsmouth ought not to try to prevent him by force from so doing, and that the local police ought not to enter the ship in order to execute a warrant for the offender's apprehension, it by no means follows that if the French captain gave up the offender we should hesitate to try him at Winchester. Such a trial would I apprehend be justified upon the ground that the murdered man and the murderer both owed a local allegiance to our laws whilst they were on board the French ship although the intervention of the French captain accidentally happened to be necessary to enable us to try the offender." Stephen, History, II, 48. On asylum on foreign ships of war in local waters, see Moore, "Asylum in Legations and Consulates and in Vessels," 7 Pol. Sci. Quart. 1, 405.

On the law governing marriages solemnized on foreign warships in local territorial waters, see Dicey, 4th ed., 694; Moore, Dig. Int. L., II, 491; 5 L. Quart. Rev. 44, 53.

Berizzi Brothers Company v. Steamship Pesaro

United States. Supreme Court. 1926.

271 *United States Reports* 562.

Appeal from a decree of the District Court in admiralty dismissing a libel *in rem* against a ship owned, possessed, and operated for trade purposes by the Italian Government, for want of jurisdiction. See 277 Fed. 473.

[The arguments of counsel and part of the opinion are omitted.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This was a libel *in rem* against the steamship "Pesaro" on a claim for damages arising out of a failure to deliver certain artificial silk accepted by her at a port in Italy for carriage to the port of New York. The usual process issued, on which the vessel was arrested; and subsequently she was released, a bond being given for her return, or the payment of the libellant's claim, if the court had jurisdiction and the claim was established. In the libel the vessel was described as a general ship engaged in the common carriage of merchandise for hire. The Italian Ambassador to the United States appeared and on behalf of the Italian Government specially set forth that the vessel at the time of her arrest was owned and possessed by that government, was operated by it in its service and interest; and therefore was immune from process of the courts of the United States. At the hearing it was stipulated that the vessel when arrested was owned, possessed and controlled by the Italian Government, was not connected with its naval or military forces, was employed in the carriage of merchandise for hire between Italian ports and ports in other countries, including the port of New York, and was so employed in the service and interest of the whole Italian nation as distinguished from any individual member thereof, private or official; and that the Italian Government never had consented that the vessel be seized or proceeded against by judicial process. On the facts so appearing the court sustained the plea of immunity and on that ground entered a decree dismissing the libel for want of jurisdiction. This direct appeal is from that decree and was taken before the Act of February 13, 1925, became effective.

The single question presented for decision by us is whether a ship owned and possessed by a foreign government, and operated by it in the carriage of merchandise for hire, is immune from arrest under process based on a libel *in rem* by a private suitor in a federal district court exercising admiralty jurisdiction.

This precise question never has been considered by this Court before. Several efforts to present it have been made in recent years, but always in circumstances which did not require its consideration. The nearest

approach to it in this Court's decisions is found in The Exchange, 7 Cranch 116. . . .

[In an omitted part of the opinion the court quoted extensively from Chief Justice Marshall's opinion in Schooner Exchange v. M'Faddon, *supra.*]

It will be perceived that the opinion, although dealing comprehensively with the general subject, contains no reference to merchant ships owned and operated by a government. But the omission is not of special significance, for in 1812, when the decision was given, merchant ships were operated only by private owners and there was little thought of governments engaging in such operations. That came much later.

The decision in The Exchange therefore cannot be taken as excluding merchant ships held and used by a government from the principles there announced. On the contrary, if such ships come within those principles, they must be held to have the same immunity as war ships, in the absence of a treaty or statute of the United States evincing a different purpose. No such treaty or statute has been brought to our attention.

We think the principles are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that war ships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force.

The subsequent course of decision in other courts gives strong support to our conclusion.

In Briggs v. Light Boats, 11 Allen 157, there was involved a proceeding against three vessels to subject them to a lien and to satisfy it through their seizure and sale. The boats had been recently acquired by the United States and were destined for use as floating lights to aid navigation. Whether their ownership and intended use rendered them immune from such a proceeding and seizure was the principal question. In answering it in the affirmative the state court, speaking through Mr. Justice Gray, afterwards a member of this Court, said (p. 163): "These vessels were not held by the United States, as property might perhaps be held by a monarch, in a private or personal, rather than in a public or political character. . . . They were, in the precise and emphatic language of the plea to the jurisdiction, held and owned by the United States for public uses." And again (p. 165): "The immunity from such interference arises, not because they are instruments of war, but because they are instruments of sovereignty; and does not depend on the extent

or manner of their actual use at any particular moment, but on the purpose to which they are devoted."

In The Parlement Belge, L. R. 5 P. D. 197, the question was whether a vessel belonging to Belgium and used by that government in carrying the mail and in transporting passengers and freight for hire could be subjected to a libel *in rem* in the admiralty court of Great Britain. The Court of Appeal gave a negative answer and put its ruling on two grounds, one being that the vessel was public property of a foreign government in use for national purposes. After reviewing many cases bearing on the question, including The Exchange, the court said:

"The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction."

Sometimes it is said of that decision that it was put on the ground that a libel *in rem* under the British admiralty practice is not a proceeding solely against property, but one directly or indirectly impleading the owner—in that instance the Belgian Government. But this latter was given as an additional and independent ground, as is expressly stated in the opinion at page 217.

The ruling in that case has been consistently followed and applied in England from 1880, when it was made, to the present day. Young v. The Scotia, 1903 A. C. 501; The Jassy, L. R. 1906 P. D. 270; The Gagara, L. R. 1919, P. D. 95; The Porto Alexandre, L. R. 1920, P. D. 30; The Jupiter, L. R. 1924, P. D. 236.

In the lower federal courts there has been some diversity of opinion on the question, but the prevailing view has been that merchant ships owned and operated by a foreign government have the same immunity that warships have. Among the cases so holding is the Maipo, 252 Fed. 627, and 259 Fed. 367. The principal case announcing the other view is The Pesaro, 277 Fed. 473. That was a preliminary decision in the present case, but it is not the one now under review, which came later and was the other way.

We conclude that the general words of section 24, clause 3, of the Judicial Code investing the district courts with jurisdiction of "all civil causes of admiralty and maritime jurisdiction" must be construed, in keeping with the last paragraph before quoted from The Exchange, as not intended to include a libel *in rem* against a public ship, such as the

"Pesaro," of a friendly foreign government. It results from this that the court below rightly dismissed the libel for want of jurisdiction.

Decree affirmed.[38]

The Attualita

United States. Circuit Court of Appeals, Fourth Circuit. 1916.

238 *Federal Reporter* 909.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk. . . .

[Part of the statement of the case, the names of counsel, and part of the opinion are omitted.]

On the 9th of September, 1916, in the court below, the appellant filed his libel *in rem* against the steamship Attualita. He sought to hold it liable for the damages, estimated at $800,000, occasioned by the alleged negligent sinking, on the 29th of July in the same year, by such vessel, of the Greek steamship Mina. The collision was said to have taken place in the Mediterranean Sea, some 50 miles east of Gibraltar. Under this libel the ship was arrested. On the 20th of September the United States attorney for the Eastern district of Virginia, acting under the direction of the Attorney General of the United States, brought to the attention of the court "that the Attorney General of the United States has received from the Secretary of State of the United States a communication, dated September 15, 1916, to the effect that the Secretary of State has been advised by the Italian ambassador that the Italian steamship Attualita, which has been libeled and attached in this proceeding, was at the time of the said attachment and is now requisitioned by the Italian government, and was at the time of said attachment and is now in the service of the Italian government." The district attorney stated he was further directed to call the attention of the court in this connection to The Luigi (D. C.) 230 Fed. 493, and concluded by stating that "in bringing this matter to the attention of the court the United States does not intervene as an interested party, nor do I appear either for the United States or for the Italian government, but I present the

[38] See also The Gagara [1919] P. 95, *supra*, 92; The Porto Alexandre [1920] P. 30; The Jupiter [1924] P. 236; Compania Mercantil Argentina v. United States Shipping Board, 93 L. J. K. B. 816; The Maipo, 252 Fed. 627, 259 Fed. 367; The Carlo Poma, 259 Fed. 369. See an opinion of the Chinese Provisional Court of Shanghai, Rizaeff Frères v. Soviet Mercantile Fleet, in North-China Daily News, Nov. 14, 1927. *Cf.* The Pesaro, 277 Fed. 473. And see Fairman, "Some Disputed Applications of the Principle of State Immunity," 22 Am. Jour. Int. L. 566, 575.

And see Mason v. Intercolonial Railway, 197 Mass. 349; Oliver American Trading Co. v. Government of Mexico, 5 F. (2d) 659; Bradford v. Director General of Railroads of Mexico, 278 S. W. (Tex.) 251.

suggestion as *amicus curiæ*, as a matter of comity between the United States government and the Italian government, for such consideration as the court may deem necessary and proper." Two days later the master of the steamship intervened for the interests of its owner, an Italian corporation, for the sole purpose of filing exceptions to jurisdiction and making claim for the vessel. He objected to the jurisdiction on the ground that the vessel was requisitioned by the Italian government for the purpose of transporting military supplies.

Evidence was taken in the court below. It showed, among other things, that the vessel had been requisitioned by the Italian government; that is to say, the Italian government had required the owners to navigate the ship to and from such ports, and to carry such cargo, as the government, during the period of the requisition, should direct. For the use of the ship the government paid its owners at certain fixed rates. The owners paid all the wages of the captain and crew and the other expenses of the ship, which was navigated by the captain and crew employed by the owners. Just before the arrest the vessel had come into the port of Norfolk in ballast, and was about to proceed to Baltimore to load, according to the directions of the Italian government, a cargo of grain and rails for Italy. The learned judge below reached the conclusion that the steamship, for reasons of comity, should be released, and so ordered. In such order it was declared that the court had not in any manner dealt with the merits of the case set forth in the libel, or with the question of jurisdiction as between the libelant and the respondent shipowner, or the master, who has claimed the ship, and that the release was ordered solely on the ground that at the time of the arrest the ship was under requisition by the government of the kingdom of Italy, and was without prejudice to the merits of the case. . . .

Before Pritchard and Knapp, Circuit Judges, and Rose, District Judge.

PER CURIAM. . . .

It is asserted that the steamship is immune to proceedings in any court. It is admitted that to give this immunity it will be necessary to take a step beyond that which has been taken in any decided case, although it is argued that the logic of some decisions heretofore made require that step. We are frankly reluctant to take it. There are many reasons which suggest the inexpediency and the impolicy of creating a class of vessels for which no one is in any way responsible. For actions of the public armed ships of a sovereign, and of those, whether armed or not, which are in the actual possession, custody, and control of the nation itself, and are operated by it, the nation would be morally responsible, although without her consent not answerable legally in her own or other courts. For the torts and contracts of an ordinary vessel, it and its owners are liable. But the ship in this case, and there are

now apparently thousands like it, is operated by its owners, and for its actions no government is responsible, at law or in morals.

The persons in charge of the navigation of the ship remain the servants of the owners and are paid by them. The immunity granted to diplomatic representatives of a sovereignty, to its vessels of war, and under some circumstances to other property in its possession and control, can be safely accorded, because the limited numbers and the ordinarily responsible character of the diplomats or agents in charge of the property in question and the dignity and honor of the sovereignty in whose services they are, make abuse of such immunity rare. There will be no such guaranty for the conduct of the thousands of persons privately employed upon ships which at the time happen by contract or requisition to be under charter to sovereign governments.

The steamship says that in any event her right to immunity is a political question, which has been passed upon by the executive branch of the government. A comparison of the suggestion which was filed in The Exchange, 7 Cranch, 116, 3 L. Ed. 287, with that in this case, shows quite clearly that, while in The Exchange the executive demanded the ship's release, it has in this case carefully refrained from doing anything of the kind.

It is said that in the exercise of a sound discretion jurisdiction should be declined. The ship flies a foreign flag. The libelant is a subject of another foreign monarch. The tort complained of was committed upon the high seas. We think this contention foreclosed by what the Supreme Court said in The Belgenland, 114 U. S. 368, 5 Sup. Ct. 860, 29 L. Ed. 152.

For these reasons, the decree below, dismissing the vessel from arrest, must be reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

The Roseric

United States. District Court, District of New Jersey. 1918.

254 *Federal Reporter* 154.

In Admiralty. Suit by the McAllister Lighterage Line, Incorporated, against the British steamship Roseric. On suggestion that writ of arrest be quashed, or suit stayed. . . .

[The names of counsel and part of the opinion are omitted.]

Rellstab, District Judge. The libel alleges that on April 16, 1918, the steamship Roseric negligently collided with libelant's barge McAllister Bros. No. 63, in New York Harbor, to its damage. After seizure by the marshal, within the territorial jurisdiction of this court, the steamship

was released by the order of libelant upon an undertaking by the owners to bond her, in case the court should hold that she was not immune from process, on grounds to be urged on behalf of the British Ambassador. Thereupon counsel for the British Embassy, appearing by leave of court as *amici curiæ*, filed a suggestion. . . .

[The text of the suggestion is omitted.]

From this suggestion and the deposition of the ship's master, which was not offered in evidence, but produced for the information of the court, it appears that, while the steamship is owned by a British subject and its navigation in charge of the owner's officers and crew, who receive their compensation from such owner, it, as well as the officers and crew, is under the complete control of the British government, and is engaged in its business as an admiralty transport, carrying such cargo, and going to and from such ports, as that government directs. For the time being it is appropriated by the British government for its public use, and was when the collision occurred and the arrest was made.

On the face of the libel, the libelant, an American citizen, has an inchoate lien on the ship, and this court *prima facie* jurisdiction to perfect it. If the arrest is set aside and the writ quashed, the libelant has no present remedy but in the British courts. If the proceedings to arrest the ship are stayed for as long as it remains in the service of the British government, the libelant's rights will be seriously prejudiced, and in the end it may find itself remediless.

On the other hand, if the right to arrest this ship, so requisitioned, is sustained, the sovereign rights of the British government, at a time when it is engaged in a war, will be subordinated to those of a private claimant. Furthermore, the right to seize one ship so requisitioned means the right to seize any number of ships similarly conditioned, with the result that during the continuance of the war, not only that government, but the United States and other sovereignties, cobelligerents in prosecuting such war against the common enemy, will be seriously hampered in their joint struggle to maintain their sovereign rights. It is of no moment that in this case, by arrangement between the proctors of the libelant and the ship's owner, no prejudicial detention of the ship resulted. The right to arrest involves the right to detain; detention includes the probability of loss to the users of the vessel; and exemption from delay of a vessel engaged exclusively in the public service of a nation is as much the privilege of sovereignty as the vessel's exemption from final condemnation. For present purposes the steamship must be regarded as still subject to or threatened with process of arrest. The Florence H. (D. C.) 248 Fed. 1012.

Libelant asserts that, "if this court drops or stays its jurisdiction, that must be done for reasons which our courts have declared to be not well founded," and that to grant such immunity would go "far beyond

the principles which have been laid down by our courts as determining whether a ship shall be immune from process."

In The Exchange, 11 U. S. (7 Cranch) 116, 3 L. Ed. 287, a pioneer in this field of judicial inquiry, it was held that—

"A public vessel of war of a foreign sovereign at peace with the United States, coming into our ports, and demeaning herself in a friendly manner, is exempt from the jurisdiction of the country." . . .

[In an omitted part of the opinion the court stated Schooner Exchange v. M'Faddon, *supra*, and quoted from Chief Justice Marshall's opinion in that case.]

The Exchange is a strong case, but it has always been accepted as law both here and abroad. There the allegation was that libelants had been wrongfully dispossessed of their vessel by the representatives of a foreign sovereign. The inconvenience or possible injustice that may happen to the libelant in the instant case, if the Roseric is held immune from arrest, is incomparable with that apparently sustained by the libelant in the cited case.

The immunity there accorded was not due to a lack of judicial power. The power was assumed, but its exercise was waived out of a due regard for the dignity and independence of a sister sovereignty, with whom this nation was at peace. The implication is that to insist upon jurisdiction in such instances likely would be considered by the foreign sovereign as a reflection upon its dignity and an interference with its independence, and would tend to strain and possibly disrupt amicable relationships.

Though in The Exchange an armed ship of war was the subject before the court, there is nothing in the reasoning resulting in its exemption from judicial process that limited the immunity of [to?] that character of vessels. The privilege was based on the idea that the sovereign's property devoted to state purposes is free and exempt from all judicial process to enforce private claims. Such idea is as cogently applicable to an unarmed vessel employed by the sovereign in the public service as it is to one of his battleships. The exemption declared in that case was considered in The Santissima Trinidad, 20 U. S. (7 Wheat.) 283, 353, 5 L. Ed. 454, and Mr. Justice Story, who sat in The Exchange, in stating the grounds thereof, referred to them as applicable to foreign public ships.

In Briggs et al. v. Lightboats, 93 Mass. (11 Allen) 157, Justice Gray, in answering the contention that these lightboats, though owned by the United States, were not intended for military service, and therefore were subject to judicial process, stated the ground of exemption as follows:

"The immunity from such interference arises, not because they are instruments of war, but because they are instruments of sovereignty, and does not depend on the extent or manner of their actual use at any particular moment, but on the purpose to which they are devoted." Page 165.

In granting immunity to property devoted by a sovereign to public use, neither its ownership nor the particular public use made of it is treated as important in the British courts.

In The Parlement Belge, L. R. 5 P. D. 197, immunity was accorded to an unarmed vessel belonging to a foreign sovereign in the hands of officers commissioned by him and employed in carrying mails, though it also carried merchandise and passengers for hire. In that case Brett, L. J., after reviewing the American and other cases, said:

"That as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise, by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction." Page 217. . . .

[In an omitted part of the opinion the court referred to The Broadmayne [1916] P. 64; The Messicano, 32 T. L. R. 519; and The Errisos, Lloyd's List, Oct. 24, 1917, p. 5.]

These cases, in my judgment, must be accepted as declaring the judicial policy to exercise no jurisdiction over a sovereign, whether local or foreign, or over instrumentalities employed by it in the public service, by any proceedings *in invitum*, regardless of the form or character of the process. The libelant, however, insists that The Johnson Lighterage Co. No. 24 (D. C.) 231 Fed. 365, and The Attualita (C. C. A. 4) 238 Fed. 909, 152 C. C. A. 43, announce a different rule and control the instant case. The Johnson Lighterage Co. Case (decided by this court) was a proceeding to recover for salvage services. Both cargo and vessel were seized. On an order to show cause why such cargo (munitions of war) should not be released from seizure and turned over to the Russian government, who was the owner thereof, if was held that, as the possession of the cargo at the time of its seizure was not in that government, but in the charterer of the vessel, under a contract for transportation, it was within the exception declared in The Davis, 77 U. S. (10 Wall.) 15, 19 L. Ed. 875, and subject to arrest. The lack of actual possession of the property by the government at the time of seizure is the basis of the exception established by the Davis Case, and distinguishes both it and the Lighterage Case from the case at bar.

The contention of libelant that, as the ship's officers and crew operated the Roseric, she was within the exception established by these cases, is not tenable. The British government, in the exercise of its sovereign powers, took the Roseric and devoted it to its own purposes. That no change in

the officers and crew took place, and that they continued in the employment of the ship's owner, is unimportant. The ship, its owner, officers, and crew, were under the compulsion of sovereignty.

While the fact that the operation of the ship was by the owner's officers and crew may be important on the question of the owner's present, and the ship's ultimate, liability for the negligence charged in the libel, it is immaterial upon the question of the right of a private individual to enforce such liability by seizing the ship while it remains appropriated to the sovereign's public use. Whether the government should operate the ship by the owner's officers and crew or others was for the sovereign's exclusive determination.

The effect of its requisition was to put the ship and its equipment into the public service. The officers and crew, as well as the ship, for the time being became the sovereign's instrumentalities, and whatever possession of the ship they obtained by reason of this employment was the sovereign's possession while the requisition was in force.

In legal effect a ship so subjected to *vis major* is no less in the possession of the sovereign than if he had taken it over by a regular charter or had manned it by his navy. In The Davis, with reference to the goods there in question, the court found:

That the United States was not in the position of a charterer of the vessel, but that "the case was the usual one of a common carrier contracting to deliver goods on his own responsibility," and that "the possession of the master of the vessel was not the possession of the United States. He was in no sense an officer of the government. He was acting for himself, under a contract which placed the property in his possession and exclusive control for the voyage." 10 Wall. 21, 22, 19 L. Ed. 875.

The Attualita (C. C. A. 4) 238 Fed. 909, 152 C. C. A. 43, is more in point. In that case, notwithstanding the ship had been requisitioned by the Italian government and was engaged in its public service, it was held subject to arrest in a proceeding *in rem* to recover damages for an alleged tort. That case was decided before this country became a cobelligerent with the Italian government in the war against Germany. In all other respects the facts of that case are seemingly identical with those of the case at bar. The District Court had held that the ship was immune from arrest, basing its decision on the ground of international comity. The Circuit Court of Appeals, observing that to allow the immunity would require it to go beyond any of the decided cases, said:

"There are many reasons which suggest the inexpediency and the impolicy of creating a class of vessels for which no one is in any way responsible." 238 Fed. 911, 152 C. C. A. 45.

And, after referring to the immunity granted to the diplomatic representatives and the vessels or other property in the possession and control of a sovereignty, it said that such immunity—

"can be safely accorded, because the limited numbers and the ordinarily responsible character of the diplomats or agents in charge of the property in question and the dignity and honor of the sovereignty in whose services they are, make abuse of such immunity rare." 238 Fed. 911, 152 C. C. A. 45.

That the seizure of the vessel interfered with sovereignty's rights and deprived it of the use of the ship, unless and until it or the owner thereof submitted to the court's jurisdiction (by bonding, etc.), was not referred to.

So far as the suggested irresponsibility of any one for a tort committed in the operation of a vessel so requisitioned is concerned, it should not be overlooked that the owner could be made personally liable for the negligence of his servants in operating the ship, even though the ship should be exempt; and so far as the ship itself is concerned the immunity need not be extended beyond the period of the sovereign's requisition; for, as soon as the sovereign restores the ship to the owner, the reason for its immunity is gone.

It seems to me, and I state my judgment with deference, that the decision in that case unduly subordinates the rights of sovereignty to those of the individual. The immunity of the sovereign's instrumentalities devoted to public service from the process of its own courts, as I understand the previous cases, is not based upon the idea that it may be "safely accorded," but on account of its dignity and independence, and because it is necessary, for the well-being of the nation that it serves, that it shall not be hampered or interfered with in the use of such instrumentalities.

In the case of the courts of one sovereignty waiving jurisdiction over another sovereignty's instrumentalities, the thought of safety to private litigants, to my mind, is at least equally irrelevant. The immunity in such cases, as already noted, is based upon the idea that sovereigns are of equal dignity and independence, and that out of regard for such rights, and to maintain and further amicable relations among them, it is, by tacit agreement, recognized as needful, in certain particulars, that one sovereign should decline to exercise some of its prerogatives when to exercise them would necessarily place another sovereign in a subordinate position.

In line with this thought, the following language of Judge Thompson in The Luigi (D. C.) 230 Fed. 495, is pertinent:

"It is far more important for the courts of the United States to recognize the international rule of comity that an independent sovereign cannot be personally sued, because such a suit would be inconsistent with the independence and equality among the nations of the state which he represents, than it is to take cognizance of private rights, if by so doing that rule is violated." Page 496.

If these ideas dominate the question whether immunity should be granted to a foreign sovereign's property devoted to the public service, it logically follows that it is not the ownership or exclusive possession of the instrumentality by the sovereign, but its appropriation and devotion to such service, that exempts it from judicial process. That in such use the owner of the instrumentality, through its servants, is permitted to remain in physical possession thereof, and, in consequence, may become personally liable for its agents' torts, is of no moment, where, as in this case, the ship and its entire equipment is under the absolute dominion of the sovereign. . . .

Thus far I have considered this question as if no relations other than those arising from a state of peace and amity existed between this nation and the one suggesting the immunity. If, then, the consent of one sovereignty to waive jurisdiction over the public instrumentalities of another is implied, when the two live in amity, and in part because their mutual well-being is promoted thereby, as announced in The Exchange, upon what theory is this immunity to be withdrawn from a sovereignty with whom this nation is actively engaged in prosecuting a war against a common enemy? The mutual benefit that accrues from such exemption in time of peace is at best but little in comparison with that which actually accrues in time of such a war.

The extraordinary conditions that environ the present suggestion of immunity, if they did not bring the instant case within the principle here deduced from the cases, would justify the announcing of one that did. However, as indicated, no such judicial declaration is needed. The Roseric is well within such principle, and, unless the British Embassy's suggestion is to be disregarded for the reasons now to be considered, must be held immune. . . .

The only remaining question is whether, in following the British Embassy's suggestion, the writ of arrest should be quashed, or merely that the suit be stayed. While full immunity is to be accorded the British government in the use of the Roseric while she is under its requisition, no good reason calls for the dismissal of the suit, a result which would follow the quashing of the writ.

A decree may be entered, staying all proceedings to arrest or detain the Roseric so long as she continues in the service of the British government.[39]

[39] See also The Broadmayne [1916] P. 64; The Messicano, 32 T. L. R. 519; The Eolo [1918] 2 Ir. Rep. 78; The Crimdon, 35 T. L. R. 81. *Cf.* The Luigi, 230 Fed. 493. *Cf.* also The Beaverton, 273 Fed. 539.

The Tervaete

Great Britain. Court of Appeal. 1922.

Law Reports [1922] *Probate Division* 259.

Appeal from a decision of Sir Henry Duke P. sitting in Admiralty, dismissing a motion to set aside a writ in an action *in rem*. . . .

[The statement of the case, the arguments of counsel, the opinion of Bankes, L. J., and part of the opinion of Scrutton, L. J., are omitted. The facts are stated sufficiently in the opinion of Scrutton, L. J.]

Scrutton L. J. In May, 1920, the English steamer, Lynntown, being in the Spanish port of Bonanza on the Guadalquivir River and within Spanish territorial waters, but on the "high seas," as that term is interpreted in the English Admiralty Court, sustained damage by collision with the steamship Tervaete. The Tervaete had been surrendered by the German Government to the allied powers, who handed her over to the Belgian Government, whose property she was at the time of the collision. After the collision the Belgian Government sold the Tervaete to private owners, under whose ownership she came to Barry Dock where she was arrested by a procedure *in rem* at the suit of the owners of the Lynntown. They alleged that the collision gave rise to a maritime lien, inchoate till the Tervaete came within British territorial waters, dormant till she ceased to be the property of the Belgian Government, but which could be enforced when the Tervaete, as the property of private owners, came within British jurisdiction.

The owners of the Tervaete replied that as the Tervaete at the time of the collision was the property of the Belgian Government, against whom no proceedings could be taken *in personam* and against whose ship no proceedings could be taken *in rem*, no maritime lien could arise. The President in a reserved judgment adopted the contention of the owners of the Lynntown, and the owners of the Tervaete appeal. . . .

At the time of the collision, if it happened in English waters, would it have been possible to arrest the Tervaete and claim a maritime lien? The well-known decision of The Parlement Belge [5 P. D. 197] compels the answer in the negative. Neither the Belgian Government could have been sued *in personam*, nor could their ship have been arrested *in rem*. If this is so, I do not understand how there could then be any maritime lien on the ship. To hold that a lien would come into existence, if the Government sold the ship to a private purchaser, would be to deprive the Belgian Government of part of their property, for such a lien about to arise must reduce the price paid to the Government and so affect the property of the Government.

The general language of Lord Watson in The Castlegate [[1893] A. C. 38, 52] that "a proper maritime lien must have its root in the

personal liability of the owner," approving the language of Lord Esher to the same effect in The Parlement Belge [5 P. D. 197, 218], and the similar language of Sir Francis Jeune in The Utopia [[1893] A. C. 492, 499], appear to me entirely to support this view, even if that general language is not applicable, as Gorell Barnes J. in The Ripon City [[1897] P. 226] thought it was not, to the complicated facts in that case. And while I agree with the President that the passage in The Parlement Belge was not strictly necessary to Brett, L. J.'s decision, yet it was so closely related to it that coming from such a master of maritime law I have no hesitation in following it, especially as I agree with it in principle. Brett, L. J. says: "The property cannot be sold as against the new owner, if it could not have been sold as against the owner at the time when the alleged lien accrued. This doctrine of the Courts of Admiralty goes only to this extent, that the innocent purchaser takes the property subject to the inchoate maritime lien which attached to it as against him who was the owner at the time the lien attached." In the present case no lien attached against the Belgian Government, nor could their ship have been arrested *in rem.* But if they could only sell the ship subject to the lien, their property would be affected by the lien, in that they would receive less than the value of the ship free from encumbrances or liens. The result would be that our law would assert a right over the property of a foreign sovereign not arising from any voluntary action on his part, which adversely affected his property.

I agree that a sovereign may call upon us to enforce legal rights in his favour. The Newbattle [10 P. D. 33] shows that if he does so, we may refuse to enforce those rights unless he allows the legal rights we recognize to be effectively enforced against him. I agree that cases like Gladstone v. Musurus Bey [1 H. & M. 495] and Larivière v. Morgan [L. R. 7 Ch. 550] show that where English trusts are concerned, this Court will proceed though foreign sovereigns' rights are concerned, while, on the other hand, Vavasseur v. Krupp [9 Ch. D. 351] involves the proposition that this country will not enforce English patent rights against property in the jurisdiction which a foreign sovereign claims. I am disposed to agree that the ground of the decisions is that though there are English rights, we do not enforce them against a foreign sovereign directly or indirectly because of the comity of nations. But it respectfully appears to me that the error of the President's judgment is that he is enforcing rights against a foreign sovereign indirectly, when he supports the view that over his property there is by English law an inchoate lien which will diminish the value of that property by lowering the price that a private purchaser will give for it.

I appreciate that the matter becomes of international importance, if states increase their commercial trading by national fleets. I have already in The Porto Alexandre [[1920] P. 30] expressed my views on

the disadvantages of state immunity in such circumstances. But the remedy is, in my opinion, state agreements by diplomatic action, not infringement of legal principles based on the comity of nations.

For these reasons I think the appeal must be allowed with costs here and below, and the writ against the Tervaete set aside.

[The opinion of Atkin, L. J. is omitted.]

Appeal allowed.[40]

International Convention for the Unification of Certain Rules Relating to the Immunity of State-owned Vessels

Brussels, April 10, 1926.

Conférence Internationale de Droit Maritime (1926) *page* 95.

Art. 1. Sea-going vessels owned or operated by States, cargoes owned by them, and cargoes and passengers carried on such vessels, and the States owning or operating such vessels, or owning such cargoes, shall be subject, in respect of claims relating to the operation of such vessels or the carriage of such cargoes, to the same rules of liability and to the same obligations as those applicable to privately owned vessels and cargoes and to the private ownership and management of vessels.

Art. 2. For the enforcement of such liabilities and obligations there shall be the same rules of jurisdiction, the same rights of action and the same procedure as in the case of privately owned vessels and cargoes and of their owners.

Art. 3. 1. The provisions of the two preceding Articles shall have no application to ships of war, State yachts, patrol vessels, hospital ships, fleet auxiliaries, supply ships and other vessels owned or operated by a State, and being exclusively used at the time a cause of action arises on governmental and non-commercial service. Such vessels shall not be subject to seizure, arrest or detention by any legal process nor to proceedings *in rem*.

Nevertheless, claimants shall have the right in the following three cases of taking proceedings in the proper courts of the State owning or operating the vessel in respect of which the claim arises, and in such proceedings the claim to immunity shall not be open:—

(i) Actions in respect of collision or other accidents of navigation;

(ii) Actions in respect of salvage and general average;

[40] See also The Sylvan Arrow [1923] P. 220; The Western Maid, 257 U. S. 419; The Augustine, 8 F. (2d) 287. But *cf.* The Meandros [1925] P. 61. *Cf.* also The Siren, 7 Wall. 152; The Davis, 10 Wall. 15; United States v. The Thekla, 266 U. S. 328.

(iii) Actions in respect of repairs, goods supplied or other contracts relating to the vessel.

2. Similar rules shall apply to State-owned cargo carried on board the vessels mentioned in paragraph 1 of this Article.

3. State-owned cargo carried on board merchant vessels for governmental and non-commercial purposes shall not be subject to seizure, arrest or detention nor to proceedings *in rem*.

Nevertheless, actions in respect of collision and accidents of navigation, salvage and general average and for breach of contract relating to such cargo may be brought before the court having jurisdiction in virtue of Article 2.

Art. 4. States may avail themselves of all defences, prescriptions and limitations of liability open to privately owned vessels and their owners.

The adaptations or modifications, if any, of such defences and limitations which may be necessary to make them applicable to the case of ships of war and other vessels specified in Article 3 shall form the subject of a separate convention to be concluded hereafter. In the meantime, any measures necessary for this purpose may be effected by national legislation in conformity with the spirit and principles of this Convention.

Art. 5. If in any proceedings there is in the opinion of the court a doubt whether the vessel or cargo is of a governmental and non-commercial character within Article 3, a certificate signed by the diplomatic representative of the Contracting State to which the vessel or cargo belongs, produced on the motion of the State before whose courts the case is pending, shall be conclusive evidence that the vessel or cargo falls within Article 3 so as to entitle the State in question to have the vessel or cargo freed from arrest, seizure or detention without prejudice to liability under that Article.

Art. 6. The provisions of this Convention shall be applied in each Contracting State, but without any obligation to extend the benefit to Non-Contracting States and their subjects, and with the right of making such extension subject to a condition of reciprocity.

Nothing in this Convention shall be held to prevent a Contracting State from settling by its own laws the rights to be accorded to its own subjects before its own courts.

Art. 7. Each Contracting State reserves the right in time of war to suspend the application of this Convention by a declaration notified to the other Contracting States, to the extent that neither the vessels owned or operated by the State nor the cargoes belonging to it shall be subject to arrest, seizure or detention by any foreign court of justice. But the claimant will have the right of taking proceedings before the proper court in accordance with Articles 2 and 3.

Art. 8. Nothing in this Convention shall affect the right of Contracting States to take any measures consistent with or required by the rights and duties of neutrality.[41]

SECTION 4. WAIVER BY SUBMISSION TO LOCAL COURTS[42]

THE COLOMBIAN GOVERNMENT v. ROTHSCHILD

Great Britain. High Court of Chancery. 1826.

1 *Simons' Chancery Reports* 94.

The bill commenced as follows: "complaining, show unto your lordship, the government of the state of Colombia, and his excellency Don Manuel Jose Hurtado, a citizen of the said state, and minister plenipotentiary from the same to the court of his Britannic majesty, now residing at No. 33 Baker-street, Portman-square, in the parish of Mary-le-bone, in the county of Middlesex.". . .

The bill prayed that an account might be taken of all sums received by Goldschmidt & Co. for or on account of the government of Colombia, and of all sums paid and expended by them unto or for the use of the government; and that what, on the balance of such accounts, should appear to be due and owing from the firm might be paid to Hurtado, as the representative of the Colombian government.

To this bill the defendants demurred for want of equity.

The Attorney General, and Mr. Pemberton, for the demurrer:— No persons appear before the court in a character which enables them to sustain this bill. The plaintiffs are described as the government of the state of Colombia, and Don Manuel Jose Hurtado joins as a citizen of that state.

There is no mutuality in this case. For suppose it were necessary for the defendants to file a cross bill, how are the plaintiffs in this bill to be described when made defendants: How is a subpœna to issue against them? . . .

[Part of the statement of the case and part of the arguments of counsel are omitted.]

[41] The omitted articles (arts. 9–14) are procedural. The Convention was signed by eighteen states. It has not been ratified and may be modified before ratification takes place. See League of Nations, Committee of Experts on Codification, Report on Legal Status of Government Ships Employed in Commerce, L. of N. Doc., C. 52. M. 29, 1926, V, 20 Am. Jour. Int. L. Spec. Suppl. 260; FRANCK, "A New Law for the Seas," 42 L. Quart. Rev. 25, 308. *Cf.* United States, Act Authorizing Suits Against the United States in Admiralty, etc., 1920, c. 95, 41 U. S. Stat. L. 525; 46 U. S. Code Ann. §§741–752. See MATSUNAMI, Immunity of State Ships.

[42] This section deals only with waiver by foreign states or sovereigns. On waiver by foreign state representatives, see *supra*, 571 *et seq.*

THE VICE-CHANCELLOR:—It does not appear to me to be necessary to notice the several objections which have been made to this bill.

A foreign state is as well entitled, as any individual, to the aid of this court in the assertion of its rights:[43] but it must sue in a form which makes it possible for this court to do justice to the defendants. It must sue in the names of some public officers who are entitled to represent the interests of the state, and upon whom process can be served on the part of the defendants; and who can be called upon to answer the cross bill of the defendants. This general description of "the Colombian government," precludes the defendants from these just rights; and no instance can be stated in which this court has entertained the suit of a foreign state by such a description.

Demurrer allowed.

THE UNITED STATES OF AMERICA v. WAGNER

Great Britain. High Court of Chancery. 1867.

36 *Law Journal Reports, Chancery, New Series*, 624.

The suit was instituted, by the United States of America, suing alone in that name, as the plaintiffs, against the defendants, as the agents in this country of the Government of the late Confederate States of America, for the purpose of obtaining an account of all moneys and goods and steam-vessels which had come into the hands of the defendants as such agents, and the payment of the moneys due and delivery up of the goods and ships to the plaintiffs.

The defendants demurred to the bill generally for want of equity. . . .

[Upon the argument of the demurrer, before Wood, V. C., his Honour said: "The question is, not whether the plaintiffs can sue—that is a right upon which there can be no doubt, and which has been recognized from the time of the case mentioned in Rolle's Abridgment, and finally established by the decision of the House of Lords in Hullet v. the King of Spain—but how they can best sue, having regard to the consideration due from the Court to the interests of Her Majesty's subjects who may be sued." And founding himself upon the principles of moral justice expressed by Lord Talbot in Wych v. Meal, and particularly upon the case of The Colombian Government v. Rothschild, he held "that the United States of America must sue subject to all the consequences that any other sovereign state is subject to, and that they must put forward some person who will be in a position to answer a cross-bill, or give dis-

[43] See Hullet & Co. v. King of Spain, 1 Dow & Clark 169; Republic of Mexico v. Arrangois, 11 How. Pr. 1; King of Prussia v. Kuepper's Adm'r., 22 Mo. 550; The Sapphire, 11 Wall. 164.

covery by that or any other means;" and he allowed the demurrer with leave to amend on payment of costs.]

The plaintiffs appealed from this decision.

[Part of the above statement of the case is taken from Lord Chancellor Chelmsford's opinion. The arguments of counsel and the opinions of Lord Chancellor Chelmsford and Lord Justice Turner are omitted.]

Lord Justice Cairns.—It is admitted that, upon the statements in this bill, it must be taken that the property claimed in the suit belongs to the United States of America, a foreign sovereign state adopting the republican form of government, and recognized and treated as such and under that style by Her Majesty; but it is contended that this foreign state, being a republic, cannot sue in its own name, but must either associate with it as plaintiff some other person in office, or proceed in the name of the President of the republic, or some other officer of state. A proposition so startling, so grave in its consequences, and in such apparent antagonism to the rules, that the proper plaintiff is to be sought in the owner of the subject-matter of the suit, and that a foreign state is at liberty to sue in our courts, would seem to require some argument and authority to support it.

It was contended that when a monarch sues in our courts, he sues as the representative of the state of which he is sovereign; that the property claimed is looked upon as the property of the people or state, and that he is permitted to sue, not as for his own property, but as the head of the executive government of the state to which the property belongs. And it was contended that in like manner, where the property belongs to a republic, the head of the executive, or, in other words, the president, ought to sue for it. This argument, in my opinion, is founded on a fallacy. The sovereign in a monarchical form of government may, as between himself and his subjects, be a trustee for the latter, more or less limited in his powers, of the property which he seeks to recover. But in the Courts of Her Majesty, as in diplomatic intercourse with the government of Her Majesty, it is the sovereign, and not the state or the subjects of the sovereign, that is recognized. From him, and as representing him individually, and not his state or kingdom, is an ambassador received. In him individually, and not in a representative capacity, is the public property assumed to be vested by all other states and the Courts of other states.

In a republic, on the other hand, the sovereign power, and with it the public property, is held to remain and to reside in the state itself, and not in any officer of the state. It is from the state that an ambassador is accredited, and it is with the state that diplomatic intercourse is conducted.

It was then contended that the republic of the United States as a body politic being plaintiff, no effective discovery could be had from it,

or relief against it on a cross-bill; that it is a condition of obtaining relief in equity that discovery may be had against the plaintiff on a cross-bill filed by the defendant, and that in the case of a corporation this right is preserved by the rule that its officers may be made co-defendants for discovery. It is to be observed, however, with regard to the case of a corporation, where the Court, making an exception from its general rules, allows persons who are merely witnesses to be made co-defendants for discovery, that the exception does not depend on any reasons springing out of the nature of bills and cross-bills; for the officers of a corporation may be sued with the corporation, even where no litigation has been commenced by the corporation; nor does the liability of the officers to discovery affect the question who is to be plaintiff, for the corporation sues for the corporate property without joining any officer of the corporation as a co-plaintiff. The rule of the Court as to corporations, if it proves anything, would seem to shew that in a cross-bill against the United States there would be a right to join some officer of the United States for the purpose of discovery. The Vice Chancellor appears to have thought that the President of the United States was not an officer who could thus be joined as a defendant, and I do not desire to express any opinion differing in that respect from the opinion of His Honour.[44] But if the reference to suits against corporations does not establish a right to make some officer of the United States a co-defendant on a cross-bill, it is, as I think, altogether irrelevant.

It is, however, in my opinion, an error to suppose that the right of a plaintiff to sue depends in any way on the effectiveness of the discovery which on a cross-bill can be exacted from him. From an infant, a lunatic, a representative, trustee or executor, wholly ignorant of the occurrences which are the subject of the suit, no practical discovery can be obtained, and yet they can maintain a suit. I apprehend that the only rule is that the person, state or corporation which has the interest must be the plaintiff, and the Court will do the best the case admits of to secure to the defendant such defensive discovery and relief as he may be entitled to. The Court can, in all cases, suspend relief on the original bill until justice is, in this respect, done to the defendant.

The case of The Colombian Government v. Rothschild, however, was said to be, and the Vice Chancellor appears to have considered that it was, a binding authority against a suit in this form. I cannot so view that case. The bill was filed in the name of the Government of the State of Colombia, and if this bill had been filed in the name of the Government of the United States the cases would have been analogous. Dealing with the words before him, Sir John Leach appears to me to have held, and to have most properly held, that an unknown and undefined body, such as the government of a state, could not sue by that

[44] See Republic of Costa Rica v. Erlanger, 1 Ch. D. 171.

quasi-corporate name, and the expressions in his judgment seem to me to intimate no more than that if the persons so described could sue at all, they must come forward as individuals, and shew that they were entitled to represent their state. Nothing could be more unreasonable than to suppose that by observations of this kind Sir John Leach meant to decide, and to decide for the first time, that a republic could not sue in its own name, but must have or must create some officer to maintain a suit on its behalf. I think the demurrer in this case must be overruled.[45]

ROTHSCHILD v. QUEEN OF PORTUGAL

Great Britain. Court of Exchequer. 1839.

3 *Younge and Collyer's Exchequer Reports* 594.

The bill was brought for discovery from the Queen of Portugal, as to the matters stated in the bill, and for a Commission to examine witnesses in Portugal, and for an injunction to restrain an action commenced against the plaintiff by the Queen of Portugal. It appeared that the Portuguese Government had deposited with the plaintiffs certain Portuguese Bonds, as a security for monies advanced by them to the government, and that a contract had been entered into by the plaintiffs with the Queen's agents in England, by which it was agreed that, on certain events, the plaintiffs should sell the bonds and place the produce of the sale to the credit of their account with the Portuguese Government. The plaintiffs sold the bonds, but claimed interest on their advances, and set up that claim in defence to the action; the Queen's agents denying their right to such interest, on the ground of delay in selling the bonds. The plaintiffs now sought by their bill for discovery of certain correspondence, and other matters in aid of their defence to the action.

The Queen demurred to the bill on two grounds—first, that, as a sovereign, the suit was not maintainable against her; and secondly, that the plaintiffs had made no case for discovery.

[The arguments of counsel are omitted.]

ALDERSON, B.—In this case I expressed at the hearing my opinion on several points; but before I gave my opinion finally on the whole case, I wished to have an opportunity of reading the bill in order to ascertain whether any part of the discovery prayed by the plaintiff was material to the question at issue in the Court of Law. The question there clearly is, whether the delay in selling the Portuguese Bonds deposited as the collateral security for a debt, clearly, under ordinary circumstances, bearing interest, was such laches, on the part of Messrs. Rothschild, as to deprive them of the right of charging Her Most Faithful Majesty with such interest in the account current between them. Now, if the conduct of Her

[45] *Accord:* Republic of Mexico v. Arrangois, 11 How. Pr. 1.

Most Faithful Majesty, through her lawfully authorized agents, was such as to induce Messrs. Rothschild, as reasonable men, to suppose that by such a delay they were acting in conformity to her Majesty's wishes, they would justly be entitled to charge her with that interest. Now, if the letters charged in the bill to have been written by her authority were so written, I think many of them, at all events,if not the whole correspondence, very proper to be laid before a jury in order to prove that fact. Then if so, the bill prays, amongst other things, a discovery whether those letters were so written, prays a discovery material to the plaintiff's defence at law. It may be true that part of the discovery prayed goes beyond the discovery to which the plaintiffs are by law entitled. But this is immaterial upon the present demurrer, which is a demurrer to the whole bill, and is not confined to the objectionable parts of it.

I am therefore of opinion that Her Most Faithful Majesty being a suitor voluntarily in a court of English law, becomes subject, as to all matters connected with that suit, to the jurisdiction of this Court of Equity. That the discovery prayed by this bill is material to the plaintiff's defence at law in that suit, and that this demurrer is too large and must be overruled, and that it must be with costs.

Demurrer overruled.[46]

South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord

Great Britain. High Court of Justice; Chancery Division. 1897.

Law Reports [1898] 1 *Chancery Division* 190.

The defendant company were a Belgian corporation constituted in 1882 for the purpose of acquiring and working a concession from the plaintiffs, the South African Republic, to make a railway in the territory of the plaintiffs. The concession was granted to the defendants, and under its terms they had power, with the sanction of the plaintiff Government, to issue bonds to the amount of 1,500,000*l.*, the payment of interest

[46] *Accord:* King of Spain v. Hullet, 1 Clark & Finnelly 333; Republic of Peru v. Weguelin, 20 Eq. 140; Republic of Costa Rica v. Erlanger, 1 Ch. D. 171 (*semble*).

When a foreign state appears as complaining party in the local courts, it may be required to give security for costs. Emperor of Brazil v. Robinson, 6 A. & E. 801; Republic of Costa Rica v. Erlanger, 3 Ch. D. 62; Vavasseur v. Krupp, 9 Ch. D. 351, 352, *supra*, 540, Republic of Honduras v. Soto, 112 N. Y. 310.

When a foreign state appears as complaining party in the local courts, it submits to set-off or counterclaim. The Newbattle, 10 P. D. 33. And see United States v. Prioleau, 35 L. J. Ch., N. S., 7; Rowan v. Sharps' Rifle Mfg. Co., 29 Conn. 282; The Siren, 7 Wall. 152; The Western Maid, 257 U. S. 419; United States v. The Thekla, 266 U. S. 328; Irish Free State v. Guaranty Safe Deposit Co., 212 N. Y. Supp. 421, 215 N. Y. Supp. 255; The Secundus, 15 F. (2d) 713.

on which was guaranteed by the plaintiff Government. In June, 1894, such bonds to the amount of 500,000*l.* having been already issued, the defendant company negotiated with the plaintiff Republic for sanction to issue the rest of the bonds, and obtained such sanction on the basis of the following term contained in a letter written on their behalf: "That the proceeds of the issue shall be placed on deposit in the joint names of Mr. Baelaerts van Blokland and a trustee named by the company, so that all moneys required for the construction, &c., can only be drawn on the joint signatures of the two trustees." Under this arrangement large sums arising from the issue of such debentures were deposited with two London banks in the names of Baelaerts van Blokland, the commissioner in Europe of the plaintiff Republic, and Baron Robert Oppenheim as trustee for the defendant company.

Baelaerts van Blokland died on March 14, 1896. The defendants thereupon claimed a right to deal as they pleased with the funds then standing in the sole name of their nominee: and in March, 1897, the plaintiffs commenced this action against the defendant company, the two banks, and Baron Oppenheim. By their writ they claimed (*inter alia*) an injunction to restrain the defendants dealing with the funds till trial of the action.

The action was brought on on motion for an injunction, the money on deposit was paid into court, and the defendant bankers were dismissed. The plaintiffs put in a statement of claim by which they claimed a declaration that they were entitled to nominate a trustee in the place of Blokland; the appointment of such a trustee on their nomination; and the transfer of the funds in court to the trustees when the new trustee had been appointed.

The defendant company put in a statement of defence and counter-claim by which they alleged various breaches by the plaintiff Government of the terms of the concession; the writing of a letter by an agent of the plaintiffs asserted to be libellous: and that the plaintiffs were unjustly and in bad faith taking proceedings in the Transvaal courts to avoid the concession.

By the counter-claim the company claimed (1.) payment of three several sums of 60,000*l.*, 1800*l.*, and 147,000*l.* as damages for alleged breaches of the terms of the concession; (2.) 100,000*l.* damages for libel; and (3.) that the plaintiff Republic might be restrained from taking or continuing proceedings in the courts of the South African Republic for the purpose of having the said concession declared void and its property expropriated, or, in the alternative, 500,000*l.* damages.

On July 26, 1897, North J., on summons by the plaintiffs, made an order in chambers to strike out the allegations in the counter-claim as to libel and the second head of the defendant company's claim. The defendants appealed, and the Court of Appeal affirmed the order of

North J.: see South African Republic v. La Compagnie Franco-Belge, &c. [[1897] 2 Ch. 487.]

This was a summons, brought on as a motion, on the part of the plaintiff Republic to strike out the rest of the counter-claim.

[The arguments of counsel and part of the opinion are omitted.]

North J. . . . I think that the application to strike out the whole counter-claim is well founded. The second paragraph in the prayer of that counter-claim has been already dealt with by me in chambers and in the Court of Appeal. . . .

They have applied now that the other portion of the counter-claim may be struck out too. They say that a foreign Government coming here to sue can be met by defence or counter-claim with respect to the matters incident to the subject-matter of the action brought by the foreign Government; but the plaintiffs deny, and the defendants allege that, by the foreign Government coming here as plaintiffs, they have submitted to the general jurisdiction of the Court, so as to be capable of being caught and sued here in respect of any matter which would be a proper subject of litigation between them if the two parties were private individuals, both resident in this country, and subject to the jurisdiction of its Courts.

Now, on that, several cases were cited as to the position of a foreign Government coming here to sue. There are only two or three that I need refer to very shortly. The first is Duke of Brunswick v. King of Hanover [6 Beav. 38], where Lord Langdale says—I need only read a few lines of a very long judgment—"The cases which we have upon this point go no further than this; that where a foreign Sovereign files a bill, or prosecutes an action in this country, he may be made a defendant to a cross-bill or bill of discovery in the nature of a defence to the proceeding, which the foreign Sovereign has himself adopted. There is no case to shew that, because he may be plaintiff in the courts of this country for one matter, he may therefore be made a defendant in the courts of this country for another and quite a distinct matter; and the question to be now determined is independent of the fact stated at the bar, that the King of Hanover is or was himself plaintiff in a suit for an entirely distinct matter in this court." It is clear that Lord Langdale considered the law settled. There may be a proceeding against a foreign government plaintiff by way of counter-proceeding, by cross-bill, or, what I take to be not the same as a cross-bill, a bill of discovery—it might be either a bill of discovery, if necessary, or a cross-bill—in the nature of a defence to the proceedings set up by the plaintiff; but not a proceeding setting up against the Sovereign another claim in respect of another and entirely distinct matter. . . .

[In an omitted part of the opinion the court referred to Strousberg v. Republic of Costa Rica, 29 W. R. 125.]

Now, I believe the law is still exactly as it was stated to be at the time Lord Langdale laid it down in the way in which he did. Here the defendant has brought in a counter-claim, and there seem to me to be two questions on it, first of all, whether it is a case in which, having regard to the action in which the foreign Government has submitted to the jurisdiction, this is a case in which a counter-claim such as this can properly be put in; and, secondly, if it is, whether as a matter of convenience, assuming the Court could allow it, it is more convenient that the subject-matter should be dealt with in a separate action, or in this action.

The great object of the defendants in getting it joined in this action is this. In ordinary cases it probably would not matter very much whether they proceeded by counter-claim or cross-action; but if there has to be a cross-action, it cannot be served upon a foreign Government in this country. They want to get a counter-claim to enable them to serve it upon the plaintiffs in the action, and so get jurisdiction against them in respect of these matters. Now, it is a remarkable thing that neither in the statement of claim nor in the defence, so far as my attention has been called to it, and certainly not in the counter-claim, is there any suggestion that the Court has to deal with this fund by executing the trusts of it, or that it is for the Court to try the question whether the fund has or has not properly been applied. Proceedings of that sort have been commenced in the country where the property is situated, which is, *primâ facie*, certainly the proper tribunal before which these matters must come, and it is conceded that that part of the counter-claim which asks me to restrain the plaintiff Government from taking proceedings in the Courts of their own country cannot be supported. There is also a claim either for such an injunction or 500,000*l.* damages; but, in my opinion, that fails absolutely and entirely, and I do not think that claim to the alternative damages has really been seriously pressed. The more important matter is as to the three sums of money which are the subject of the first head of the counter-claim. There are three sums in respect of which it has been pointed out in various paragraphs of the counter-claim that the Government are alleged to be indebted to the defendants; but they are not sums with respect to which the defendants have any claim whatever upon the fund in question itself. The claim, if any, is against the Government for particular sums, which would have to be paid by the Government out of its general revenues, and for which there is no claim on the fund in question in any way. That being so, I do not see how the claim to recover those sums against the Government can be right, having regard to the passages which I have read from those two cases, and passages similar to which may be found in many other cases. It is a pure pecuniary claim against the Government, entirely outside of and independent of the subject-matter of the present action.

It is not in reality a defence at all to the case set up by the Government in that action.

Under these circumstances, it seems to me that these sums are not sums which can be made the subject of counter-claim against the Government; in other words, I do not think the Government can be sued in respect of these matters by way of counter-claim; but even if they could, I certainly think they are so foreign to the subject-matter of the present action that it would not by any means be convenient to unite these matters with the subject-matters of the action at all. Under these circumstances, the counter-claim must be struck out; but without costs, because I see no reason why the two applications to strike out parts of the counter-claim should not have been combined in one.[47]

FRENCH REPUBLIC (LA REPUBLIQUE FRANÇAISE) v. INLAND NAVIGATION COMPANY ET AL

United States. District Court, Eastern District of Missouri. 1920.

263 *Federal Reporter* 410.

In Equity. Suit by the French Republic (la Republique Française) against the Inland Navigation Company and the Philip A. Rohan Boat, Boiler & Tank Company. On motion to strike out defendants' counterclaim. . . .

[The names of counsel are omitted.]

FARIS, DISTRICT JUDGE. The plaintiff sued defendant Inland Navigation Company (hereinafter for brevity called simply defendant) and another, as holder of an alleged lien, to recover from defendant a certain sum of money, to wit, $330,000, paid to defendant as payment in part upon a contract, whereby defendant agreed to alter and complete, sell, and deliver to plaintiff three certain barges. Defendant, averring that it has been damaged by reason of an alleged breach of the contract on plaintiff's part, asks, as affirmative relief, judgment against plaintiff by way of counterclaim for the sum of $600,000.

Plaintiff moved to strike out the counterclaim of defendant, for that, since plaintiff is an independent, friendly sovereign nation it may not be, it is contended, sued in a friendly jurisdiction without its consent, even by way of counterclaim.

Plaintiff admits that any damages which may have accrued to defendant may be used by it as a defense or counterclaim *pro tanto*, by way of a defense, or set-off against the demand of plaintiff. The law is unques-

[47] See also Union of Soviet Republics v. Belaiew, 42 T. L. R. 21; Republic of France v. Pittsburgh Steel Export Co., 112 Misc. (N. Y.) 688. And see Strousberg v. Republic of Costa Rica, 44 L. T. R. 199; Kingdom of Roumania v. Guaranty Trust Co., 250 Fed. 341.

tionably in consonance with this concession; so that when a sovereign sues in its own courts, or even in a friendly foreign jurisdiction, so much of a demand (which I may designate for lack of a better word as "counter-claimable") as may serve as a defense, and which is sufficient to liquidate the whole or any part of plaintiff's demand, may be set up by the defendant. State v. Bank, 106 Ind. 435, 7 N. E. 379; Com. v. Barker, 126 Ky. 200, 103 S. W. 303; State v. Bank, 10 Ohio, 91.

Defendant concedes: (a) That a sovereign cannot be sued in its own courts unless by its consent; also—or if it does not so concede in a thorough-going way, the law seems clear upon the propositions—(b) that the Republic of France may sue in this court (The Sapphire, 11 Wall. 174, 20 L. Ed. 127; King of Prussia v. Kuepper, etc., 22 Mo. 550, 66 Am. Dec. 639); and (c) that it may not be sued in the courts of a friendly nation except by its own consent (Beers v. Arkansas, 20 How. 527, 15 L. Ed. 991; Nicholl v. U. S., 74 U. S. (7 Wall.) 122, 19 L. Ed. 125; The Siren, 74 U. S. (7 Wall.) 152, 19 L. Ed. 129).

In the Beers Case, *supra*, at page 529 of 20 How. (15 L. Ed. 991), the Supreme Court of the United States, upon this and another point pertinent in the instant case, said:

"It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another state. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it."

But the defendant insists that, since plaintiff voluntarily submitted itself to the jurisdiction of this court for the collection of a demand, it must be held, by the same token, to have submitted itself to any proper legal proceeding or procedure in the case to which any private person, or corporation, or any individual litigant whatever, would be amenable. Plaintiff concedes so much of this contention as applies to a mere defensive set-off, as discussed above, and the matter of practice and procedure; but it contends that a counterclaim, whereby a judgment for substantial damages is sought, does not fall within the category of mere practice and procedure, but that such a claim is in its legal effect a new and affirmative action to which the sovereign must give its consent before it can be thus sued, and that no such consent is to be deduced from the mere act of plaintiff in bringing suit in a case wherein ordinarily a counterclaim would be permissible. For there is no doubt that this case is one wherein the counterclaim pleaded would lie against any private person or corporation, and that it will likewise lie against

plaintiff herein, unless it be precluded by the fact of plaintiff's status as a friendly independent sovereignty. Thus it will be seen that the point before me falls into a narrow compass when the several concessions and the settled law of the case are considered.

So far as concerns this case, a counterclaim is a cause of action in favor of defendant and against the plaintiff, arising out of the transaction or contract pleaded by plaintiff, and on which plaintiff's claim is bottomed. Section 1807, R. S. Mo. 1909; Gamewell, etc., Co. v. Fire, etc., Co., 116 Ky. 759, 76 S. W. 862. It is so far an independent action as that it must be pleaded with like sufficiency as the law requires, if a new and independent action were brought by the defendant against the plaintiff. Com. v. Barker, 126 Ky. 200, 103 S. W. 303; Emmerson's Adm'r v. Herriford, 71 Ky. (8 Bush.) 229; Ross v. Ross, 60 Ky. (3 Metc.) 274. The verdict of the jury must be responsive to the issues made by the counterclaim (Nowell v. Mode, 132 Mo. App. 232, 111 S. W. 641; Winkelman v. Maddox, 119 Mo. App. *loc. cit.* 661, 95 S. W. 308; Marshall v. Armstrong, 105 Mo. App. 234, 79 S. W. 1161), and after the filing of a counterclaim by a defendant a plaintiff cannot dismiss, or take a voluntary nonsuit in the action, without the defendant's consent thereto.

There is, as forecast above, scant doubt that the great weight of opinion and authority leans strongly to the view expressed by Mr. Justice Taney in the case of Beers v. Arkansas, *supra*, that no sovereign can be sued without its consent, either in its own courts or in the courts of any other friendly jurisdiction. The Schooner Exchange, 7 Cranch, 116, 3 L. Ed. 287; Kingdom of Roumania v. Guaranty Trust Co., 250 Fed. 341, 162 C. C. A. 411, Ann. Cas. 1918E, 524; Hassard v. U. S. of Mexico, 173 N. Y. 645, 66 N. E. 1110; Le Parlement Belge, 28 Weekly Rep. & Dig. 642; Nicholl v. U. S., 74 U. S. (7 Wall.) 122, 19 L. Ed. 125; The Sapphire, 78 U. S. 164, 20 L. Ed. 127; Blackstone, c. VII, title "The King's Prerogative."

Does such sovereign, by the mere fact of going into the courts of a friendly foreign jurisdiction, so by waiver give its consent to being sued by way of counterclaim? I am constrained to hold that it does not. It is, of course, apparent that an insuperable difficulty, perhaps even an utter impossibility, will inevitably be met in enforcing the payment of any judgment which might be obtained upon the counterclaim against the plaintiff herein. But this is not decisive, since the courts ordinarily will not stop to consider whether a judgment, if decreed, can or cannot be collected. Such a consideration is negligible upon the question of the right to maintain an action. Here, short of a serious disturbance of international peace, it may be conceded that a judgment against the Republic of France in favor of defendant upon its counterclaim could never be collected save with the consent of France. And while in a sense,

upon this consideration, the point involved here is academic. it is yet of great pith and moment as a principle of international law.

Keeping in mind the nature and effect of an action by way of counterclaim, I think the authorities, the analogous cases, and the reason of the thing all sustain the conclusion, which I reach, that such a proceeding is not permissible. While there is scarcely a dissenting view upon the point that, as against a sovereign electing to sue an individual or a public or private corporation in its own courts, or in the courts of a friendly foreign jurisdiction, such defendant may, as a defense to the demand of the sovereign, set off a part, or the whole, of plaintiff's demand by pleading a demand which might otherwise form the subject-matter of a counterclaim (State v. Bank, *supra;* State v. Bank, *supra*), and that such a foreign sovereign is amenable, just as is any other plaintiff, to mere matters of practice and procedure, yet no affirmative judgment can be sustained as upon a counterclaim against the sovereign, whereby the sovereign shall be compelled or adjudged to pay money or any other thing of value. The Siren, 74 U. S. (7 Wall.) 152, 19 L. Ed. 129; Reeside v. Walker, 11 How. 272, 13 L. Ed. 693; U. S. v. Eckford, 73 U. S. (6 Wall.) 484, 18 L. Ed. 920; Treat v. Farmers' Loan & Trust Co., 185 Fed. *loc. cit.* 763, 108 C. C. A. 98; De Groot v. U. S., 5 Wall. 419, 18 L. Ed. 700.

In the entirely analogous case of an individual attempting to counterclaim against a state of the American Union, when sued by the latter in its own courts, the unanimity of the holdings that such a counterclaim (beyond such part thereof as will suffice to form a defense) is not permissible, is illuminating. The below cases so hold: White v. Governor, 18 Ala. 767; Holmes v. State, 100 Ala. 291, 14 South. 51; People v. Miles, 56 Cal. 401; State v. Leckie, 14 La. Ann. 636; State v. Bradley, 37 La. Ann 623; State v. Gaines, 46 La Ann. 431, 15 South. 174; State v. Railroad, 34 Md. 344; Auditor Gen. v. Board, etc., 106 Mich. 662, 64 N. W. 570; Raymond v. State, 54 Miss. 562, 28 Am. Rep. 382; People v. Dennison, 84 N. Y. 272; Com. v. Matlack, 4 Dall. (Pa.) 303, 1 L. Ed. 843; Comm. v. Philadelphia County, 157 Pa. 531, 27 Atl. 378; State v. Corbin, 16 S. C. 533; Moore v. Tate, 87 Tenn. 725, 11 S. W. 935, 10 Am. St. Rep. 712; Borden v. Houston, 2 Tex. 594; Bates v. Republic of Texas, 2 Tex. 616; Com. v. Todd, 72 Ky. (9 Bush.) 708; Com. v. Owensboro & Nashville Ry. Co., 81 Ky. 572.

The very recent case of Kingdom of Roumania v. Guaranty Trust Co., 250 Fed. 341, 162 C. C. A. 411, Ann Cas. 1918E, 524, is by analogy very persuasive authority in support of the conclusion which I have reached. The Kingdom of Roumania sued the Guaranty Trust Company in a District Court of the United States for the recovery of money, forming the balance of a certain fund theretofore deposited with defendant therein. One Arditti had theretofore claimed this identical money, and had brought suit therefor in a state court against the Guaranty Trust

Company and the Kingdom of Roumania. Desiring to protect itself fully, and averring itself to be as to the money in controversy a mere stakeholder, defendant Trust Company got an order from the District Court requiring both Arditti and the Kingdom of Roumania to show cause why Arditti should not be substituted as defendant in the case and defendant Trust Company discharged, on payment into court of the money on deposit. The District Court sustained the motion and ordered that Arditti be impleaded.

This ruling was held by the Court of Appeals of the Second Circuit to be error. Upon this point the court, among other things (250 Fed. at page 343 *et seq.*, 162 C. C. A. 413), in the reported case, said:

"It is the long-accepted law that a foreign sovereign cannot be sued, nor his property attached, in the courts of a foreign friendly country without his consent (citing cases). Nor can the defendant, when sued by a foreign sovereign, avail himself of any counterclaim or set-off, except perhaps a set-off arising out of the same transaction. Under no circumstances can he obtain an affirmative judgment. People v. Dennison, 84 N. Y. 272. . . . We are clear that the action by the Kingdom of Roumania to recover a debt owed it by the Guaranty Trust Company was not a waiver of its immunity as a sovereign to be sued by other parties. If this be not so, the immunity can be frittered away either by interpleader or attachment in any case when a foreign sovereign undertakes to collect a debt owed it."

Constrained by the above cases, and others, as well as by the reason of the thing, I am of the opinion that the motion of plaintiff, to strike from defendants' answer all that portion thereof which attempts to set up a counterclaim, and obtain thereby affirmative relief against the plaintiff, ought to be sustained; and it is so ordered.[48]

KINGDOM OF NORWAY v. FEDERAL SUGAR REFINING COMPANY

United States. District Court, Southern District of New York. 1923.

286 *Federal Reporter* 188.

At Law. Action by the Kingdom of Norway against the Federal Sugar Refining Company. On motion by plaintiff to restrict answer and counterclaim. . . .

[The opinion disposed of three cases, The Gloria, The Thekla, and Kingdom of Norway v. Federal Sugar Refining Co. Part only of that portion of the opinion which deals with the latter case is reproduced here.]

[48] *Accord:* In re Patterson-MacDonald Shipbuilding Co., 293 Fed. 192. See Irish Free State v. Guaranty Safe Deposit Co., 212 N. Y. Supp. 421, 215 N. Y. Supp. 255.

MACK, CIRCUIT JUDGE. . . . Case III is a suit at law by the plaintiff, the kingdom of Norway, a sovereign state, for money had and received in the alleged sum of $165,000, on the ground that the defendant has been unjustly enriched by the receipt of money which equitably is alleged to belong to the plaintiff. The complaint may be briefly summarized: The kingdom of Norway had, through its Food Commission, contracted with the defendant, the Federal Sugar Refining Company, to purchase 4,500 tons of refined sugar at $6.60 per hundredweight. Although the plaintiff was in great need of sugar to feed its people, it was prevented from receiving sugar under its contract, by reason of the embargo placed on the export of sugar by the United States government. On account of this embargo it was agreed between the plaintiff and the defendant that the time for the performance of their contract should be extended, and that the price should equal that fixed by the government for the market at the time delivery was actually made. It is alleged that the United States Sugar Equalization Board, Inc., a corporation organized and controlled by the Food administration of the United States, which owned and held all the capital stock thereof, procured the government of the United States to refuse to license the export of sugar under the plaintiff's contract with the defendant, and that in the meantime the market price as fixed by the government rose to $8.12 per hundredweight. The United States Sugar Equalization Board is alleged to have taken advantage of the necessities of the plaintiff, and to have sold the plaintiff 4,500 tons of refined sugar at $11 per hundredweight, an extortionate price, $2.88 per hundredweight above the price fixed by the government. It is stated that the defendant herein, the Federal Sugar Refining Company, brought suit against the United States Sugar Equalization Board for tortious interference with its contract with the kingdom of Norway, and that on demurrer it was held by this court (Federal Sugar Refining Co. v. U. S. Sugar Equalization Board, 268 Fed. 575) that the complaint stated a good cause of action. Before trial a settlement was effected, and the kingdom of Norway contends that $165,000 collected by the defendant from the Equalization Board represented the money unjustly exacted from the plaintiff by the Equalization Board when it took advantage of the plaintiff's necessities to extort an unfair and improper price for its sugar. It is maintained that the defendant in fact did not suffer the loss or damage for which the compensation was paid, and that the sum of $165,000 collected from the Equalization Board is money had and received to the use of the plaintiff, to which money the plaintiff is equitably entitled.

The defendant has filed a counterclaim, setting up that the plaintiff, the kingdom of Norway, has, without legal excuse, failed to perform its contract for the purchase of 4,500 tons of sugar, whereby the defendant sustained damage in the sum of $219,000, for which judgment is asked.

The case is now before the court on the motion of the plaintiff, the kingdom of Norway, to restrict the answer and counterclaim to such matters and to such amount as may properly be pleaded as a set-off to the plaintiff's cause of action. Although counsel for the defendant has contended that under section 266 of the New York Civil Practice Act, printed in the footnote, he is not limited, even in filing a counterclaim against a friendly sovereign state, to a cause of action arising out of the contract or transaction as set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action, still it would seem clear that, if it were necessary that the counterclaim arise out of the same transaction as the original complaint, under a fair and liberal construction of the act, this counterclaim could be regarded as so arising.

The principle of immunity of a sovereign state from suit without its consent has a long history in our law, yet there are many new and unsettled problems in regard to its application in modern law to-day. Precedent and logic, while important, afford no infallible guide to the correct solution of these. All the important interests involved must be carefully weighed and balanced. The Pesaro (D. C.) 277 Fed. 473.

With respect to the specific questions here to be decided, it must be remembered that the law of set-off and counterclaim is of relatively recent development. Recoupment only was known to the common law, and a restricted right of set-off first developed in equity. Even the limited right of set-off, properly so called, was never recognized at common law, but was introduced by the statute of 2 Geo. II, c. 22, §13, made permanent by the statute of 8 Geo. II, c. 24, §§4 and 5. *Cf.* also earlier St. 4 and 5 Anne, c. 17, authorizing set-off in bankruptcy. The broader right of counterclaim and affirmative relief was an even more modern innovation. The right of counterclaim and set-off having been first introduced as a part of our procedural law, halting recognition is just beginning to be given to the fact that the right as between litigants is something more than a procedural convenience and is really a requirement of substantive justice. That the right of set-off and counterclaim is regarded in our law to-day as affecting, in important aspects, the substantive relations between the parties, is clearly seen in the rules as to the assignment of choses in action being subject to existing set-offs or counterclaims. It is interesting to note that in Roman law, too, the right of set-off was at first grudgingly recognized as part of the adjective law and only gradually accepted as a part of the substantive law. Girard, *Manuel Elementaire de Droit Romain* (4th Ed.) pp. 701–708; Buckland, A Text-Book of Roman Law, pp. 696–700.

If the right of set-off and counterclaim be regarded as a mere matter of procedure, there would seem to be no reason why a right against a sovereign state should be recognized by set-off or counterclaim, which

could not be set up in an independent suit. On the other hand, if the right of set-off or counterclaim is to be regarded as affecting the substantive relations between the litigants, the question presented assumes an entirely different aspect. It would be only natural for one to expect, in the development of the law of set-off and counterclaim, to find decisions refusing to recognize anything but a right of recoupment in respect of the transaction in suit in a proceeding begun by a sovereign state. *Cf.* People v. Dennison, 84 N. Y. 272.

On the other hand, as the right of set-off and counterclaim gradually comes to be regarded as affecting the substantive rights of the litigants, one would expect to find courts reluctant to give judgment in favor of a sovereign state, where judgment would, in the circumstances, be denied a private litigant because of the right of set-off or counterclaim. Once the first hurdle is past, and it is recognized that the defendant in suit brought by a sovereign state is not limited in his defense to strict common-law recoupment, but may assert the broader right of set-off, it may be expected that a modern court of equity, of admiralty, or even of law will be impatient of any restrictions on its jurisdiction to determine judicially all questions involved in the controversy or controversies submitted. While a court may have no power to enforce an affirmative judgment against a sovereign state, still if, as a defense to a suit instituted by a sovereign state, a counterclaim or set-off is asserted, it would seem only proper that the court determine all issues fairly before it, even though it involve a finding that the plaintiff state was indebted to the defendant. A modern court should strive to do complete justice; a partial and incomplete adjudication tends only to protract and complicate litigation to the detriment of all concerned. A partial and incomplete adjudication leaves all parties in grave doubt as to their status and rights, and leads to a multiplicity of suits.

A sovereign state, generally speaking, is not obliged to go into court; but, if it seeks the assistance of the court, it would seem to be in accord with the best principles of modern law that it should be obliged to submit to the jurisdiction of the court in respect of any set-off or counterclaim properly assertable as a defense in a similar suit between private litigants. Although, perhaps, the defendant should not be permitted to assert any counterclaim which would not be, in whole or part, a defense to the action brought by the state, yet, if it is necessary to examine a counterclaim for the purpose of determining whether there is a defense to the original action, it would seem inconsistent with the duty of a court of general jurisdiction to do complete justice for the court not to determine the whole nature and extent of the counterclaim, even though it involved incidentally a determination that a sovereign state was indebted or obligated to the defendant.

There is no principle of public law exempting a sovereign state from its obligations under the law. It should not be assumed that a state desires to deny or evade its obligations. There may be sound reasons of public policy why a state should be immune from the harassment of litigation in forums and under conditions not agreeable to the state. But, once the state has chosen its forum, there seems little reason in law or policy why it should not be subject to the substantive requirements of law and justice.

It is believed that a careful analysis of the English decisions and the decisions of our Supreme Court justify the views herein expressed. . . .

[In an omitted part of the opinion the court reviewed Duke of Brunswick v. King of Hanover, 6 Beav. 1; Strousberg v. Republic of Costa Rica, 29 W. R. 125; The Newbattle, 10 P. D. 33; Imperial Japanese Government v. Peninsular and Oriental Steam Navigation Co. [1895] A. C. 644; South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord [1897] 2 Ch. D. 487, [1898] 1 Ch. D. 190; The Tervaete [1922] P. 197, [1922] P. 259; Reeside v. Walker, 11 How. 272; De Groot v. United States, 5 Wall. 419; United States v. Eckford, 6 Wall. 484; The Siren, 7 Wall. 152; Case v. Terrell, 11 Wall. 199; Lee v. Kaufman, 15 Fed. Cas. 162; Schaumborg v. United States, 103 U. S. 667; The Nuestra Senora de Regla, 108 U. S. 92; The Paquete Habana, 189 U. S. 453; The Western Maid, 257 U. S. 419; Richardson v. Fajardo Sugar Co., 241 U. S. 44; and other authorities.]

Case III is complicated by the fact that, the proceedings being at law, the procedure should conform with the state practice. The counterclaim filed, however, appears to arise out of the same transaction as the original suit, and would seem, therefore, to be properly entertainable under the state practice. It may be that, under the law of the state of New York an affirmative judgment should not be rendered against the kingdom of Norway, even though the final determination of the controverted issues would justify the same, if the suit were between private litigants. The New York precedents may preclude the rendering of an affirmative judgment, but they do not clearly necessarily preclude a complete determination of the issues raised, short of a judgment. There is, therefore, no necessity at this stage to grant the motion of the kingdom of Norway to restrict the answer and counterclaim to such matters and to such amount as may properly be pleaded as a set-off to the plaintiff's causes of action.

Plaintiff's motion is denied.[49]

[49] On the question whether execution may issue against the property of a foreign state to enforce judgment on a counterclaim to which the foreign state has submitted, see von Hellfeld v. Russian Government, 5 Am. Jour. Int. L. (Germany) 490.

Duff Development Company, Limited, Appellants, v. Government of Kelantan and Another, Respondents

Great Britain. House of Lords. 1924.

Law Reports [1924] *Appeal Cases* 797.

Appeal from an order of the Court of Appeal (Lord Sterndale M. R., Warrington and Younger L. JJ.) reversing an order of Roche J.

The following statement is taken from the opinion of Viscount Cave.—

"On July 15, 1912, the respondents, the Government of Kelantan (acting by the Crown Agents for the Colonies), entered into an agreement under seal with the appellants, the Duff Development Co., Ld., whereby the Government of Kelantan granted to the company certain rights of mining, timber cutting and road making and other rights to be exercised in that State. The deed contained an arbitration clause, which incorporated the Arbitration Act, 1889. Disputes having arisen as to the meaning and effect of the deed, the disputes were referred in accordance with the provisions of the arbitration clause to an arbitrator, who, on November 17, 1921, made an award whereby he made certain declarations in favour of the company and directed an inquiry as to damages and directed the Government of Kelantan to pay the costs of the arbitration and award. On December 22, 1921, the Government moved the Chancery Division of the High Court of Justice in England, under s. 11 of the Arbitration Act, 1889, to set aside the award on the ground of error in law appearing on the face of it; but this application was on March 23, 1922, dismissed with costs, a decision which was afterwards affirmed by the Court of Appeal and by this House [[1923] A.C. 395.] On June 12, 1922, the company applied to the King's Bench Division of the High Court by originating summons under s. 12 of the Arbitration Act for leave to enforce the award, and an order to that effect was made by Master Bonner. On July 7, 1922, Master Ball, on the application of the company, made a garnishee order whereby certain moneys said to be owing to the Government of Kelantan from the Crown Agents for the Colonies were attached for payment of the taxed costs of the arbitration. On December 12, 1922, Master Jelf made an order, whereby he set aside the order made by Master Bonner and all proceedings under it, including the garnishee order made by Master Ball, and stayed all further proceedings in the matter on the ground that the Sultan of Kelantan was an independent sovereign ruler and the State of Kelantan was an independent sovereign State, and that the Court had no jurisdiction over the Sultan or the Government of Kelantan. An appeal against the order of Master Jelf was allowed by Roche J.; but on an appeal to the Court of Appeal that Court reversed the decision of Roche J., and restored the order of Master Jelf. Hence the present appeal."

Before making the order of December 12, 1922, Master Jelf wrote to the Secretary of State for the Colonies requesting information as to the status of the Government of Kelantan, and received in reply a letter sent by direction of the Secretary of State and dated October 9, 1922.

The letter enclosed an agreement dated October 22, 1910, regulating the relations between the King and the Sultan. The letter is set out and the effect of the agreement is stated in the opinion of Viscount Cave. . . .

[The arguments of counsel and part of Viscount Cave's opinion are omitted.]

Viscount Cave (after stating the facts). My Lords, on the hearing of the appeal before your Lordships two points were argued on behalf of the appellant company.

First, it was argued that the Government of Kelantan was not an independent sovereign State, so as to be entitled by international law to the immunity against legal process which was defined in The Parlement Belge. [5 P. D. 197.] It has for some time been the practice of our Courts, when such a question is raised, to take judicial notice of the sovereignty of a State, and for that purpose (in any case of uncertainty) to seek information from a Secretary of State; and when information is so obtained the Court does not permit it to be questioned by the parties. . . . In the present case the requisite inquiry was addressed by Master Jelf (while the summons to enforce the award was pending before him) to the Secretary of State for the Colonies, and in answer to this inquiry the Under Secretary replied. . . . The documents enclosed in this reply show that Kelantan had formerly been recognized as a dependency of Siam; that the Siamese Government had by the Treaty of Bangkok transferred to the British Government all its rights over Kelantan; and that by the agreement dated October 22, 1910, referred to in the letter from the Secretary of State, the Rajah (afterwards styled the Sultan) of Kelantan had engaged to have no political relations with any foreign power except through the medium of His Majesty the King of England and to follow in all matters of administration (save those touching the Mohammedan religion and Malay custom) the advice of an adviser appointed by His Majesty. Upon these documents it was argued on behalf of the appellants that, although the Secretary of State had stated in the letter of October 9, 1922, that Kelantan was an independent State and its Sultan a sovereign ruler, this statement must be held to be qualified by the terms of the documents enclosed with the letter; that, taking the information as a whole, the true result was that Kelantan was not an independent but a dependent State; and accordingly that the Sultan was not immune from process in the English Courts.

My Lords, in my opinion this argument cannot prevail. Vattel (*Droit des Gens*, ed. Pradier-Fodéré (1863), vol. i., ch. 1) defines a sovereign

State as a nation which governs itself by its own authority and laws without dependence on any foreign power (s. 4); but he also lays it down (s. 5) that a State may without ceasing to be a sovereign State be bound to another more powerful state by an unequal alliance, and he adds:—

"*Les conditions de ces alliances inègales peuvent varier à l'infini. Mais quelles qu'elles soient, pourvu que l'allié inférieur se réserve la souveraineté ou le droit de se gouverner par lui-même, il doit être regardé comme un État indépendant, qui commerce avec les autres sous l'autorité du droit des gens.*

"*Par conséquent un État faible qui, pour sa sûreté, se met sous la protection d'un plus puissant et s'engage, en reconnaissance, à plusieurs devoirs équivalents à cette protection, sans toutefois se dépouiller de son gouvernment et de sa souveraineté, cet État, dis-je, ne cesse point pour cela de figurer parmi les souverains qui ne reconnaissent d'autre loi que le droit des gens.*"

No doubt the engagements entered into by a State may be of such a character as to limit and qualify, or even to destroy, the attributes of sovereignty and independence: Wheaton, 5th ed., p. 50; Halleck, 4th ed., p. 73; and the precise point at which sovereignty disappears and dependence begins may sometimes be difficult to determine. But where such a question arises it is desirable that it should be determined, not by the Courts, which must decide on legal principles only, but by the Government of the country, which is entitled to have regard to all the circumstances of the case. Indeed, the recognition or non-recognition by the British Government of a State as a sovereign State has itself a close bearing on the question whether it is to be regarded as sovereign in our Courts. In the present case the reply of the Secretary of State shows clearly that notwithstanding the engagements entered into by the Sultan of Kelantan with the British Government that Government continues to recognize the Sultan as a sovereign and independent ruler, and that His Majesty does not exercise or claim any rights of sovereignty or jurisdiction over that country. If after this definite statement a different view were taken by a British Court, an undesirable conflict might arise; and, in my opinion, it is the duty of the Court to accept the statement of the Secretary of State thus clearly and positively made as conclusive upon the point.[50]

But secondly it is argued on behalf of the appellant company that, assuming the Sultan of Kelantan to be a sovereign ruler, he has waived his sovereignty and submitted to the jurisdiction of the High Court—and that in two ways—namely, first by assenting to the arbitration clause in the deed of 1912, and secondly by applying to the Court to set aside the award of the arbitrator.

Then has the respondent by agreeing to the arbitration clause in the deed of 1912 submitted to the jurisdiction so far as regards an application

[50] See ch. 2, §2, *supra*, 90.

to the Court to enforce the award? The arbitration clause provides that "this shall be deemed a submission to arbitration within the Arbitration Act 1889 or any statutory modification or re-enactment thereof for the time being in force, the provisions whereof shall apply so far as applicable." I think the effect of this provision is to incorporate in the deed the relevant provisions of the Arbitration Act, including the power given by the Act to either party on having an award made in his favour to make an application to the Court under s. 12 of the Act for leave to enforce the award, and the words "so far as applicable" do not appear to me to qualify that right. If so, then the Sultan has in effect agreed to submit to the jurisdiction so far as to entitle the appellants to apply to the Court for leave to enforce an award against him and on leave being given to enforce it by the usual modes of execution; but the question remains whether this agreement to submit is equivalent to an actual submission. On full consideration I am not satisfied that it is. I do not forget the cases in which it has been held that a person not otherwise liable to the jurisdiction of a Court may make it a term of a contract that questions arising under it shall be decided by that Court, or those cases (such as Montgomery v. Liebenthal [[1898] 1 Q. B. 487]) in which it has been held that a person outside the jurisdiction may agree that service of process upon a person within the jurisdiction shall be good service upon himself. But in the case of a foreign sovereign something more than this is required. It was held in Mighell v. Sultan of Johore [[1894] 1 Q. B. 149] that a submission by such a sovereign, to be effective, must take place when the jurisdiction is invoked and not earlier, and that when a question of jurisdiction is raised by him there can be no inquiry by the Court into his conduct or actions prior to that date; and I see no reason for doubting the correctness of that decision. If therefore a sovereign having agreed to submit to jurisdiction refuses to do so when the question arises, he may indeed be guilty of a breach of his agreement, but he does not thereby give actual jurisdiction to the Court.

There remains the question whether the Sultan by applying under s. 11 of the Act to set aside the award impliedly submitted to an application under s. 12 of the Act to enforce it. In my opinion, he did not. By his application under s. 11 he endeavoured to get rid of the award and left it to the Court to decide his rights in this respect; but the application for leave to enforce the award is a new proceeding, and though connected with the earlier application is distinct from it. In my opinion, therefore, this argument also fails.

Upon the above view of the case a question which was debated during the argument—namely, whether a foreign sovereign who submits to judgment thereby submits to execution under the judgment upon his property in this country—does not arise for decision; and accordingly I express no opinion upon that question.

For these reasons I am of opinion that this appeal fails and should as against the respondent Government be dismissed with costs, such costs to be set off against any sum which may be owing by the respondent Government to the appellants.

[The opinions of Viscount Finlay, Lord Dunedin, and Lord Sumner, concurring in result with Viscount Cave, and part of the opinion of Lord Carson are omitted.]

Lord Carson. My Lords, I must confess that if it was open to me to disregard the statements contained in the letter from the Secretary of State for the Colonies, that "Kelantan is an independent State and the present Sultan is the present sovereign ruler thereof," I would find great difficulty in coming to that conclusion of fact, having regard to the terms of the documents enclosed in the letter from the Secretary of State. It is, in my opinion, difficult to find in these documents the essential attributes of independence and sovereignty in accordance with the tests laid down by the exponents of international law. It is, however, unnecessary to pursue that investigation or to examine the very ample material put before us in the arguments of Mr. Maugham, as I agree with your Lordships that the Courts of this country are bound to take judicial notice of the status of any other country in accordance with the information afforded to them by the proper representative of the Crown. As Lord Esher said in the case of Mighell v. Sultan of Johore [[1894] 1 Q. B. 149, 158]: "When once there is the authoritative certificate of the Queen through her Minister of State as to the status of another sovereign, that in the Courts of this country is decisive." Indeed, it is difficult to see in what other way such a question could be decided without creating chaos and confusion, the more especially so when we consider that "many States, regarded as sovereign, do not exercise the right of self-government entirely independent of other States, but have their sovereignty limited and qualified in various degrees, either by the character of their internal constitution, by stipulations of unequal treaties of alliance, or by treaties of protection or of guarantee made by a third Power:" Halleck, p. 67. And, in truth, it is the recognition of the status of the Government which must be the main element to determine this question; the only proper evidence of which can be supplied by the officer representing the Crown.[51]

The cases upon this subject have been already referred to, and they are discussed at considerable length in the judgment of the Master of the Rolls. Treating, therefore, the Government of Kelantan as a sovereign State, it follows that *prima facie*, at all events, neither the Government nor its property is subject to the jurisdiction of the Courts of this country. "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign

[51] See ch. 2, §2, *supra*, 90.

authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction:" The Parlement Belge. [5 P. D. 197, 207, 214.]

It is necessary to note, with a view to subsequent consideration of the present case, that "the real principle," as stated by Lord Esher in the same case, "on which the exemption of every sovereign from the jurisdiction of every Court has been deduced is that the exercise of such jurisdiction would be incompatible with his regal dignity—that is to say, with his absolute independence of every superior authority," and this privilege every sovereign or sovereign Power has a right to claim. The main contention, however, of the appellant in the present case is that wherever a sovereign State has submitted to the jurisdiction of our Courts, it waives its privileges, and must for the purpose of doing justice be treated in exactly the same way as any other litigant. The general proposition upon this subject is, I think, accurately stated in Westlake's Private International Law, 6th ed., p. 259, s. 192: "But a foreign state or person entitled to the privilege of exterritoriality, bringing an action in England, will be bound as a private corporation or person would be bound to do complete justice to the defendant with regard to the matters comprised in the action, and will be subject to all cross-actions, counterclaims, defences and steps of procedure which as between private parties would be competent to the defendant for the purpose either of obtaining such complete justice or of defending himself against the plaintiff's claim," and the editor quotes Paulus, Digest 5, 1, 22: "*Qui non cogitur in aliquo loco judicium pati, si ipse ibi agat, cogitur excipere actiones et ad eundem judicem mitti.*" . . .

[In an omitted part of the opinion Lord Carson referred to King of Spain v. Hullet, 1 Cl. & F. 333; Strousberg v. Republic of Costa Rica, 44 L. T. 199; and The Newbattle, 10 P. D. 33.]

The real crux, however, is as to whether the Government of Kelantan has waived its privileges, and if so, how far, under the circumstances disclosed in the present case. The deed of cancellation under which the arbitration was held contained in cl. 21 a submission to arbitration by the Government of Kelantan, which provides that "this shall be deemed a submission to arbitration within the Arbitration Act 1889 or any statutory modification or re-enactment thereof for the time being in force the provisions whereof shall apply so far as applicable." Now the Arbitration Act of 1889, under the heading of "References by consent

out of Court," by the first section provides as follows: "A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a judge, and shall have the same effect in all respects as if it had been made an order of Court."

The jurisdiction therefore of the Court to see that the submission is duly carried out and the machinery for making it effective attaches from the moment of the submission, and a refusal to comply with an award made on a submission in writing is a contempt of Court and might in certain cases have been punished by attachment. I fail to see how the principles to which I have already referred of doing complete justice where a sovereign has waived his privileges can be carried out if it is to be held, as it has been held apparently in this case, that at each step when it is necessary to invoke the assistance of the Court the sovereign Power can claim such assistance, but can when it is demanded by the other party raise as a defence that he is protected by his sovereignty. Take, for instance, the present case; the arbitration was duly held in pursuance of the submission and the sovereign Power duly appeared as a party, and when an award was made against him, claimed the right to appeal to the Courts and finally to your Lordships' House to set aside the award under s. 11, and no doubt if he had been successful would have claimed and would have been held entitled to levy execution against the appellants for the costs of such award. Similarly, if the award had been in his favour, he would have been entitled to claim, as the appellants now claim, under cl. 12 to enforce the award "in the same manner as a judgment or order to the same effect."

My Lords, under such circumstances as these, how can it be said that, when the act of the sovereign Power has invoked the benefits of the procedure devised by the laws of this country for enforcing its claims or settling its disputes, "international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State" requires that our Courts should lend themselves to such palpable injustice as to refuse a mutual relief to both parties concerned? or how can it be suggested that under such circumstances we would be acting upon the principles laid down in the cases I have already quoted of doing complete justice between the parties if we refused the application of the appellants? I do not myself see any difference in principle between the present case and those in which cross-actions were allowed in order that both sides should receive equal justice, nor do I think we are entitled to consider each step taken for the purpose of carrying out the proceedings necessary for making the award effective as a separate invocation of the jurisdiction of the Court which required a separate submission by the sovereign State to give it jurisdiction; rather should we consider that the Government of Kelantan by agreeing to the submission which became an order of Court and taking the course

they did, are bound to treat the matter as one proceeding, in which the sovereign State has waived its privileges and in which justice can alone be done by making the law applicable equally to both parties.

In my opinion, this appeal should be allowed.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.[52]

[52] See also Compania Mercantil Argentina v. United States Shipping Board, 93 L. J. K. B. 816. *Cf.* Porto Rico v. Rosaly, 227 U. S. 270; Porto Rico v. Ramos, 232 U. S. 627; Richardson v. Fajardo Sugar Co., 241 U. S. 44; Veitia v. Fortuna Estates, 240 Fed. 256.

On jurisdictional immunities, in general, see ANGELL, "Sovereign Immunity—The Modern Trend," 35 Yale L. Jour. 150; BAR, 2d ed., 1101, 1069; FAIRMAN, "Some Disputed Applications of the Principle of State Immunity," 22 Am. Jour. Int. L. 566; FÉRAUD-GIRAUD, États et Souverains devant les Tribunaux Étrangers; FRAENKEL, "Juristic Status of Foreign States, their Property and their Acts," 25 Col. L. Rev. 544; HAYES, "Private Claims against Foreign Sovereigns," 38 Harv. L. Rev. 599; THORNELY, "Extraterritoriality," B. Y. B. Int. L. (1926) 121; WALTON, "State Immunity in the Laws of England, France, Italy, and Belgium," 2 Jour. Soc. Comp. Leg., 3d series, 252; WATKINS, The State as a Party Litigant, ch. 11; WESTON, "Actions against the Property of Sovereigns," 32 Harv. L. Rev. 266.

CHAPTER VII

JURISDICTION OF CRIME AND THE EXTRADITION OF FUGITIVES IN THE LAW OF NATIONS

SECTION 1. JURISDICTION OF CRIME[1]

TRAVERS, LE DROIT PÉNAL INTERNATIONAL

Volume I, page 73, section 66. 1920.

Now it goes without saying that a state ought not arbitrarily to consider its general interests as affected.

Its authority of determination is limited by certain rules which we are now going to specify by considering the essential circumstances which may be invoked.

Account may be taken:

1. Of the place of the offense (also wrongly called the principle of the territoriality of penal law);

2. Of the nature of the criminal act (sometimes called the principle of universality, or the cosmopolitan system);

3. Of the nationality of the party injured (the principle of the passive personality);

4. Of the nationality of the party accused (the principle of the active personality);

5. Of the presence of the author of the act on the soil of the state which has enacted the penal law.[2] [Editor's transl.]

[1] "It is proper to advert to the fact that the rules governing the jurisdiction in civil and in criminal cases are founded in many respects on radically different principles, and that an assumption of jurisdiction over an alien in the one case is not to be made a precedent for a like assumption in the other. In the first place, civil proceedings are instituted only at the suit of private persons for the enforcement of private rights; criminal proceedings are conducted by the public authority, for the vindication of the national sovereignty and control. In civil suits, the courts of a nation will enforce foreign laws and foreign judgments; in criminal matters, it is a universal rule that the courts of one country will not enforce the laws of another. Thus in the protection and enforcement of private rights national boundaries are in a great measure obliterated; while, in criminal proceedings, they define the only jurisdiction in which, unless by treaty, the law can be enforced." MOORE, "Report on Extraterritorial Crime," U. S. For. Rel. (1887) 757, 805–6. On jurisdiction in civil cases, see ch. 3, §3, *supra*, 278, and ch. 4, §5, *supra*, 399.

[2] See BECKETT, "Exercise of Criminal Jurisdiction over Foreigners," B. Y. B. Int. L. (1925) 44, 55; MOORE, "Report on Extraterritorial Crime," U. S. For. Rel. (1887) 757, 770.

Case of Raymond Fornage

France. Court of Cassation, Criminal Chamber. 1873.

Sirey, Recueil Général des Lois et des Arrêts (1873) *Pt. I*, 141.

The grand jury (*la chambre des mises en accusation*) of the court of appeal of Chambéry having referred Raymond Fornage to the court of assizes of Haute-Savoie upon a charge of stealing with aggravated circumstances (*vol qualifié,*) committed in the canton of Vaud (Switzerland), the accused did not appeal from the decision of reference (*l'arrêt de renvoi*), but merely took an exception to the competence of the court of assizes on the ground that being a foreigner the French court was incompetent to try him for a crime committed in a foreign country. However, on the 10th of December, 1872, the court of assizes, considering itself irrevocably invested with authority by the decision of reference, which had not been contested, declared the accused's exception inadmissible.

Appeal by Raymond Fornage.

Réquier, counselor reporter, presented the following observations on this appeal:

[Part of the argument is omitted.]

The single question for decision is this: the accused having been referred to a court of assizes by a decision of the grand jury from which he has not appealed within the period fixed by art. 296 of the Code of Criminal Procedure, is it admissible to take an exception to the competence of that court upon the ground of his alleged foreign nationality? In other words, to generalize the question, may a court of assizes declare itself incompetent to take cognizance of a case of which it has been seized by a decision of reference not contested within the period fixed by law under penalty of forfeiture? . . .

Could the court of assizes of Chambéry have decided otherwise? It may be said, in support of the appeal, that there are no rules without exception. . . . May it not be said likewise, in the case which is submitted to you, that there are considerations of a higher order for making an exception to general rules? The right to punish has for its foundation only the right of sovereignty, which expires at the frontier. If French law permits the prosecution of Frenchmen for crimes or misdemeanors committed in a foreign country, this is because the criminal law is of the nature of both a personal and a territorial statute. The Frenchman, whenever he finds himself in a foreign country, remains nevertheless a citizen of his own country and as such subject to French law, which applies to him again as soon as he returns to France. But the law itself cannot give to French tribunals the power to judge foreigners for crimes or misdemeanors committed outside of French territory; that

exorbitant jurisdiction, which would be founded neither upon the personal statute nor upon the territorial statute, would constitute a violation of international law, a violation of the sovereignty of neighboring states.—There exists only one exception to this rule of the law of nations. When a foreigner has committed, even outside the territory, a crime against the safety of the state, he may be prosecuted, judged, and punished in France. But, save for that exception, based upon the right of legitimate defense, foreigners are justiciable only before the tribunals of their own country for acts committed outside the territory. The French tribunals, in punishing an act of this kind, would commit a veritable usurpation of sovereignty which might disturb the good relations of France with neighboring states . . .

But, when the crime has been committed outside the territory by a foreigner, the culprit is not subject for that act to the French law; the French tribunals have no jurisdiction over him; the incompetence is radical and absolute. The court of assizes, in punishing this act, would commit an abuse of powers; it would usurp a right of sovereignty belonging to a foreign power. Would it not be contrary to all principles of justice to oblige the magistrates to render themselves knowingly guilty of an arbitrary act, of a violation of international law? . . .

The Court: Considering that, although as a general principle the courts of assizes, when invested by a decision of the grand jury which has not been contested within the periods fixed by art. 296 of the Code of Criminal Procedure, cannot declare themselves incompetent, either because the criminal act constitutes only a misdemeanor, or because the accused should be taken before another court of assizes, or even before a tribunal of exception, this rule is founded upon the principle that the courts of assizes, being invested with plenitude of jurisdiction in criminal cases, may, without exceeding their powers and without transgressing the limits of their competence, take cognizance of all acts punished by French law; but that this jurisdiction, however general it may be, cannot be extended to offences committed outside the territory by foreigners who, by reason of such acts, are not justiciable before French tribunals;—Considering, indeed, that the right to punish is derived from the right of sovereignty, which does not extend beyond the territorial limits; that except in the cases provided for in art. 7 of the Code of Criminal Procedure,[3] which provision is based upon the right of legitimate defense, the French tribunals are without power to judge foreigners for acts committed by them in a foreign country;—That their incompetence in this respect is absolute and permanent; that it can be waived neither by the silence nor by the consent of the accused; that it exists always the same, at all stages of jurisdiction,

[3] *Infra*, 671.

and that the grand jury could not by its decision of reference give the court of assizes the right which it itself did not have to pass upon an act subject to French law;—Considering, in fact, that Raymond Fornage was taken before the court of assizes of Haute-Savoie, on a charge of theft committed in the canton of Valais (Switzerland); that before the opening of arguments he submitted conclusions tending to show that this court might declare itself incompetent, on the ground that having been born in France of foreign parents, and not having claimed the quality of Frenchman, he was not justiciable before French tribunals for an act committed in a foreign country;—Considering that this exception, which challenged the legality itself of the prosecution and the right of jurisdiction of the court of assizes, constituted necessarily a preliminary question which should have been decided by that court before any argument on the merits of the case; that the appellant could not be deprived in this peremptory way of the right to plead an exception, neither by his silence during the course of the proceedings, nor by failure to appeal from the decision of the grand jury which after all was not called upon to decide the question of nationality presented for the first time before the court of assizes;—Considering that in declaring it inadmissible to present that exception, because he did not appeal from the decision of reference within the period fixed by law, the court of assizes of Haute-Savoie has erroneously applied arts. 296, 297, and 301 of the Code of Criminal Procedure; and that in ordering the trial to proceed, without passing upon the preliminary question of nationality raised by the accused, it violated art. 408 of the same code, and disregarded the rights of the defense;—Annul, etc.[4]

January 10, 1873—Criminal Chamber—MM. Faustin Hélie, presiding judge; Réquier, rapporteur; Bédarrides, advocate-general. [Editor's transl.]

[4] See also Reg. v. Madge, 9 C. & P. 29; Reg. v. Debruiel, 11 Cox C. C. 207; Reg. v. Carr, 15 Cox C. C. 131 n.; Reg. v. Waina, 2 N. S. W. R. 403; State v. Stephens, 118 Me. 237.

Cf. Rex v. Graham, 65 J. P. 248; Hemmaker v. State, 12 Mo. 453.

"Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty." Permanent Court of International Justice, in the Lotus Case, P. C. I. J. Publ., Series A, Judgment No. 9, p. 20, *infra*, 656.

Ford et al. v. United States

United States. Supreme Court. 1927.

273 *United States Reports* 593.

Certiorari (271 U. S. 652) to a judgment of the Circuit Court of Appeals affirming a conviction of conspiracy to import liquor into the United States in violation of the Prohibition Law. See 3 F. (2d) 643.

[The case is stated in the opinion. The arguments of counsel and part of the opinion are omitted.]

Mr. Chief Justice Taft delivered the opinion of the Court.

This is a review by certiorari of the conviction of George Ford, George Harris, J. Evelyn, Charles H. Bellanger and Vincent Quartararo, of a conspiracy, contrary to §37 of the Criminal Code,[5] to violate the National Prohibition Act, Title II, §§3 and 29, c. 85, 41 Stat. 305, 308, 316, and the Tariff Act of 1922, §593 (b), c. 356, 42 Stat. 858, 982. The trial and conviction resulted largely from the seizure of the British vessel Quadra, hovering in the high seas off the Farallon Islands, territory of the United States, twenty-five miles west from San Francisco. The ship, her officers, her crew and cargo of liquor were towed into the port of San Francisco. The seizure was made under the authority of the treaty between Great Britain and the United States, proclaimed by the President May 22, 1924, 43 Stat. 1761, as a convention to aid in the prevention of the smuggling of intoxicating liquors into the United States.

The main questions presented are, first, whether the seizure of the vessel was in accordance with the treaty; second, whether the treaty prohibits prosecution of the persons, subjects of Great Britain, on board the seized vessel brought within the jurisdiction of the United States upon the landing of such vessel, for illegal importation of liquor; third, whether the treaty authorizes prosecution of such persons, not only for the substantive offense of illegal importation or attempt to import, but also for conspiracy to effect it; and, fourth, whether such persons, without the United States, conspiring and coöperating to violate its laws with other persons who are within the United States and to commit overt acts therein, can be prosecuted therefor when thereafter found in the United States.

The petitioners and fifty-five others were indicted in November, 1924, for carrying on a continuous conspiracy at the Bay of San Fran-

[5] Section 37 of the United States Criminal Code provides: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both." 35 U. S. Stat. L. 1088, 1096.

cisco, in the jurisdiction of the United States, from January 1, 1924 to November of that year, the date of the indictment, to commit offenses against the laws of the United States, first, by introducing into and transporting in the United States intoxicating liquor, in violation of the National Prohibition Act; second, by importing liquor into the United States, in violation of §593, sub-division (b), of the Tariff Act of 1922, making it a penal offense to introduce merchandise into the United States in violation of law; and, third, by violation of the terms of the treaty. It charged as overt acts: the loading of 12,000 cases of liquor on the Quadra at Vancouver, British Columbia, her proceeding on September 10, 1924, to a point less than twelve miles from the Farallon Islands,—a distance which could be traversed in less than an hour by the Quadra and by the motor boats, 903 B, C-55, Marconi, California, Ocean Queen and divers others, by which the liquor was then delivered from her and imported into the United States; that on the 29th of September, 1924, the defendants landed from the steamer Quadra a barrel containing 100 gallons of whiskey, and, at another time, on October 11, 1924, a large variety of alcohol, gin, brandy, whiskey, and vermouth; and that, at another time, on October 12th, the day of the seizure, they attempted to land 89 sacks of whiskey, but that two of the defendants, who were on the small craft C-55, were arrested and were prevented from carrying out their purpose. Two defendants pleaded guilty. Of twenty-nine defendants tried, nineteen, including all the crew of the Quadra were acquitted, and ten, including the captain and the first and second officers of the Quadra, were convicted. Of these ten, five, including the three officers, are now before the Court as petitioners. The convictions were affirmed by the Circuit Court of Appeals of the Ninth Circuit. 10 Fed. (2d) 339. . . .

[In an omitted part of the opinion the court disposed of objections to the validity of the indictment, reviewed the evidence, disposed of several objections relating to the validity of the seizure, held that the treaty should be construed liberally to permit the arrest of persons on board vessels which it authorized the United States to bring in for adjudication, and held further that the treaty permitted seizure for conspiracy to import liquor illegally, the overt acts of the conspiracy including actual importation and attempt, as well as for the substantive offense of importing or attempting to import.]

The next objection of the defendants taken from the Quadra is that on all the evidence they were entitled to a directed verdict of not guilty. They argue that they are charged with a conspiracy illegally to import, or to attempt to import, liquor into the United States when they were corporeally at all times during the alleged conspiracy out of the jurisdiction of the United States and so could commit no offense against it. What they are charged with is conspiring "at the bay of San Fran-

cisco" with the defendants Quartararo and Belanger illegally to import liquor, and the overt acts of thus smuggling and attempting to smuggle it. The conspiracy was continuously in operation between the defendants in the United States and those on the high seas adjacent thereto, and of the four overt acts committed in pursuance thereof, three were completed and took effect within the United States and the fourth failed of its effect only by reason of the intervention of the federal officers. In other words, the conspiring was directed to violation of the United States law within the United States by men within and without it, and everything done was at the procuration and by the agency of each for the other in pursuance of the conspiracy and the intended illegal importation. In such a case all are guilty of the offense of conspiring to violate the United States law whether they are in or out of the country.

In Strassheim v. Daily, 221 U. S. 280, Daily had been convicted of procuring Armstrong, a public official of Michigan, to pay bills presented to the State which Armstrong knew to be fraudulent. It was objected that, during the whole period of the crime, Daily was in Chicago, Illinois, and could not be punished under an indictment found in Michigan for such an offense. This Court denied the claim, saying (pp. 284, 285):

"If a jury should believe the evidence and find that Daily did the acts that led Armstrong to betray his trust, deceived the Board of Control, and induced by fraud the payment by the State, the usage of the civilized world would warrant Michigan in punishing him, although he never had set foot in the State until after the fraud was complete. Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power. Commonwealth v. Smith, 11 Allen 243, 256, 259; Simpson v. State, 92 Georgia 41; American Banana Co. v. United Fruit Co., 213 U. S. 347, 356; Commonwealth v. Macloon, 101 Mass. 1, 6, 18. We may assume therefore that Daily is a criminal under the laws of Michigan."

Other cases in this Court which sustain the same view are Benson v. Henkel, 198 U. S. 1; Re Palliser, 136 U. S. 257; Horner v. United States, 143 U. S. 207; Burton v. United States, 202 U. S. 344, 387; and Lamar v. United States, 240 U. S. 60, 65, 66.

There has been much discussion of this general principle, and its application has been varied in some courts because of certain rules of the common law with respect to principals and accessories; but in the consideration of such a case as this, we are not controlled by such considerations and regard the principle as settled, as in the passage quoted. It is supported by other authorities: Commonwealth v. Gillespie, 7 Sargent & Rawle 469, 478; Rex v. Brisac and Scott, 4 East, 164; State v. Piver, 74 Wash. 96; Weil v. Black, 76 W. Va. 685, 694.

In Regina v. Garrett, Dearsly's Crown Cases Reserved, 232, 241, Lord Campbell said:

"I do not proceed upon the ground that the offense was committed beyond the jurisdiction of the Court"—which was the fact there—"for if a man employ a conscious or unconscious agent in this country, he may be amenable to the laws of England, although at the time he was living beyond the jurisdiction."

It will be found among the earlier cases that the principle is sometimes qualified by saying that the person out of the State can not be held for a crime committed within the State by his procuration unless it is done by an innocent agent or a mechanical one; but the weight of authority is now against such limitation. Generally the cases show that jurisdiction exists to try one who is a conspirator whenever the conspiracy is in whole or in part carried on in the country whose laws are conspired against. In Hyde v. United States, 225 U. S. 347; Brown v. Elliott, 225 U. S. 392, the question was whether a conspiracy could be tried, not where it was carried on, but in a place where only an overt act under it was performed by one conspirator. There was strong diversity of opinion among the Justices, though a majority sustained the venue following the Court of King's Bench in Rex v. Brisac and Scott, 4 East, 164. But we have no such ground for difference here, for the conspiracy was being carried on all the time by communications exchanged between the conspirators in San Francisco and on the high seas just beyond the three-mile limit near San Francisco Bay, and the overt acts were in both places.

The whole question was fully considered from the international standpoint in a learned opinion by John Bassett Moore, now Judge of the Permanent Court of International Justice, while he was Assistant Secretary in the State Department, to be found in Moore's International Law Digest, vol. 2, p. 244. The report was made in view of controversy between this Government and the Government of Mexico in reference to the arrest and imprisonment of one Cutting for a libel charged to have been committed by Cutting in the publication of an article in a newspaper in the State of Texas. The prosecution was under Article 186 of the Mexican Penal Code. That code provided that penal offences committed in a foreign country against a Mexican might be punished in Mexico. Our government maintained that it could not recognize the validity of a prosecution in Mexico of an American citizen who happened thereafter to be there, for an offense committed in the United States, merely because it was committed against a Mexican. In the course of the examination of this question, Mr. Moore, recognizing the principle already stated, said:

"The principle that a man who outside of a country wilfully puts in motion a force to take effect in it is answerable at the place where the

evil is done, is recognized in the criminal jurisprudence of all countries. And the methods which modern invention has furnished for the performance of criminal acts in that manner has made this principle one of constantly growing importance and of increasing frequency of application.

"Its logical soundness and necessity received early recognition in the common law. Thus it was held that a man who erected a nuisance in one county which took effect in another was criminally liable in the county in which the injury was done. (Bulwer's case, 7 Co. 2 b. 3 b.; Com. Dig. Action, N. 3, 11.) So, if a man, being in one place, circulates a libel in another, he is answerable at the latter place. (Seven Bishops' Case, 12 State Trials, p. 331; Rex v. Johnson, 7 East. 65.)"

After referring to the doctrine of innocent agent and its dependence on the distinctions between accessories and principal in crime, Judge Moore says (p. 249):

"But, as has been shown, the doctrine of accessoryship has been abolished by statute in many jurisdictions in which it formerly prevailed, and is condemned by many writers as unnecessary and unsound. Referring to accessories before the fact, Mr. Bishop says:

"'The distinction between such accessory and a principal rests solely in authority, being without foundation either in natural reason or in the ordinary doctrines of the law. The general rule of the law is, that what one does through another's agency is to be regarded as done by himself.'

"And on this point he cites Broom's Legal Maxims, 2d ed., p. 643; Co. Lit. 258a; and the opinion of Hosmer, C. J., in Barkhamsted v. Parsons, 3 Conn. 1, that 'the principal of common law, *Qui facit per alium, facit per se*, is of universal application, both in criminal and civil cases.'"

The overt acts charged in the conspiracy to justify indictment under §37 of the Criminal Code were acts within the jurisdiction of the United States, and the conspiracy charged, although some of the conspirators were corporeally on the high seas, had for its object crime in the United States and was carried on partly in and partly out of this country, and so was within its jurisdiction under the principles above settled. . . .

The judgment of conviction of the Court of Appeals is

Affirmed.[6]

[6] On the other hand, if the object of the conspiracy is also a violation of the law of the country where it is formed, the offenders may be prosecuted there. See Reg. v. Kohn, 4 F. & F. 68; Rex v. Bachrack, 28 O. L. R. 32; Dealy v. United States, 152 U. S. 539; Hyde v. Shine, 199 U. S. 62; Arnold v. Weil, 157 Fed. 429.

Quaere: may the offenders be prosecuted where the conspiracy is formed if its object is an act in violation of the law of a foreign country which would be in violation of the local law if done locally? See Reg. v. Tchorzewski, 8 St. Tr. N. S. 1091; Reg. v. Kohn, *supra;* Rex v. Walkem, 14 B. C. L. R. 1; Rex v. Bachrack, *supra;* People v.

The Case of the S. S. "Lotus"

France and Turkey. Permanent Court of International Justice. 1927.

Publications of the Permanent Court of International Justice, Series A, Judgment No. 9.

Twelfth (Ordinary) Session.

Before: MM. Huber, President; Loder, Former President; Weiss, Vice-President; Lord Finlay, MM. Nyholm, Moore, de Bustamente, Altamira, Oda, Anzilotti, Pessôa, Judges; Feïzi-Daïm Bey, National Judge. . . .

The Government of the French Republic, represented by M. Basdevant, Professor at the Faculty of Law of Paris, versus

The Government of the Turkish Republic, represented by His Excellency Mahmout Essat Bey, Minister of Justice.

[Part of the opinion is omitted.]

The Court, composed as above, having heard the observations and conclusions of the Parties, delivers the following judgment:

By a special agreement signed at Geneva on October 12th, 1926, between the Governments of the French and Turkish Republics and filed with the Registry of the Court, in accordance with Article 40 of the Statute and Article 35 of the Rules of Court, on January 4th, 1927, by the diplomatic representatives at The Hague of the aforesaid Governments, the latter have submitted to the Permanent Court of International Justice the question of jurisdiction which has arisen between them following upon the collision which occurred on August 2nd, 1926, between the steamships Boz-Kourt and Lotus.

According to the special agreement, the Court has to decide the following questions:

Werblow, 241 N. Y. 55; Stephen, History, II, 12. *Cf.* Great Britain, Offences Against the Person Act, 1861, §4, 24 & 25 Vict. c. 100; Queen v. Most, 7 Q. B. D. 244.

The maxim *crimen trahit personam* has been applied by British and American courts, expressly or by implication, in a variety of international and interstate cases. See Reg. v. Blythe, 4 B. C. L. R. 276 (abduction); State v. Morrow, 40 S. C. 221 (abortion); State v. Grady, 34 Conn. 118 (accessory to theft); State v. Chapman, 6 Nev. 320 (accessory to robbery); Benson v. Henkel, 198 U. S. 1 (bribery); Lamar v. United States, 240 U. S. 60 (false personation); Reg. v. Jacobi, 46 L. T. 595 n. (false pretenses); Queen v. Nillins, 53 L. J. M. C. 157 (false pretenses); King v. Godfrey [1923] 1 K. B. 24 (false pretenses); People v. Adams, 3 Denio (N. Y.) 190 (false pretenses); State v. Devot, 66 Utah 319 (false pretenses); King v. Oliphant [1905] 2 K. B. 67 (falsification of accounts); Reg. v. Taylor, 4 F. & F. 511 (forgery); Queen v. Bull, 1 Cox C. C. 281 (forgery); Commonwealth v. Blanding, 3 Pick. (Mass.) 304 (libel); State v. Piver, 74 Wash. 96 (libel); King v. Coombes, 1 Leach 388 (murder); State v. Hall, 114 N. C. 909 (murder); Claramont v. United States, 26 F. (2d) 797 (procuring the landing of an excluded alien); Wharton, Conflict of Laws, 3d ed., II, §§809-833. *Cf.* State v. Burton, 105 La. 516.

"(1) Has Turkey, contrary to Article 15 of the Convention of Lausanne of July 24th, 1923,[7] respecting conditions of residence and business and jurisdiction, acted in conflict with the principles of international law—and if so, what principles—by instituting, following the collision which occurred on August 2nd, 1926, on the high seas between the French steamer Lotus and the Turkish steamer Boz-Kourt and upon the arrival of the French steamer at Constantinople—as well as against the captain of the Turkish steamship—joint criminal proceedings in pursuance of Turkish law against M. Demons, officer of the watch on board the Lotus at the time of the collision, in consequence of the loss of the Boz-Kourt having involved the death of eight Turkish sailors and passengers?

"(2) Should the reply be in the affirmative, what pecuniary reparation is due to M. Demons, provided, according to the principles of international law, reparation should be made in similar cases?" . . .

[In an omitted part of the opinion the court referred briefly to the proceedings and set forth in some detail the conclusions summarizing the arguments of the respective parties.]

According to the statements submitted to the Court by the Parties' Agents in their Cases and in their oral pleadings, the facts in which the affair originated are agreed to be as follows:

On August 2nd, 1926, just before midnight, a collision occurred between the French mail steamer Lotus, proceeding to Constantinople, and the Turkish collier Boz-Kourt, between five and six nautical miles to the north of Cape Sigri (Mitylene). The Boz-Kourt, which was cut in two, sank, and eight Turkish nationals who were on board perished. After having done everything possible to succour the shipwrecked persons, of whom ten were able to be saved, the Lotus continued on its course to Constantinople, where it arrived on August 3rd.

At the time of the collision, the officer of the watch on board the Lotus was Monsieur Demons, a French citizen, lieutenant in the merchant service and first officer of the ship, whilst the movements of the Boz-Kourt were directed by its captain, Hassan Bey, who was one of those saved from the wreck.

As early as August 3rd the Turkish police proceeded to hold an enquiry into the collision on board the Lotus; and on the following day, August 4th, the captain of the Lotus handed in his master's report

[7] The Convention of Lausanne Respecting Conditions of Residence and Business and Jurisdiction, July 24, 1923, art. 15, provided: "Subject to the provisions of Article 16, all questions of jurisdiction shall, as between Turkey and the other Contracting Powers, be decided in accordance with the principles of international law." 28 L. of N. T. S. 151, 163, and *infra*, 661. Article 16 related to matters of personal status, succession to personalty, and family law in general, and had no bearing on the questions presented to the Permanent Court in the principal case.

at the French Consulate-General, transmitting a copy to the harbour master.

On August 5th, Lieutenant Demons was requested by the Turkish authorities to go ashore to give evidence. The examination, the length of which incidentally resulted in delaying the departure of the Lotus, led to the placing under arrest of Lieutenant Demons—without previous notice being given to the French Consul-General—and Hassan Bey, amongst others. This arrest, which has been characterized by the Turkish Agent as arrest pending trial (*arrestation préventive*), was effected in order to ensure that the criminal prosecution instituted against the two officers, on a charge of manslaughter, by the Public Prosecutor of Stamboul, on the complaint of the families of the victims of the collision, should follow its normal course.

The case was first heard by the Criminal Court of Stamboul on August 28th. On that occasion, Lieutenant Demons submitted that the Turkish Courts had no jurisdiction; the Court, however, overruled his objection. When the proceedings were resumed on September 11th, Lieutenant Demons demanded his release on bail: this request was complied with on September 13th, the bail being fixed at 6,000 Turkish pounds.

On September 15th, the Criminal Court delivered its judgment, the terms of which have not been communicated to the Court by the Parties. It is, however, common ground, that it sentenced Lieutenant Demons to eighty days' imprisonment and a fine of twenty-two pounds, Hassan Bey being sentenced to a slightly more severe penalty.

It is also common ground between the Parties that the Public Prosecutor of the Turkish Republic entered an appeal against this decision, which had the effect of suspending its execution until a decision upon the appeal had been given; that such decision has not yet been given; but that the special agreement of October 12th, 1926, did not have the effect of suspending "the criminal proceedings . . . now in progress in Turkey."

The action of the Turkish judicial authorities with regard to Lieutenant Demons at once gave rise to many diplomatic representations and other steps on the part of the French Government or its representatives in Turkey, either protesting against the arrest of Lieutenant Demons or demanding his release, or with a view to obtaining the transfer of the case from the Turkish Courts to the French Courts.

As a result of these representations, the Government of the Turkish Republic declared on September 2nd, 1926, that "it would have no objection to the reference of the conflict of jurisdiction to the Court at The Hague."

The French Government having, on the 6th of the same month, given "its full consent to the proposed solution," the two Governments

appointed their plenipotentiaries with a view to the drawing up of the special agreement to be submitted to the Court; this special agreement was signed at Geneva on October 12th, 1926, as stated above, and the ratifications were deposited on December 27th, 1926.

I. Before approaching the consideration of the principles of international law contrary to which Turkey is alleged to have acted—thereby infringing the terms of Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction—, it is necessary to define, in the light of the written and oral proceedings, the position resulting from the special agreement. For, the Court having obtained cognizance of the present case by notification of a special agreement concluded between the Parties in the case, it is rather to the terms of this agreement than to the submissions of the Parties that the Court must have recourse in establishing the precise points which it has to decide. In this respect the following observations should be made:

1.—The collision which occurred on August 2nd, 1926, between the S. S. Lotus, flying the French flag, and the S. S. Boz-Kourt, flying the Turkish flag, took place on the high seas: the territorial jurisdiction of any State other than France and Turkey therefore does not enter into account.

2.—The violation, if any, of the principles of international law would have consisted in the taking of criminal proceedings against Lieutenant Demons. It is not therefore a question relating to any particular step in these proceedings—such as his being put to trial, his arrest, his detention pending trial or the judgment given by the Criminal Court of Stamboul—but of the very fact of the Turkish Courts exercising criminal jurisdiction. That is why the arguments put forward by the Parties in both phases of the proceedings relate exclusively to the question whether Turkey has or has not, according to the principles of international law, jurisdiction to prosecute in this case. . . .

3.—The prosecution was instituted because the loss of the Boz-Kourt involved the death of eight Turkish sailors and passengers. It is clear, in the first place, that this result of the collision constitutes a factor essential for the institution of the criminal proceedings in question; secondly, it follows from the statements of the two Parties that no criminal intention has been imputed to either of the officers responsible for navigating the two vessels; it is therefore a case of prosecution for involuntary manslaughter. . . .

5.—The prosecution was instituted in pursuance of Turkish legislation. The special agreement does not indicate what clause or clauses of that legislation apply. No document has been submitted to the Court indicating on what article of the Turkish Penal Code the prosecution was based; the French Government however declares that the

Criminal Court claimed jurisdiction under Article 6 of the Turkish Penal Code, and far from denying this statement, Turkey, in the submissions of her Counter-Case, contends that that article is in conformity with the principles of international law. It does not appear from the proceedings whether the prosecution was instituted solely on the basis of that article.

Article 6 of the Turkish Penal Code, Law No. 765 of March 1st, 1926 (Official Gazette No. 320 of March 13th, 1926), runs as follows:

"Any foreigner who, apart from the cases contemplated by Article 4, commits an offence abroad to the prejudice of Turkey or of a Turkish subject, for which offence Turkish law prescribes a penalty involving loss of freedom for a minimum period of not less than one year, shall be punished in accordance with the Turkish Penal Code provided that he is arrested in Turkey. The penalty shall however be reduced by one third and instead of the death penalty, twenty years of penal servitude shall be awarded.

"Nevertheless, in such cases, the prosecution will only be instituted at the request of the Minister of Justice or on the complaint of the injured Party.

"If the offence committed injures another foreigner, the guilty person shall be punished at the request of the Minister of Justice, in accordance with the provisions set out in the first paragraph of this article, provided however that:

"(1) the article in question is one for which Turkish law prescribes a penalty involving loss of freedom for a minimum period of three years;

"(2) there is no extradition treaty or that extradition has not been accepted either by the government of the locality where the guilty person has committed the offence or by the government of his own country."

Even if the Court must hold that the Turkish authorities had seen fit to base the prosecution of Lieutenant Demons upon the above-mentioned Article 6, the question submitted to the Court is not whether that article is compatible with the principles of international law; it is more general. The Court is asked to state whether or not the principles of international law prevent Turkey from instituting criminal proceedings against Lieutenant Demons under Turkish law. Neither the conformity of Article 6 in itself with the principles of international law nor the application of that article by the Turkish authorities constitutes the point at issue; it is the very fact of the institution of proceedings which is held by France to be contrary to those principles. . . .

II. Having determined the position resulting from the terms of the special agreement, the Court must now ascertain which were the principles of international law that the prosecution of Lieutenant Demons could conceivably be said to contravene.

It is Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction, which refers the contracting Parties to the principles of international law as regards the delimitation of their respective jurisdiction.

This clause is as follows:

"Subject to the provisions of Article 16, all questions of jurisdiction shall, as between Turkey and the other contracting Powers, be decided in accordance with the principles of international law."

The French Government maintains that the meaning of the expression "principles of international law" in this article should be sought in the light of the evolution of the Convention. Thus it states that during the preparatory work, the Turkish Government, by means of an amendment to the relevant article of a draft for the Convention, sought to extend its jurisdiction to crimes committed in the territory of a third State, provided that, under Turkish law, such crimes were within the jurisdiction of Turkish Courts. This amendment, in regard to which the representatives of France and Italy made reservations, was definitely rejected by the British representative; and the question having been subsequently referred to the Drafting Committee, the latter confined itself in its version of the draft to a declaration to the effect that questions of jurisdiction should be decided in accordance with the principles of international law. The French Government deduces from these facts that the prosecution of Demons is contrary to the intention which guided the preparation of the Convention of Lausanne.

The Court must recall in this connection what it has said in some of its preceding judgments and opinions, namely, that there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself. Now the Court considers that the words "principles of international law," as ordinarily used, can only mean international law as it is applied between all nations belonging to the community of States. This interpretation is borne out by the context of the article itself which says that the principles of international law are to determine questions of jurisdiction—not only criminal but also civil—between the contracting Parties, subject only to the exception provided for in Article 16. Again, the preamble of the Convention says that the High Contracting Parties are desirous of effecting a settlement in accordance "with modern international law," and Article 28 of the Treaty of Peace of Lausanne, to which the Convention in question is annexed, decrees the complete abolition of the Capitulations "in every respect." In these circumstances it is impossible—except in pursuance of a definite stipulation—to construe the expression "principles of international law" otherwise than as meaning the principles which are in force between all independent nations and which therefore apply equally to all the contracting Parties. . . .

[In an omitted part of the opinion the court pointed out that the records of the preparatory work preliminary to the drafting of the convention actually contained nothing inconsistent with this construction.]

III. The Court, having to consider whether there are any rules of international law which may have been violated by the prosecution in pursuance of Turkish law of Lieutenant Demons, is confronted in the first place by a question of principle which, in the written and oral arguments of the two Parties, has proved to be a fundamental one. The French Government contends that the Turkish Courts, in order to have jurisdiction, should be able to point to some title to jurisdiction recognized by international law in favour of Turkey. On the other hand, the Turkish Government takes the view that Article 15 allows Turkey jurisdiction whenever such jurisdiction does not come into conflict with a principle of international law.

The latter view seems to be in conformity with the special agreement itself, No. 1 of which asks the Court to say whether Turkey has acted contrary to the principles of international law and, if so, what principles. According to the special agreement, therefore, it is not a question of stating principles which would permit Turkey to take criminal proceedings, but of formulating the principles, if any, which might have been violated by such proceedings.

This way of stating the question is also dictated by the very nature and existing conditions of international law.

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so

in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

This discretion left to States by international law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other States; it is in order to remedy the difficulties resulting from such variety that efforts have been made for many years past, both in Europe and America, to prepare conventions the effect of which would be precisely to limit the discretion at present left to States in this respect by international law, thus making good the existing lacunæ in respect of jurisdiction or removing the conflicting jurisdictions arising from the diversity of the principles adopted by the various States.

In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.

It follows from the foregoing that the contention of the French Government to the effect that Turkey must in each case be able to cite a rule of international law authorizing her to exercise jurisdiction, is opposed to the generally accepted international law to which Article 15 of the Convention of Lausanne refers. Having regard to the terms of Article 15 and to the construction which the Court has just placed upon it, this contention would apply in regard to civil as well as to criminal cases, and would be applicable on conditions of absolute reciprocity as between Turkey and the other contracting Parties; in practice, it would therefore in many cases result in paralyzing the action of the courts, owing to the impossibility of citing a universally accepted rule on which to support the exercise of their jurisdiction.[8] . . .

IV. The Court will now proceed to ascertain whether general international law, to which Article 15 of the Convention of Lausanne refers, contains a rule prohibiting Turkey from prosecuting Lieutenant Demons. . . .

The arguments advanced by the French Government, other than those considered above, are, in substance, the three following:

[8] See also the contentions of Mexico in the Cutting Case, *infra*, 673, 682; BERGE, "Case of the S. S. 'Lotus'," 26 Mich. L. Rev. 361, 368. *Cf.* Beckett, "Exercise of Criminal Jurisdiction Over Foreigners," B. Y. B. Int. L. (1925) 44, 50; BRIERLY, "The 'Lotus' Case," 44 L. Quart. Rev. 154.

(1) International law does not allow a State to take proceedings with regard to offences committed by foreigners abroad, simply by reason of the nationality of the victim; and such is the situation in the present case because the offence must be regarded as having been committed on board the French vessel.

(2) International law recognizes the exclusive jurisdiction of the State whose flag is flown as regards everything which occurs on board a ship on the high seas.

(3) Lastly, this principle is especially applicable in a collision case.

As regards the first argument, the Court feels obliged in the first place to recall that its examination is strictly confined to the specific situation in the present case, for it is only in regard to this situation that its decision is asked for.

As has already been observed, the characteristic features of the situation of fact are as follows: there has been a collision on the high seas between two vessels flying different flags, on one of which was one of the persons alleged to be guilty of the offence, whilst the victims were on board the other.

This being so, the Court does not think it necessary to consider the contention that a State cannot punish offences committed abroad by a foreigner simply by reason of the nationality of the victim. For this contention only relates to the case where the nationality of the victim is the only criterion on which the criminal jurisdiction of the State is based. Even if that argument were correct generally speaking—and in regard to this the Court reserves its opinion—it could only be used in the present case if international law forbade Turkey to take into consideration the fact that the offence produced its effects on the Turkish vessel and consequently in a place assimilated to Turkish territory in which the application of Turkish criminal law cannot be challenged, even in regard to offences committed there by foreigners. But no such rule of international law exists. No argument has come to the knowledge of the Court from which it could be deduced that States recognize themselves to be under an obligation towards each other only to have regard to the place where the author of the offence happens to be at the time of the offence. On the contrary, it is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there. French courts have, in regard to a variety of situations, given decisions sanctioning this way of interpreting the territorial principle.

Again, the Court does not know of any cases in which governments have protested against the fact that the criminal law of some country contained a rule to this effect or that the courts of a country construed their criminal law in this sense. Consequently, once it is admitted that the effects of the offence were produced on the Turkish vessel, it becomes impossible to hold that there is a rule of international law which prohibits Turkey from prosecuting Lieutenant Demons because of the fact that the author of the offence was on board the French ship. Since, as has already been observed, the special agreement does not deal with the provision of Turkish law under which the prosecution was instituted, but only with the question whether the prosecution should be regarded as contrary to the principles of international law, there is no reason preventing the Court from confining itself to observing that, in this case, a prosecution may also be justified from the point of view of the so-called territorial principle.

Nevertheless, even if the Court had to consider whether Article 6 of the Turkish Penal Code was compatible with international law, and if it held that the nationality of the victim did not in all circumstances constitute a sufficient basis for the exercise of criminal jurisdiction by the State of which the victim was a national, the Court would arrive at the same conclusion for the reasons just set out. For even were Article 6 to be held incompatible with the principles of international law, since the prosecution might have been based on another provision of Turkish law which would not have been contrary to any principle of international law, it follows that it would be impossible to deduce from the mere fact that Article 6 was not in conformity with those principles, that the prosecution itself was contrary to them. The fact that the judicial authorities may have committed an error in their choice of the legal provision applicable to the particular case and compatible with international law only concerns municipal law and can only affect international law in so far as a treaty provision enters into account, or the possibility of a denial of justice arises.

It has been sought to argue that the offence of manslaughter cannot be localized at the spot where the mortal effect is felt; for the effect is not intentional and it cannot be said that there is, in the mind of the delinquent, any culpable intent directed towards the territory where the mortal effect is produced. In reply to this argument it might be observed that the effect is a factor of outstanding importance in offences such as manslaughter, which are punished precisely in consideration of their effects rather than of the subjective intention of the delinquent. But the Court does not feel called upon to consider this question, which is one of interpretation of Turkish criminal law. It will suffice to observe that no argument has been put forward and nothing has been found from which it would follow that international law has established

a rule imposing on States this reading of the conception of the offence of manslaughter.

The second argument put forward by the French Government is the principle that the State whose flag is flown has exclusive jurisdiction over everything which occurs on board a merchant ship on the high seas.

It is certainly true that—apart from certain special cases which are defined by international law—vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them. Thus, if a war vessel, happening to be at the spot where a collision occurs between a vessel flying its flag and a foreign vessel, were to send on board the latter an officer to make investigations or to take evidence, such an act would undoubtedly be contrary to international law.

But it by no means follows that a State can never in its own territory exercise jurisdiction over acts which have occurred on board a foreign ship on the high seas. A corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the State the flag of which it flies, for, just as in its own territory, that State exercises its authority upon it, and no other State may do so. All that can be said is that by virtue of the principle of the freedom of the seas, a ship is placed in the same position as national territory; but there is nothing to support the claim according to which the rights of the State under whose flag the vessel sails may go farther than the rights which it exercises within its territory properly so called. It follows that what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies. If, therefore, a guilty act committed on the high seas produces its effects on a vessel flying another flag or in foreign territory, the same principles must be applied as if the territories of two different States were concerned, and the conclusion must therefore be drawn that there is no rule of international law prohibiting the State to which the ship on which the effects of the offence have taken place belongs, from regarding the offence as having been committed in its territory and prosecuting, accordingly, the delinquent. . . .

[In an omitted part of the opinion the court considered and rejected the authorities offered on behalf of the French Government to prove the contrary.]

The Court therefore has arrived at the conclusion that the second argument put forward by the French Government does not, any more than the first, establish the existence of a rule of international law prohibiting Turkey from prosecuting Lieutenant Demons.

It only remains to examine the third argument advanced by the French Government and to ascertain whether a rule specially applying to collision cases has grown up, according to which criminal proceedings regarding such cases come exclusively within the jurisdiction of the State whose flag is flown.

In this connection, the Agent for the French Government has drawn the Court's attention to the fact that questions of jurisdiction in collision cases, which frequently arise before civil courts, are but rarely encountered in the practice of criminal courts. He deduces from this that, in practice, prosecutions only occur before the courts of the State whose flag is flown and that that circumstance is proof of a tacit consent on the part of States and, consequently, shows what positive international law is in collision cases.

In the Court's opinion, this conclusion is not warranted. Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand, as will presently be seen, there are other circumstances calculated to show that the contrary is true.

So far as the Court is aware there are no decisions of international tribunals in this matter; but some decisions of municipal courts have been cited. Without pausing to consider the value to be attributed to the judgments of municipal courts in connection with the establishment of the existence of a rule of international law, it will suffice to observe that the decisions quoted sometimes support one view and sometimes the other. Whilst the French Government have been able to cite the Ortigia—Oncle-Joseph case before the Court of Aix[9] and the Franconia—Strathclyde case before the British Court for Crown Cases Reserved,[10] as being in favour of the exclusive jurisdiction of the State whose flag is flown, on the other hand the Ortigia—Oncle-Joseph case before the Italian Courts[11] and the Ekbatana—West-Hinder case before the Belgian Courts[12] have been cited in support of the opposing contention.

Lengthy discussions have taken place between the Parties as to the importance of each of these decisions as regards the details of which the

[9] 12 Jour. du Dr. Int. Privé 286.
[10] Queen v. Keyn, 2 Ex. D. 63, *supra*, 462.
[11] 12 Jour. du Dr. Int. Privé 287.
[12] 41 Jour. du Dr. Int. Privé 1327.

Court confines itself to a reference to the Cases and Counter-Cases of the Parties. The Court does not think it necessary to stop to consider them. It will suffice to observe that, as municipal jurisprudence is thus divided, it is hardly possible to see in it an indication of the existence of the restrictive rule of international law which alone could serve as a basis for the contention of the French Government.

On the other hand, the Court feels called upon to lay stress upon the fact that it does not appear that the States concerned have objected to criminal proceedings in respect of collision cases before the courts of a country other than that the flag of which was flown, or that they have made protests: their conduct does not appear to have differed appreciably from that observed by them in all cases of concurrent jurisdiction. This fact is directly opposed to the existence of a tacit consent on the part of States to the exclusive jurisdiction of the State whose flag is flown, such as the Agent for the French Government has thought it possible to deduce from the infrequency of questions of jurisdiction before criminal courts. It seems hardly probable, and it would not be in accordance with international practice, that the French Government in the Ortigia—Oncle-Joseph case and the German Government in the Ekbatana—West-Hinder case would have omitted to protest against the exercise of criminal jurisdiction by the Italian and Belgian Courts, if they had really thought that this was a violation of international law.

As regards the Franconia case (R. v. Keyn 1877, L. R. 2 Ex. Div. 63) upon which the Agent for the French Government has particularly relied, it should be observed that the part of the decision which bears the closest relation to the present case is the part relating to the localization of the offence on the vessel responsible for the collision.

But, whatever the value of the opinion expressed by the majority of the judges on this particular point may be in other respects, there would seem to be no doubt that if, in the minds of these judges, it was based on a rule of international law, their conception of that law, peculiar to English jurisprudence, is far from being generally accepted even in common-law countries. This view seems moreover to be borne out by the fact that the standpoint taken by the majority of the judges in regard to the localization of an offence, the author of which is situated in the territory of one State whilst its effects are produced in another State, has been abandoned in more recent English decisions (R. v. Nillins, 1884, 53 L. J. 157; R. v. Godfrey, L. R. 1923, 1 K. B. 24). This development of English case-law tends to support the view that international law leaves States a free hand in this respect. . . .

The conclusion at which the Court has therefore arrived is that there is no rule of international law in regard to collision cases to the effect that criminal proceedings are exclusively within the jurisdiction of the State whose flag is flown. . . .

The Court, having arrived at the conclusion that the arguments advanced by the French Government either are irrelevant to the issue or do not establish the existence of a principle of international law precluding Turkey from instituting the prosecution which was in fact brought against Lieutenant Demons, observes that in the fulfilment of its task of itself ascertaining what the international law is, it has not confined itself to a consideration of the arguments put forward, but has included in its researches all precedents, teachings and facts to which it had access and which might possibly have revealed the existence of one of the principles of international law contemplated in the special agreement. The result of these researches has not been to establish the existence of any such principle. It must therefore be held that there is no principle of international law, within the meaning of Article 15 of the Convention of Lausanne of July 24th, 1923, which precludes the institution of the criminal proceedings under consideration. Consequently, Turkey, by instituting, in virtue of the discretion which international law leaves to every sovereign State, the criminal proceedings in question, has not, in the absence of such principles, acted in a manner contrary to the principles of international law within the meaning of the special agreement. . . .

V.—Having thus answered the first question submitted by the special agreement in the negative, the Court need not consider the second question, regarding the pecuniary reparation which might have been due to Lieutenant Demons.

For these reasons, the Court, having heard both Parties, gives, by the President's casting vote—the votes being equally divided—, judgment to the effect

(1) that, following the collision which occurred on August 2nd, 1926, on the high seas between the French steamship Lotus and the Turkish steamship Boz-Kourt, and upon the arrival of the French ship at Stamboul, and in consequence of the loss of the Boz-Kourt having involved the death of eight Turkish nationals, Turkey, by instituting criminal proceedings in pursuance of Turkish law against Lieutenant Demons, officer of the watch on board the Lotus at the time of the collision, has not acted in conflict with the principles of international law, contrary to Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction;[13]

[13] "It is clear that the place where an offence has been committed is necessarily that where the guilty person is when he commits the act. The assumption that the place where the effect is produced is the place where the act was committed is in every case a legal fiction. It is, however, justified where the act and its effect are indistinguishable, when there is a direct relation between them; for instance, a shot fired at a person on the other side of a frontier; a parcel containing an infernal machine intended to explode on being opened by the person to whom it is sent. The author

(2) that, consequently, there is no occasion to give judgment on the question of the pecuniary reparation which might have been due to Lieutenant Demons if Turkey, by prosecuting him as above stated, had acted in a manner contrary to the principles of international law. . . .

Done at the Peace Palace, The Hague, this seventh day of September, nineteen hundred and twenty-seven, in three copies, one of which is to

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of the crime intends in such cases to inflict injury at a place other than that where he himself is.

"But the case which the Court has to consider bears no resemblance to these instances. The officer of the Lotus, who had never set foot on board the Boz-Kourt, had no intention of injuring anyone, and no such intention is imputed to him. The movements executed in the navigation of a vessel are only designed to avoid an accident. . . .

"In these circumstances, it seems to me that the legal fiction whereby the act is held to have been committed at the place where the effect is produced must be discarded." LODER, J., dissenting, in the Lotus Case, P. C. I. J. Publ., Series A, Judgment No. 9, p. 37.

British and American cases are not in harmony with respect to the application, in the absence of statutory authority, of the maxim *crimen trahit personam* to acts done in one jurisdiction which produce unintended effects in another. There is authority supporting the application of the maxim. See United States v. Davis, 2 Sumn. 482 (manslaughter); Simpson v. State, 92 Ga. 41 (assault with intent to commit murder). And there is authority to the contrary. See Beattie v. State, 73 Ark. 428 (permitting cattle to run at large); People v. International Nickel Co., 168 App. D. 245 (nuisance); Queen v. Keyn, 2 Ex. D. 63, *supra*, 462 (manslaughter); BECKETT, "Criminal Jurisdiction Over Foreigners," B. Y. B. Int. L. (1927) 108, 112.

British and American legislation, however, has greatly expanded the jurisdiction of offences committed in part within the authority of one state and in part within the authority of another, including both offences which produce intended effects and those which produce unintended effects. One type of legislation accomplishes its purpose by expanding the common law definition of specific crimes. See, for example, Commonwealth v. Acker, 197 Mass. 91 (abandonment); State v. Stewart, 194 Mo. 345 (bigamy); Hemmaker v. State, 12 Mo. 453 (larceny); Rex v. Graham, 65 J. P. 248 (larceny); Commonwealth v. Macloon, 101 Mass. 1 (manslaughter); Tyler v. People, 8 Mich. 320 (murder); State v. McCoy, 8 Rob. (La.) 545 (murder); Ex parte McNeeley, 36 W. Va. 84 (murder).

Another type of legislation accomplishes its purpose by expanding the jurisdiction of crimes generally. The following are examples: (1) Statutes making accessories principals and triable where the principal offence is committed. See State v. Chapman, 6 Nev. 320; Elliott v. State, 77 Fla. 611; People v. Werblow, 241 N. Y. 55. (2) Statutes providing for the punishment of offences commenced abroad but consummated within the state. See State v. Piver, 74 Wash. 96; State v. Owen, 119 Ore. 15. And see Hawaii, Rev. Laws, 1925, §§3909, 3910, 3911. (3) Statutes providing for the punishment of offences commenced within the state but consummated abroad. See Green v. State, 66 Ala. 40. (4) Statutes providing for the punishment of any person who "commits within the state any crime, in whole or in part." See People v. Botkin, 132 Calif. 231; People v. Bihler, 154 App. D. 618; People v. Zayas, 217 N. Y. 78; People v. Sansom, 37 Calif. App. 435; People v. Licenziata, 199 App. D. 106; People v. Werblow, 241 N. Y. 55. (5) Statutes combining two or more of the features enumerated above. See 26 Col. L. Rev. 70.

be placed in the archives of the Court, and the others to be transmitted to the Agents of the respective Parties. . . .

MM. Loder, former President, Weiss, Vice-President, and Lord Finlay, MM. Nyholm and Altamira, Judges, declaring that they are unable to concur in the judgment delivered by the Court and availing themselves of the right conferred on them by Article 57 of the Statute, have delivered the separate opinions which follow hereafter.

Mr. Moore, dissenting from the judgment of the Court only on the ground of the connection of the criminal proceedings in the case with Article 6 of the Turkish Penal Code, also delivered a separate opinion. . . .

[The dissenting opinions are omitted.]

FRANCE, CODE OF CRIMINAL PROCEDURE

Preliminary Provisions, Article 7. 1926.

Art. 7. (Law 27th June 1866.) Every foreigner who, outside the territory of France, shall be guilty, either as author, or as accomplice, of a crime against the safety of the state,[14] or of counterfeiting the seal of the state, national moneys having currency, national papers, or bank notes authorized by law, may be prosecuted and judged according to the provisions of the French law, if he is arrested in France, or if the government obtains his extradition.

(Law 3d April 1903.) No prosecution shall be directed against a foreigner for a crime or *délit* committed in France, if the accused proves that he has been definitively judged in a foreign country, and, in case of conviction, that he has submitted to his penalty, or that it has been barred by limitation, or that he has obtained pardon.[15] [Editor's transl.]

[14] See TRAVERS, I, 517.

[15] See MOORE, "Report on Extraterritorial Crime," U. S. For. Rel (1887) 757, 790. *Cf.* Maryland, Ann. Code, 1924, art. 27, §§516–524; New York, Consol. Laws, 1923, c. 41, §581; Texas, Penal Code, 1925, art. 1009; Hanks v. State, 13 Tex. App. 289.

"Whether laws of this nature are good internationally; whether, in other words, they can be enforced adversely to a state which may choose to object to their exercise, appears, to say the least, to be eminently doubtful. It is indeed difficult to see upon what they can be supported. Putting aside the theory of the non-territoriality of crime as one which unquestionably is not at present accepted either universally or so generally as to be in a sense authoritative, it would seem that their theoretical justification, as against an objecting country, if any is alleged at all, must be that the exclusive territorial jurisdiction of a state gives complete control over all foreigners, not protected by special immunities, while they remain on its soil. But to assert that this right of jurisdiction covers acts done before the arrival of the foreign subjects in the country is in reality to set up a claim to concurrent jurisdiction with other states as to acts done within them, and so to destroy the very principle of exclusive

State v. Knight

United States. Superior Court of North Carolina, Halifax District. 1799.

1 *North Carolina Reports* 65.

The defendant was indicted under the 4th. section of the act of 1784, cap. 25, the words of which are, "And whereas there is reason to apprehend that wicked and ill-disposed persons, resident in the neighbouring states, make a practice of counterfeiting the current bills of credit of this state; and by themselves, or emissaries, utter or vend the same with an intention to defraud the citizens of this state; Be it enacted, &c. that all such persons shall be subject to the same mode of trial, and on conviction, liable to the same pains and penalties, as if the offence had been committed within the limits of this state, and be prosecuted in the Superior Court of any district of the state." Being found guilty by the jury, he was now brought up to receive judgment.

Taylor, J. As the prisoner was unassisted with counsel at his trial, we have felt it to be our duty to examine whether this indictment and conviction be warranted by a just application of the principles of criminal justice and of general jurisprudence; and an enquiry having produced great doubts as to the validity of this section of the act, independent of the indefinite terms in which it is expressed, we have thought it right that this judgment should be arrested. The states are to be considered, with respect to each other, as independent sovereignties, possessing powers completely adequate to their own government, in the exercise of which they are limited only by the nature and objects of government, by their respective constitutions, and by that of the United States. Crimes and misdemeanors committed within the limits of each, are punishable only by the jurisdiction of that state where they arise; for the right of punishing, being founded upon the consent of the citizens, express or implied, cannot be directed against those who never were citizens, and who likewise committed the offence beyond the territorial limits of the state claiming jurisdiction. Our legislature may define and punish crimes committed within the state, whether by citizens or strangers; because the former are supposed to have consented to all laws made by the legislature, and the latter, whether their residence be temporary or permanent, do impliedly agree to yield obedience to all such laws, as long as they remain in the state: but they cannot define

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territorial jurisdiction to which the alleged rights must appeal for support." Hall, 8th ed., 263. See also Oppenheim, 4th ed., I, §147. *Cf.* Brierly, in Report on Criminal Competence of States in Respect of Offences Committed outside Their Territory, L. of N. Doc., C. 50. M. 27, 1926, V, p. 3, 20 Am. Jour. Int. L. Spec. Suppl. 252, 255.

and punish crimes committed in another state, the citizens of which, while they remain there, are bound to regulate their civil conduct only according to their own laws. If our legislature does not rightfully possess such a power, its assumption and exercise should be carefully avoided, lest our own citizens should be harassed under the operation of similar laws enacted in other states; whereby acts, against which the policy of this state did not require that any punishment should be denounced, may be punished in other states with exemplary severity. This may happen in relation to those acts which are not criminal in the state where committed; but the consequences will be far more serious, if the acts are originally criminal; for then a conviction and punishment in a state having no right to entertain jurisdiction of the offence, and consequently to inflict the punishment, will be disregarded in the courts of that state, where the offence arose. The crime described in this section of the act is no doubt punishable in Virginia as a common law misdemeanor, and although the punishment may be less severe than that prescribed by our act of assembly, yet it is better to yield up the offender to the laws of his own state, than, by inflicting a punishment under the exercise of a doubtful jurisdiction, furnish a precedent for a sister state to legislate against acts committed by our own citizens, and within the limits of our own territory. I am authorized by Judge Haywood, to declare his concurrence in the opinion, that the prisoner be

Discharged.[16]

The Case of Cutting

Mexico and the United States. 1886–1888.

Papers Relating to the Foreign Relations of the United States, 1886, *pages* 691–708; 1887, *pages* 751–867; 1888, *pages* 1113–1136, 1189–1190.

[The following statement of the case is condensed from Moore, "Report on Extraterritorial Crime and the Cutting Case," *op. cit.*, 1887, p. 757.]

On the 19th of July, 1886, there was sent to Mr. Jackson, minister of the United States at the City of Mexico, the following telegram:

"You are instructed to demand of the Mexican Government the instant release of A. K. Cutting, a citizen of the United States, now unlawfully imprisoned at Paso del Norte.

Bayard."

The facts upon which this demand was based may briefly be summarized:

[16] See People v. Merrill, 2 Parker's Cr. Rep. 590. *Cf.* Ex parte McNeeley, 36 W Va. 84.

On the 1st of July, 1886, Mr. Brigham, consul of the United States at Paso del Norte, Mexico, wrote to the Department of State at Washington that A. K. Cutting, a citizen of the United States, had been arrested in Paso del Norte, on the 23d of the preceding month, by the direction of the judge of a local court, for the publication in Texas of a libel against a Mexican citizen. When arrested Mr. Cutting had, it was stated, been about eighteen months a resident of Paso del Norte, engaged in editing a newspaper called "El Centinela," in a recent number of which he had reflected upon the character and questioned the good faith of one Emigdio Medina, a Mexican, who proposed to start a rival newspaper in the same town. For this publication Mr. Cutting was, at the instance of Medina, arrested, brought before a local court, and required to sign a "reconciliation," which is in the nature of a compromise or settlement between the parties, in consideration of which the party who feels himself aggrieved abandons penal proceedings.

What occurred after the "reconciliation" may be related in Mr. Brigham's own words:

"Under the law here, when the parties agree to and sign a 'reconciliation,' the case is dismissed, which was done in this instance, Mr. Cutting being required by the court to publish it (the 'reconciliation') in his paper, which he did.

"On the 18th day of June Mr. Cutting proceeded across the Rio Grande river to the United States, to El Paso, Tex., and published a card in the El Paso Herald, in which he reiterated his former charges, and made some others, branding Medina's conduct as contemptible and cowardly, etc. . . .

"When Mr. Cutting returned to Paso del Norte he was again arrested, presumably at the instance of Medina, and taken before the judge of the second court. Before this court Mr. Cutting was refused counsel and an interpreter, both of which he requested, and with closed doors, no one being present but the judge, the court interpreter, and the accused, the so-called examination of the case was proceeded with, which resulted in the committing of Mr. Cutting to jail. . . ."

Mr. Cutting at once appealed to the United States consul for protection, stating that he had been cast into jail—

"for an alleged offence committed in Texas." "On the receipt of this communication" (continued Mr. Brigham) "I proceeded to the office of the official interpreter of the court to ascertain the exact charges against Mr. Cutting, and was informed that he was arrested for the publication in the El Paso (Texas) Herald; that he was examined upon this charge alone, and committed to jail on the same. . . . "

Accompanying this dispatch of Consul Brigham, which was received at the Department of State on the 17th of July, were affidavits of the consul and other persons substantiating his statements. . . .

On the 17th of July, when all the facts above detailed were before the Department of State, a telegram was received from Mr. Brigham, saying that Mr. Cutting was still in prison, and that nothing had been done by the local authorities for his relief. . . .

The release of Mr. Cutting was then demanded, as appears by the telegram of July 19, above quoted.

On the 20th of July, the day after the date of the demand, Mr. Bayard sent to Mr. Jackson a full statement of the grounds thereof. . . .

Under date of July 27, Mr. Bayard sent to Mr. Jackson another communication, from which may be quoted the following pertinent passages:

"On Saturday last, the 24th instant, I was called upon by Mr. Romero, the minister from Mexico at this capital, in relation to the case referred to.

"Mr. Romero produced to me the Mexican laws, Article 186, whereby jurisdiction is assumed by Mexico over crimes committed against Mexicans within the United States or any other foreign country; and under this he maintained the publication of a libel in Texas was made cognizable and punishable in Mexico. And thus Mr. Cutting was assumed to be properly held.

"This claim of jurisdiction and lawful control by Mexico was peremptorily and positively denied by me, and the statement enunciated that the United States would not assent to or permit the existence of such extraterritorial force to be given to Mexican law, nor their own jurisdiction to be so usurped, nor their own local justice to be so vicariously executed by a foreign government.

"In the absence of any treaty of amity between the United States and Mexico providing for the trial of the citizens of the two countries respectively, the rules of international law would forbid the assumption of such power by Mexico as is contained in the penal code, Article 186, above cited. The existence of such power was and is denied by the United States.

"Mr. Romero informed me that the local or state jurisdiction over Cutting's case did not allow interference by the national Government of Mexico in the matter, and that it was this conflict that had induced delay in responding to the demand of this Government for Mr. Cutting's release. . . ."

Article 186 of the Mexican penal code, translated, is as follows:

"Penal offenses committed in a foreign country by a Mexican against Mexicans or foreigners, or by a foreigner against Mexicans, may be punished in the Republic (Mexico) and according to its laws, subject to the following conditions:

"I. That the accused be in the Republic, whether he has come voluntarily or has been brought by extradition proceedings.

"II. That, if the offended party be a foreigner, he shall have made proper legal complaint.

"III. That the accused shall not have been definitively tried in the country where the offense was committed, or if tried, that he shall not have been acquitted, included in an amnesty, or pardoned.

"IV. That the breach of law of which he is accused shall have the character of a penal offense, both in the country in which it was committed and in the Republic.

"V. That by the laws of the Republic the offense shall be subject to a severer penalty than that of '*arresto mayor.*'" . . .

Immediately after the demand for Mr. Cutting's release, and pending the correspondence that ensued, the authorities of Chihuahua hastened to bring the case to trial; and, on the 6th of August, Judge Zubia, of the Bravos district, before whom the case had been brought for trial, rendered a decision sustaining the jurisdiction of Mexico, and sentenced the prisoner to a year's imprisonment at hard labor, to pay a fine of $600, or, in default thereof, endure one hundred days' additional imprisonment, and to pay a civil indemnity to Medina.[17] . . .

The only incident of the trial of Mr. Cutting that now remains to be considered is the decision of the supreme court of Chihuahua, pronounced on the 21st of August, 1886, releasing the prisoner.[18] . . .

From the decision of the supreme court of Chihuahua appear the following facts:

1. The decision of Judge Zubia was fully approved; but—

2. The prisoner was released on the ground that the plaintiff having withdrawn from the prosecution of the suit, the principal motive of its continuance had ceased to exist; it appearing, moreover, that the withdrawal had "for its principal object the quieting of the alarm consequent upon his complaint."

[The following statement of the contentions of the United States is taken from a dispatch of Mr. Bayard, Secretary of State of the United States, to Mr. Connery, Chargé d'Affaires of the United States at the City of Mexico, November 1, 1887, *op. cit.*, 1887, p. 751.[19]]

It is unnecessary to set forth in this communication a detailed account of the case, the facts of which are fully reviewed and copious extracts from the correspondence given in a report made in this Department on the subject of extraterritorial crime, with a special reference to the case in question, and a copy of which is herewith inclosed for your information.

[17] For a translation of the official text of Judge Zubia's decision, see U. S. For. Rel. (1887) 761.

[18] For a translation of the decision of the Supreme Court of Chihuahua, see U. S. For. Rel. (1887) 766.

[19] The contentions adopted by the United States are set forth in detail in Moore, "Report on Extraterritorial Crime," U. S. For. Rel. (1887) 757.

It is sufficient here to state, as was set forth at the time of the demand, that the ground upon which Mr. Cutting's release was demanded was that the judicial tribunals of Mexico were not competent under the rules of international law to try a citizen of the United States for an offense committed and consummated in his own country, merely because the person offended happened to be a Mexican. This was coupled with another ground, namely, that, by the law of nations, no punishment can be inflicted by a sovereign on citizens of other countries "unless in conformity with those sanctions of justice which all civilized nations hold in common." "Among these sanctions," it was stated, "are the right of having the facts on which the charge of guilt was made examined by an impartial court; the explanation to the accused of these facts; the opportunity granted to him of counsel; such delay as is necessary to prepare his case, permission in all cases, not capital to go at large on bail till trial; the due production, under oath, of all evidence prejudicing the accused; giving him the right to cross-examination; the right to produce his own evidence in exculpation; release even from temporary imprisonment in all cases where the charge is simply one of threatened breach of the peace, and where due security to keep the peace is tendered."

From the facts before the Department it appeared that all these sanctions had been violated in the case of Mr. Cutting by the judge before whom he was brought. The importance of this second ground upon which Mr. Cutting's release was demanded is not to be underestimated, although, in the course of time, it was overshadowed by the jurisdictional question raised by the claim of the Mexican Government of a right to try and punish a citizen of the United States for an offense committed by him in his own country against a Mexican. Not only was this claim, which is defined in Article 186 of the Mexican penal code, defended and enforced by Judge Zubia, before whom the case of Mr. Cutting was tried, and whose decision was affirmed by the supreme court of Chihuahua (translations of both of which decisions are given in the inclosed report above referred to), but the claim was defended and justified by the Mexican Government in communications to this Department, emanating both from the Mexican minister at this capital and from the department of foreign affairs in the City of Mexico.

The statement of the consul at Paso del Norte that Mr. Cutting was arrested on the charge of the publication in Texas of an alleged libel against a Mexican is fully sustained by the opinion of Judge Zubia. Under the head of "It appears 6," in that decision, it is stated that on the 22d of June, 1886, "the plaintiff enlarged the accusation, stating that although the newspaper, the El Paso Sunday Herald, is published in Texas, Mr. Cutting had had circulated a great number in this town (Paso del Norte) and in the interior of the Republic, it having been read by more than three persons, for which reason an order had been issued

to seize the copies which were still in the office of the said Cutting." The conclusive inference from this statement is that the charge upon which the warrant of arrest was issued was the publication of the alleged libel in Texas. It matters not whether such publication was originally treated by the court as a breach of a conciliation previously entered into between Cutting and Medina, the Mexican plaintiff, or whether it was treated as a distinct and original offense. In either case the assumption of the Mexican tribunal, under the law of Mexico, to punish a citizen of the United States for an offense wholly committed and consummated in his own country against its laws was an invasion of the independence of this Government. To say that a conciliation in Mexico which operates as a stay of criminal proceedings there binds a citizen of the United States in his own country, is simply to assert that the Mexican penal law is binding upon citizens of the United States in their own country. It appears, however, under "Considering 6," in Judge Zubia's decision, that the claim made in Article 186 of the Mexican penal code was actually enforced in the case in question as a distinct and original ground of prosecution. The decision of Judge Zubia was framed in the alternative, and it was held that, even supposing the defamation arose solely from the publication of the alleged libel in the El Paso (Texas) Sunday Herald, Article 186 of the Mexican penal code provided for punishment in that case; Judge Zubia saying that it did not belong to the judge to examine the principle laid down in that article but to apply it fully, it being the law in force in the State of Chihuahua. It nowhere appears that the Texas publication was ever circulated in Mexico so as to constitute the crime of defamation under the Mexican law. As has been seen, this was not a part of the original charge on which the warrant for Mr. Cutting's arrest was issued; and while it is stated in Judge Zubia's decision that an order was issued for the seizure of copies of the Texas paper which might be found in the office of Mr. Cutting in Paso del Norte, it nowhere appears from that decision that any copies were actually found in that place or elsewhere in Mexico.

But, however this may be, this Government is still compelled to deny what it denied on the 19th of July, 1886, and what the Mexican Government has since executively and judicially maintained, that a citizen of the United States can be held under the rules of international law to answer in Mexico for an offense committed in the United States, simply because the object of that offense happens to be a citizen of Mexico. The Government of Mexico has endeavored to sustain this pretension on two grounds: First, that such a claim is justified by the rules of international law and the positive legislation of various countries; and, secondly, on the ground that such a claim being made in the legislation of Mexico the question is one solely for the decision of the Mexican tribunals. In respect of the latter ground it is only necessary to say, that

if a Government could set up its own municipal laws as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name and would afford no protection either to States or to individuals. It has been constantly maintained and also admitted by the Government of the United States that a government can not appeal to its municipal regulations as an answer to demands for the fulfillment of international duties. Such regulations may either exceed or fall short of the requirements of international law, and in either case that law furnishes the test of the nation's liability and not its own municipal rules. This proposition seems now to be so well understood and so generally accepted, that it is not deemed necessary to make citations or to adduce precedents in its support.

I turn now to the consideration of the Mexican jurisdictional claim in connection with the principles of international law. It is not now, and has not been contended, by this Government, as seems to have been assumed in some of the arguments put forth in behalf of the Mexican Government, that if Mr. Cutting had actually circulated in Mexico a libel printed in Texas, in such manner as to constitute a publication of the libel in Mexico within the terms of the Mexican law, he could not have been tried and punished for this offense in Mexico.[20] Oftentimes, the question where a libel may actually have been printed is a matter of small moment, the real offense being the publication or circulation. I shall, therefore, pass this question by as having nothing to do with the present case.

As to the question of international law, I am unable to discover any principle upon which the assumption of jurisdiction made in Article 186 of the Mexican penal code can be justified. There is no principle better settled than that the penal laws of a country have no extraterritorial force. Each state may, it is true, provide for the punishment of its own citizens for acts committed by them outside of its territory; but this makes the penal law a personal statute, and while it may give rise to inconvenience and injustice in many cases, it is a matter in which no other Government has the right to interfere. To say, however, that the penal laws of a country can bind foreigners and regulate their conduct, either in their own or any other foreign country, is to assert a jurisdiction over such countries and to impair their independence. Such is the consensus of opinion of the leading authorities on international law at the present day, from whom ample quotations are made in the report accompanying this instruction. There being then no principle of international law which justifies such a pretension, any assertion of it must rest, as an exception to the rule, either upon the general concurrence of nations or upon express conventions. Such a concurrence in respect

[20] See Commonwealth v. Blanding, 3 Pick. (Mass.) 304; State v. Piver, 74 Wash. 96. *Cf.* United States v. Smith, 173 Fed. 227; People v. Bihler, 154 App. D. 618.

to the claim made in Article 186 of the Mexican penal code can not be found in the legislation of the present day. Though formerly asserted by a number of minor states, it has now been generally abandoned, and may be regarded as almost obsolete.

The only assertion I have found in the legislation of Europe of a general jurisdiction by one state of offenses committed abroad by foreigners against subjects is in the cases of Greece and Russia. The legislation of these countries gives to the judicial tribunals general jurisdiction over such offenses. In Sweden and Norway their punishment is discretionary, and depends upon the King ordering the prosecution. In Austria felonies, but not misdemeanors (the charge against Mr. Cutting of libel is only a misdemeanor, not only under the Mexican law, but under that of Texas), committed by foreigners abroad are punished, but only (except in crimes against the safety of the state and against the national seals and moneys, etc.) after an offer of surrender of the accused person has first been made to the state in which the crime was committed, and has been refused by it. The law is substantially the same in Hungary and in Italy; but criminal offenses committed outside the state by foreigners against its citizens or subjects are not punished under any circumstances or conditions by France, Germany, Belgium, Denmark, Great Britain, Luxembourg, The Netherlands, Portugal, Spain, and Switzerland.

It is thus seen that Russia and Greece are the only European countries whose claim of extraterritorial jurisdiction is as extensive and absolute as that of Mexico; for it was held by Judge Zubia, whose decision was affirmed by the supreme court of Chihuahua, that it did not belong to the judicial tribunals of Mexico to examine the principle laid down in Article 186, but to apply it in all force, it being the law of the State of Chihuahua, and Mr. Mariscal disclaimed any power on the part of the Mexican Executive to interfere with the execution of the law by the judicial tribunals. Thus the Mexican claim is absolute, and exceeds that made by Sweden and Norway, where the prosecution can only take place if the King order it.

An appeal has been made in the Mexican arguments to the law of France as sustaining Article 186. The error of this is apparent when we observe that the French code authorizes the prosecution of foreigners for offenses outside of the territory of France, only in the exceptional cases of crimes against the safety of the state, and of counterfeiting the seal of the state, national moneys having circulation, national papers or bank bills authorized by law. Not only is the law thus clear, but it was decided by the court of cassation of France in 1873, in a case which is fully set forth in the report above referred to, that, with the exception of the crimes above mentioned, the French tribunals are without power to judge foreigners for acts committed by them in a foreign country; that

their incompetence in this regard is absolute and permanent; that it can be waived neither by the silence nor by the consent of the accused; that the right to punish emanates from the right of sovereignty, which does not extend beyond the limits of the territory, and that the incompetence of the French tribunals, as above stated, exists always and to the same degree in every stage of the proceedings.

Neither is Article 186 sustained by the legislation of the Spanish-American Republics. Neither in the Argentine Republic, nor in Chili, nor in Peru, nor in Colombia, nor in Costa Rica, is there any law, so far as known to this Department, that authorizes the punishment of foreigners for offenses committed abroad against citizens of those countries. Indeed, such a pretension is incompatible with those free and friendly relations which it is so important for Governments mutually to promote.

It has constantly been laid down in the United States as a rule of action, that citizens of the United States can not be held answerable in foreign countries for offenses which were wholly committed and consummated either in their own country or in other countries not subject to the jurisdiction of the punishing state. When a citizen of the United States commits in his own country a violation of its laws, it is his right to be tried under and in accordance with those laws, and in accordance with the fundamental guaranties of the Federal Constitution in respect to criminal trials in every part of the United States.

To say that he may be tried in another country for his offense, simply because its object happens to be a citizen of that country, would be to assert that foreigners coming to the United States bring hither the penal laws of the country from which they come, and thus subject citizens of the United States in their own country to an indefinite criminal responsibility. Such a pretension can never be admittted by this Government.

It has been seen that Article 186 of the Mexican penal code requires that the offenses included in the article must be also punishable in the place of their commission; and the proceedings before Judge Zubia, as set forth in his decision, show that the Texas penal code was introduced in the trial to prove that Mr. Cutting had committed the offense of libel in Texas. With this code before him, Judge Zubia held that its provision had been violated. Thus, sitting as a Mexican magistrate, he did what no Texas judge could have done had Mr. Cutting been on trial in that State for the alleged offense against its laws. By the Texas code (sec. 2291), "It is no offense to publish statements of fact as to the qualification of any person for any occupation, profession, or trade." But this is not all. By the fundamental law of the State no judge can convict any person of libel; for section 6, Article 1, of the constitution, of Texas provides that "in all indictments for libels the jury shall have the right

to determine the law and the facts under the direction of the court, as in other cases."

The provisions render it wholly unwarrantable for any judge, domestic, or foreign, alone to decide that a person has committed a libel under the law in Texas. Nor is it shown that Judge Zubia even attempted to inquire as to the truth of Mr. Cutting's alleged libelous statements.

You are therefore instructed to say to the Mexican Government, not only that an indemnity should be paid to Mr. Cutting for his arrest and detention in Mexico on the charge of publishing a libel in the United States against a Mexican, but also, in the interests of good neighborhood and future amity, that the statute proposing to confer such extraterritorial jurisdiction should, as containing a claim invasive of the independent sovereignty of a neighboring and friendly state, be repealed.

[The following summary of the contentions of Mexico is taken from the reply of Mr. Mariscal, Mexican Minister of Foreign Affairs, to Mr. Connery, Chargé d'Affaires of the United States at the City of Mexico, February 10, 1888, *op. cit.*, 1888, pp. 1114, 1131.[21]]

In this note I believe I have demonstrated—

First. That Cutting did not suffer ill treatment, nor was he the victim of illegal procedure, and that even his apparent lack of defense was due to his own refusal of counsel for defense, of his own rejection of liberty under bail or any other legal recourse; for at all times he simply insisted that he relied alone upon his consul and his Government.

Second. That, therefore, there is no reason of that kind why Cutting should be indemnified.

Third. That neither can the complaint stand that a law antagonistic to international rights of individuals was applied to him—

A. Because he was tried not merely for an offense committed in a foreign country, but on account of the continuation or repetition thereof in Mexican territory; and

B. Because the one hundred and eighty-sixth article of the penal code of Chihuahua does not contain the defect attributed thereto.

Fourth. The simple fact that the aforesaid article carries the idea of extraterritorial jurisdiction, as applied to foreigners, beyond the limits of the legislation of the majority of other countries, does not prove the same to be opposed to the recognized rights of individuals.

Fifth. International usage confines itself to the establishment of general principles, and when controversy arises regarding the application to be made of any part of those principles, any interpretation, even that

[21] The contentions of Mexico are set forth in detail in the following papers: Romero to Bayard, Aug. 7, 1886, U. S. For. Rel. (1887) 849; Mariscal to Romero, Aug. 12, 1886, *ibid.* (1887) 857; Mariscal to Romero, Aug. 13, 1886, *ibid.* (1887) 860; Gamboa, "The Cutting Affair," *ibid.* (1887) 863; Mariscal to Connery, Feb. 10, 1888, *ibid.* (1888) 1114.

rendered by a minority of the States, is a legitimate manifestation of the sovereignty of those States.[22]

Sixth. This occurs in the case of the so-called objective or quasi-territorial jurisdiction; that is, that which is applicable to a foreigner abroad when offending a citizen of the complaining state; a question which, according to all acknowledged authorities, far from being settled, is one of those undecided problems presenting greatest difficulties to the legislator and to legal science.

Seventh. Meanwhile, that jurisdiction, admitted as it is in the majority of recognized legislations over cases in which the foreigner has attacked the safety of a state, or to the detriment of many of its citizens or subjects has counterfeited the coin of the realm or the paper of its banks, can with equal reason embrace such cases wherein the damage falls upon a few, or even upon one, of the citizens of the complaining state.

Eighth. The right which every nation has to impose rational conditions upon the entry of foreigners upon its own territory conveys with it the right within the limits of its legislation, to hold such foreigners responsible for acts they may commit abroad against that nation or against any of its citizens or subjects.

Ninth. The United States can not request Mexico to modify her legislation in this respect, even supposing that legislation to contain the alleged defect, for the United States themselves in one or more of their territorial entities hold and follow substantially the same legislation.[23]

FRANCE, CODE OF CRIMINAL PROCEDURE

Preliminary Provisions, Article 5. 1926.

Art. 5. (Law 26th February 1910.) Every Frenchman who, outside the territory of France, is guilty of a crime punishable by French law, may be prosecuted and judged in France.

Every Frenchman who, outside the territory of France, is guilty of an act defined as a *délit* by French law, may be prosecuted and judged in France, if the act is punishable by the legislation of the country where it was committed.

It will be the same if the accused has only acquired French nationality after the accomplishment of the crime or *délit*.

[22] *Cf.* the Lotus Case, *supra*, 656, 662.

[23] "The case is indecisive to the extent that both parties adhered to their positions and the matter dropped without any arbitral decision." BECKETT, in B. Y. B. Int. L. (1925) 44, 46.

However, in case of a crime or *délit*, no prosecution shall take place if the accused proves that he has been definitively judged in the foreign country, and, in case of conviction, that he has submitted to his penalty, or that it has been barred by limitation, or that he has obtained pardon.

In case of *délit* committed against a French or foreign individual, the prosecution can only be instituted at the request of the public minister; it must be preceded by a complaint from the injured party or by an official denunciation to the French authority by the authority of the country where the *délit* was committed.

No prosecution can take place before the return of the accused to France, except for the crimes specified in article 7 following.[24] [Editor's transl.]

[24] "Foreigners in a country are subject to two sovereignties, each of which may restrict their liberty by the provisions of its criminal law. They are subject to the local criminal law just as native citizens are, and they are subject to such criminal enactments as the law of their own country may apply to its people abroad, on condition that no attempt is made to enforce the latter until they come within the physical limits of their home sovereignty, its territory and its ships. England has acted on this doctrine by legislation which began as early as the reign of Henry the eighth, and British subjects are now punishable in the British dominions for many grave offences committed in foreign countries." Westlake, Collected Papers, 128. See Moore, "Report on Extraterritorial Crime," U. S. For. Rel. (1887) 757, 779; Stephen, History, II, 14.

"The received rule as to the territoriality of criminal law rests on a sound basis. The territorial sovereign has the strongest interest, the greatest facilities, and the most powerful instruments for repressing crimes, whether committed by native-born subjects, or by domiciled aliens, in his territory. But a sovereign government, which pursues its subjects into foreign countries, and keeps its criminal law suspended over them, attempts a task in which, even if undertaken with earnestness, it is sure to fail; but which will probably be performed in a careless, indifferent, and intermitting manner. A government has no substantial interest in punishing crimes in the territory of another State: it has not on the spot officers of justice to discover and arrest the criminal; the transport of witnesses to a distance is a troublesome and costly operation; the difference of language, law, and customs creates further impediments. A failure of justice, and an acquittal, is therefore likely to occur, even if the utmost diligence is used; but it may be assumed as certain that, unless some special motive exists, little diligence will be used. A government would feel, with respect to offences committed abroad in a civilized country, that it was, at the best, undertaking a work of supererogation; perhaps that it was interfering in a matter which, as the law of the place provided for it, would most properly be left alone. The experience of this and other countries shows that a criminal law applicable to offences committed in foreign lands (such as the Act of 33 Hen. 8 and 9 Geo. 4), is for the most part a *brutum fulmen*, and that it is rarely carried into execution. The slumber of the law is therefore in practice a sufficient security to the native subject against its oppression." Lewis, Foreign Jurisdiction and the Extradition of Criminals, 30.

The Case of John B. Foichat

France and the United States. 1883–84.

Moore, Digest of International Law, Volume III, page 593.

John B. Foichat was born in France, January 4, 1853. In 1870, at the age of seventeen, he came to the United States, where, in 1883, he was admitted to citizenship. In August, 1883, he obtained a passport and went to France, arriving there in the following month. In November, 1884, he was arrested on the charge of having failed to report for military service. He protested and, exhibiting his naturalization papers and passport, demanded that he be released. He was kept, however, two days and three nights in the military prison at Chamberry, and was then handcuffed and taken to the military prison at Grenoble to be tried by court-martial. He was detained at Grenoble four days, when he was released through the efforts of the United States consul at Lyons. March 25, 1884, the American minister at Paris was instructed to look into the case and, if the facts were found to be as stated, to present it to the minister of foreign affairs, with an earnest request that it might receive early and just consideration and that a reasonable pecuniary indemnity might be paid. The French Government admitted that the facts were substantially as stated, but denied that they entitled the claimant to any compensation. In a note to the American legation, October 22, 1884, M. Ferry, minister of foreign affairs, said that Foichat was arrested on the charge of *insoumission*, and added: "Upon principle we have constantly refused to admit that a Frenchman, naturalized in a foreign country, can be exempted if he returns to France from being answerable for the offense of insubmission, when the naturalization has taken place subsequently to the existence of the offence. You will understand that we cannot abandon this jurisprudence, which is dictated by a question of public order of a most important character, and against which the Government of the United States would be all the less founded in protesting, as it is in conformity with one of the principal provisions which appear in the treaties of naturalization concluded by it with certain powers." M. Ferry then cited Article II. of the treaty between the United States and the North German Union of February 22, 1868,[25] to the effect that a naturalized citizen remains punishable for offences committed prior to his emigration, subject to the statutes of limitation.

[25] *Supra*, 229.

Macleod v. Attorney-General for New South Wales

Great Britain. Judicial Committee of the Privy Council. 1891.

Law Reports [1891] *Appeal Cases* 455.

[The statement of the case and the arguments of counsel are omitted. The facts are stated sufficiently in the opinion.]

The judgment of their Lordships was delivered by Lord Halsbury, L. C.:—

The facts upon which this appeal arises are very simple.

The appellant was, on the 13th of July, 1872, at Darling Point, in the Colony of New South Wales, married to one Mary Manson, and, in her lifetime, on the 8th of May, 1889, he was married, at St. Louis, in the State of Missouri, in the United States of America, to Mary Elizabeth Cameron. He was afterwards indicted, tried, and convicted, in the Colony of New South Wales, for the offence of bigamy, under the 54th section of the Criminal Law Amendment Act of 1883 (46 Vict. No. 17).

That section, so far as it is material to this case, is in these words: "Whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years." In the first place, it is necessary to construe the word "whosoever"; and in its proper meaning it comprehends all persons all over the world, natives of whatever country. The next word which has to be construed is "wheresoever." There is no limit of person, according to one construction of "whosoever"; and the word "wheresoever" is equally universal in its application. Therefore, if their Lordships construe the statute as it stands, and upon the bare words, any person, married to any other person, who marries a second time anywhere in the habitable globe, is amenable to the criminal jurisdiction of New South Wales, if he can be caught in that Colony. That seems to their Lordships to be an impossible construction of the statute; the Colony can have no such jurisdiction, and their Lordships do not desire to attribute to the Colonial Legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to a colony, and, indeed, inconsistent with the most familiar principles of international law. It therefore becomes necessary to search for limitations, to see what would be the reasonable limitation to apply to words so general; and their Lordships take it that the words "Whosoever being married" mean, "Whosoever being married, and who is amenable, at the time of the offence committed, to the jurisdiction of the Colony of New South Wales."

The word "wheresoever" is more difficult to construe; but when it is remembered that in the Colony, as appears from the statutes that

have been quoted to their Lordships, there are subordinate jurisdictions, some of them extending over the whole Colony, and some of them, with respect to certain classes of offences, confined within local limits of venue, it is intelligible that the 54th section may be intended to make the offence of bigamy justiceable all over the Colony, and that no limits of local venue are to be observed in administering the criminal law in that respect. "Wheresoever," therefore, may be read, "Wheresoever in this Colony the offence is committed."

It is to be remembered that the offence is the offence of marrying, the wife of the offender being then alive—going through, in fact, the ceremony of marriage with another person while he is a married man. That construction of the statute receives support from the subordinate arrangements which the statute makes for the trial, the form of the indictment, the venue, and so forth. The venue is described as New South Wales, and sect. 309 of the statute provides that "New South Wales shall be a sufficient venue for all places, whether the indictment is in the Supreme Court, or any other Court having criminal jurisdiction. Provided that some district, or place, within, or at, or near which, the offence is charged to have been committed, shall be mentioned in the body of the indictment. And every such district or place shall be deemed to be in New South Wales, and within the jurisdiction of the Court, unless the contrary be shewn." That, by plain implication, means that the venue shall be sufficient, and that the jurisdiction shall be sufficient, unless the contrary is shewn. Upon the face of this record the offence is charged to have been committed in Missouri, in the United States of America, and it therefore appears to their Lordships that it is manifestly shewn, beyond all possibility of doubt, that the offence charged was an offence which, if committed at all, was committed in another country, beyond the jurisdiction of the Colony of New South Wales.

The result, as it appears to their Lordships, must be that there was no jurisdiction to try the alleged offender for this offence, and that this conviction should be set aside. Their Lordships think it right to add that they are of opinion that if the wider construction had been applied to the statute, and it was supposed that it was intended thereby to comprehend cases so wide as those insisted on at the bar, it would have been beyond the jurisdiction of the Colony to enact such a law. Their jurisdiction is confined within their own territories, and the maxim which has been more than once quoted, "*Extra territorium jus dicenti impune non paretur*," would be applicable to such a case. Lord Wensleydale, when Baron Parke, advising the House of Lords in Jefferys v. Boosey [4 H.L.R. 815], expresses the same proposition in very terse language. He says [4 H.L.R. 926]: "The Legislature has no power over any persons except its own subjects—that is, persons natural-born subjects, or

resident, or whilst they are within the limits of the kingdom. The Legislature can impose no duties except on them; and when legislating for the benefit of persons, must, *primâ facie*, be considered to mean the benefit of those who owe obedience to our laws, and whose interests the Legislature is under a correlative obligation to protect." All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, and, except over her own subjects, Her Majesty and the Imperial Legislature have no power whatever. It appears to their Lordships that the effect of giving the wider interpretation to this statute necessary to sustain this indictment would be to comprehend a great deal more than Her Majesty's subjects; more than any persons who may be within the jurisdiction of the Colony by any means whatsoever; and that, therefore, if that construction were given to the statute, it would follow as a necessary result that the statute was *ultrà vires* of the Colonial Legislature to pass. Their Lordships are far from suggesting that the Legislature of the Colony did mean to give to themselves so wide a jurisdiction. The more reasonable theory to adopt is that the language was used, subject to the well-known and well-considered limitation, that they were only legislating for those who were actually within their jurisdiction, and within the limits of the Colony.

For these reasons, their Lordships will humbly advise Her Majesty that the judgment of the Supreme Court should be reversed, and that this conviction should be set aside. The respondent must pay the costs of the appeal.[26]

The Trial of Earl Russell

Great Britain. Before the King in Parliament. 1901.

Law Reports [1901] *Appeal Cases* 446.

This was a prosecution initiated by the Director of Public Prosecutions against Earl Russell for bigamy in America.

Earl Russell was married to Mabel Edith Scott on February 6, 1890, in England. Much litigation followed between Earl Russell and his wife from 1890 to 1897. On April 14, 1900, Earl Russell obtained from the First Judicial District for the county of Douglas in the State of Nevada, in the United States of America, an order for divorce from his wife; and on April 15 he went through the ceremony of marriage before Judge Curler in the State of Nevada with one Mollie Cooke, otherwise known as Mrs. Somerville. In June, 1890, Mabel Edith, Lady Russell, presented a petition against Earl Russell for divorce on the ground of his

[26] See also R. v. Lander [1919] N. Z. L. R. 305; State v. Cutshall, 110 N. C. 538; State v. Ray, 151 N. C. 710. And see Johnson v. Commonwealth, 86 Ky. 122; State v. Stephens, 118 Me. 237. *Cf.* State v. Stewart, 194 Mo. 345.

bigamous adultery, and on March 24, 1901, a decree *nisi* was pronounced, the suit being undefended.

On June 17, 1901, Earl Russell was arrested and charged with bigamy. Subsequently the grand jury found a true bill, and the Recorder wrote to the House of Lords informing their Lordships that a true bill had been found against Earl Russell, a Peer of the Realm.

Arrangements were then made for the trial of Earl Russell before his Peers in the Royal Gallery (Parliament being then in session), and the King issued a Commission appointing the Earl of Halsbury L. C. to preside at the trial as Lord High Steward.

On July 2 Earl Russell was taken into custody by the Gentleman Usher of the Black Rod, and it was moved in the House that the bill of indictment for felony found by the grand jury be removed before the House by writ of *certiorari*. This was done, and Earl Russell was allowed to enter into recognizances with two sureties to appear before the House at any time he should be so ordered. The trial was fixed for July 18. On July 4, 1901, the House met to consider Earl Russell's application for an adjournment to next session in order to produce evidence from America as to his change of domicil to America and as to the validity of the Nevada divorce. The Attorney-General, for the Crown, opposed such a long adjournment on the ground that Judge Curler, who was now in this country, would probably be unable to attend to give evidence next session.

The House granted a postponement until August 6, provided affidavits were lodged specifying the American evidence and witnesses to be called. This extension was declined by Earl Russell.

July 18. The Earl of Halsbury L. C. presided as Lord High Steward. There were also present about 160 Peers, including all the Law Lords who generally hear appeals, and the following judges: Sir Francis Jeune, and Mathew, Wills, Wright, Lawrance, Kennedy, Darling, Bigham, Cozens-Hardy, Farwell, and Buckley JJ.

The King's Commission, the writ of *certiorari*, the return thereof, and the indictment having been read, Earl Russell was called upon to plead guilty or not guilty.

Sir R. B. Finlay, A.-G., Sir Edward Carson, S.-G., H. Sutton, R. D. Muir, Bodkin, and G. R. Askwith, appeared for the Crown.

Robson, K. C., Horace Avory, K. C. (with them Charles Mathews, Llewelyn Davies, and J. H. W. Pilcher), for Earl Russell.

Before the defendant pleads to this indictment it is submitted that the indictment ought to be quashed, inasmuch as it discloses no offence according to the true construction of the 57th section of the Offences against the Person Act, 1861.[27] The section defining the offence does

[27] The British Offences Against the Person Act, 1861, §57, provided in part that "Whosoever, being married, shall marry any other Person during the Life of the former Husband or Wife, whether the Second Marriage shall have taken place in

not in express terms apply to any offence committed beyond the King's dominions. According to the well-known rule of construction in every Act passed by our Parliament, words, however wide, with reference to area must have read along with them a reference to the King's dominions, unless very express words are added in the Act shewing that it was the intention of the Legislature to make justiciable offences committed outside the King's dominions. The word "elsewhere" must be read with a limitation—that is, it means "elsewhere" within the King's dominions. This is shewn by ss. 9 and 4 of this very Act, where the framers of the statute did not consider the preliminary words "where any murder, &c., shall be committed on land out of the United Kingdom" sufficiently wide to cover offences committed outside His Majesty's dominions, and added the express words which are absent from s. 57, "whether within the Queen's dominions or without." Therefore, if the words "or elsewhere" had been intended to apply to places beyond the King's dominions, words would have been added to that effect.

(The Lord High Steward referred to the proviso in s. 57. Has not the Imperial Legislature a right to legislate with respect to His Majesty's subjects all over the world wherever they are?)

Undoubtedly. But if s. 57 had been intended to apply to countries abroad, words would have been inserted for that purpose. The reasons given for the decision in Macleod v. Attorney-General for New South Wales apply here. . . .

The Lord High Steward. My Lords, we have the advantage of having His Majesty's judges here. I have been myself of opinion for some time that the matter which has been discussed at such inordinate length was really too plain for argument. The statute is plain in its ordinary signification, and the only ground upon which the learned counsel can suggest that we should not give it its ordinary signification is apparently because of the use of certain words in other statutes enacted under other circumstances in relation to other crimes. My Lords, I thought it right to ask His Majesty's judges whether there is anything in the argument suggested which should call for the Attorney-General to reply; and they are unanimously of opinion that there is not, and that it is not necessary to hear the Attorney-General.

Thereupon, Earl Russell having under the advice of his counsel pleaded guilty,

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England or Ireland or elsewhere, shall be guilty of Felony . . . and any such Offence may be dealt with, inquired of, tried, determined, and punished in any County or Place in England or Ireland where the Offender shall be apprehended or be in Custody, in the same Manner in all respects as if the Offence had been actually committed in that County or Place: Provided that nothing in this Section contained shall extend to any Second Marriage contracted elsewhere than in England and Ireland by any other than a Subject of Her Majesty . . . " 24 & 25 Vict. c. 100, §57.

Robson, K. C., adressed their Lordships on the mitigation of punishment; and Earl Russell was also allowed to make a speech.

Sentence—Three calendar months' imprisonment in His Majesty's prison at Holloway as an offender of the First Division.[28]

AUSTRIA, PENAL CODE

Sections, 38, 39, and 40. 1852.

§38. If a foreigner has committed abroad the offence of high treason against the Austrian state, or the offence of falsification of Austrian public paper currency or money, he shall be treated like a national under this law.[29]

§39. Again, if a foreigner has committed abroad an offence other than those indicated in the preceding paragraph, he shall always be arrested upon entering the country; arrangement shall be made forthwith for his extradition to the state where the offence was committed.

§40. Should the foreign state refuse to receive him, the foreign offender will generally be prosecuted in accordance with the provisions of the present penal code. If, however, more lenient treatment is prescribed by the criminal law of the place where he committed the act, he shall be treated according to this more lenient law. Expulsion shall also be included in the penal sentence in addition to the infliction of the usual penalty.[30] [Editor's transl.]

[28] For other examples of British penal statutes applicable to nationals abroad, see the following: Act of 1350, 25 Edw. III. stat. 5, c. 2 (treason), applied in Rex v. Casement [1917] 1 K. B. 98; Act of 1541, 33 Hen. VIII. c. 23 (treason, murder), applied in Rex v. Sawyer, 2 C. & K. 101; Act of 1828, 9 Geo. IV. c. 31, §7 (murder, manslaughter, including accessories), applied in Rex v. Helsham, 4 C. & P. 394; Rex v. Mattos, 7 C. & P. 458; Reg. v. Azzopardi, 1 C. & K. 203.

And see also the following sections of the United States Criminal Code, Act of 1909, c. 321, §1 (treason) 35 U. S. Stat. L. 1088; §5 (correspondence with foreign government) *ibid.;* §§246, 247 (slave trade) *ibid.*, 1138; §§303, 304 (hostilities against United States, its citizens, or their property) *ibid.*, 1147; §§308, 309 (supplying arms, liquor, or opium to Pacific islands natives) *ibid.*, 1148.

[29] See also France, Code of Criminal Procedure, art. 7, *supra*, 671.

[30] Provisions of similar effect are found in the penal codes of Argentine, Hungary, Italy, and Turkey. See TRAVERS, I, 567, and the Lotus Case, *supra*, 656.

See PINHEIRO-FERREIRA, Cours de Droit Public, II, §12. *Cf.* MOORE, Extradition, I, 6. "Only a few States have adopted the rule of bringing all offences, wherever they may have been committed, before their own courts, and these few have only done so under important limitations: either by requiring that an offer of extradition shall first be made to that State in whose territory the crime has been committed, and by giving jurisdiction to its own courts only in the event of this offer being refused, or

SECTION 2. OBLIGATION TO EXTRADITE AND TREATIES OF EXTRADITION[31]

WOOLSEY, INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW

Fifth Edition, page 114, section 77. 1878.

The considerations which affect the question, what a government ought to do in regard to fugitives from foreign justice, who have escaped into its territory, are chiefly these: First, that no nation is held to be bound to administer the laws of another, or to aid in administering them; secondly, that it is for the interest of general justice that criminals should not avoid punishment by finding a refuge on another soil, not to say that the country harboring them may add thereby to the number of its worthless inhabitants; thirdly, that the definitions of crime vary so much in different nations, that a consent to deliver up all accused fugitives to the authorities at home for trial, would often violate the feeling of justice or of humanity; and fourthly, that truth can be best ascertained, and justice best administered near the *forum criminis*, and where the witnesses reside.[32]

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else by providing that a special license by the head of the Government shall be necessary to originate such a jurisdiction." BAR, 637 (GILLESPIE'S transl.).

On the jurisdiction of crime, in general, see LEWIS, Foreign Jurisdiction and the Extradition of Criminals; MOORE, "Report on Extraterritorial Crime," U. S. For. Rel. (1887) 757; and the monumental work of TRAVERS, Le Droit Penal International.

[31] "Extradition may be sufficiently defined to be the surrender by one nation to another of an individual accused or convicted of an offence outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender." FULLER, C. J., in Terlinden v. Ames, 184 U. S. 270, 289.

[32] "In considering the principles which ought to govern the extradition of criminals, we may, in the first place, revert to the maxim already laid down, that the administration of criminal law is essentially local. It is the peculiar interest of the district to maintain order by protecting person and property. It is on the spot where a crime is committed that the proofs of a criminal's guilt can be most effectually, most easily, and most inexpensively obtained. It is at the place where a crime is alleged to have been committed, that the accused person can best establish his innocence, if he be falsely charged, or prove any extenuating circumstances which may exist in his favour. It is equally conducive to the repression of crime and to the protection of innocence, that criminal trials should be held near the place where the offence is alleged to have taken place.

"If, therefore, a comity of nations for the enforcement of criminal law is desirable; if there ought to be a combined action of independent States for the repression of crimes; it follows that the proper mode of attaining this end is, not by an attempt to exercise a criminal jurisdiction upon the territories of foreign States, but by extradition." LEWIS, Foreign Jurisdiction and the Extradition of Criminals, 41.

On the origin of extradition, see MOORE, Extradition, I, 8.

Respublica v. De Longchamps

United States. Court of Oyer and Terminer at Philadelphia, Pennsylvania. 1784.

1 *Dallas' Reports* 111.

[Part only of the report, dealing with the answer given to the first of three questions submitted by the President and Executive Council of Pennsylvania, is reproduced here.]

M'Kean, Chief Justice.—Charles-Julian De Longchamps:—You have been indicted for unlawfully and violently threatening and menacing bodily harm and violence to the person of the honorable Francis-Barbe De Marbois, Secretary to the Legation from France, and Consul General of France to the United States of America, in the mansion-house of the Minister Plenipotentiary of France; and for an Assault and Battery committed upon the said Secretary and Consul, in a public street in the City of Philadelphia. To this Indictment you have pleaded, that you were not guilty, and for trial put yourself upon the country;—an unbiased Jury, upon a fair trial, and clear evidence, have found you guilty.

These offences having been thus legally ascertained and fixed upon you, his Excellency, the President, and the Honorable the Supreme Executive Council, attentive to the honor and interest of the State, were pleased to inform the Judges of this Court, as they had frequently done before, that the Minister of France had earnestly repeated a demand, that you, having appeared in his house in the uniform of a French Regiment, and having called yourself an officer in the troops of his Majesty, should be delivered up to him for these outrages, as a Frenchman to be sent to France; and wished us in this stage of your prosecution, to take into mature consideration, and in the most solemn manner to determine:—

1st. Whether you could be legally delivered up by Council, according to the claim made by the late Minister of France? . . .

And as to the first question, we answer, That it is our opinion, that, in this case, Charles-Julian De Longchamps cannot be legally delivered up by Council, according to the claim made by the Minister of France. Though, we think, cases may occur, where Council could, *pro bono publico*, and to prevent atrocious offenders evading punishment, deliver them up to the Justice of the Country to which they belong, or where the offences were committed.[33]

[33] "The request of the French government for the prisoner's surrender still being pressed, Congress referred the case for an opinion to John Jay, then Secretary of the United States for the Department of Foreign Affairs, who reported adversely to compliance with the demand, upon the ground that the State of Pennsylvania had a clear right to hold the prisoner until he should have satisfied its laws, which he had violated. . . . The French government subsequently withdrew its demand, and the matter was dropped." Moore, Extradition, I, 24. De Longchamps was sentenced in Pennsylvania where the offence was committed. See *infra*, 810.

In the Matter of Daniel Washburn

United States. Court of Chancery of New York. 1819.

4 *Johnson's Chancery Reports* 106.

D. Washburn was brought before the Chancellor upon *habeas corpus*, allowed and directed to the sheriff of Rensselaer county. It appeared by the return, that he was detained in custody by virtue of a *mittimus* from the recorder of Troy, under a charge of having in his possession 170 bills of the bank of Montreal, of the denomination and value of five dollars each, which had been feloniously taken from some person unknown, and that he had received and secreted the bills, knowing them to be so stolen. . . .

[Part of the statement of the case, the argument for the prosecution, and part of the opinion are omitted.]

It appeared, that a theft had been committed at Kingston, in Upper Canada, on or about the 29th of June last, and that one George Ridout, upon whom the theft was committed, had 4,000 dollars, or upwards, stolen from him, at a public house in that town. That the prisoner was an inhabitant of Kingston, an acquaintance of G. R., and spent the night, or a part of the night, in which the money was stolen, in company with him. That the money stolen consisted of Montreal bills, and were said to be five dollar bills. That the prisoner left Kingston within the two last weeks on a journey to the United States. That he was in company with one Lyman Parks, who, on Tuesday last, at a bank in Troy, offered 900 dollars of Montreal bank bills, of five dollars each, to be exchanged, at four per cent. discount, and that the bills received in exchange were immediately handed by P. to the prisoner. The circumstances attending the intercourse between the prisoner and Parks, and a denial by the prisoner, that he had ever seen or known Parks before that time, though it was proved that they had been together previously at Albany, and that they came down from the Black river in company with each other, were the chief grounds of the charge and commitment.

Cushman, and Van Vechten, for the prisoner, moved for his discharge:

1. Because the Chancellor had no jurisdiction of the case, even admitting the prisoner had stolen the bills in question at Kingston, in Upper Canada, inasmuch, as our Courts have no concern with crimes committed out of the United States, and have no authority to arrest or detain the offender.

2. Because the proof is insufficient to charge the prisoner with the theft, even if it had been committed within this state. . . .

The Chancellor. It is the law and usage of nations, resting on the plainest principles of justice and public utility, to deliver up offenders

charged with felony and other high crimes, and fleeing from the country in which the crime was committed, into a foreign and friendly jurisdiction. When a case of that kind occurs, it becomes the duty of the civil magistrate, on due proof of the fact, to commit the fugitive, to the end that a reasonable time may be afforded for the government here to deliver him up, or for the foreign government to make the requisite application to the proper authorities here, for his surrender. Who are the proper authorities in this case, whether it be the executive of the state, or, as the rule is international, the executive authority of the United States, the only regular organ of communication with foreign powers, it is not now the occasion to discuss.[34] It is sufficient to observe, that if no such application be made, and duly recognized, within a reasonable time, the prisoner will then be entitled to his discharge upon *habeas corpus*. If the judicial authority has afforded sufficient means and opportunity for the exercise of this act of commutative justice, it has done its duty. Whether such offender be a subject of the foreign government, or a citizen of this country, would make no difference in the application of the principle; though, if the prisoner, as in this case, be a subject of the foreign country, the interference might meet with less repugnance.

This doctrine is supported equally by reason and authority.

Vattel observes (b. 2. ch. 6. s. 76.) that to deliver up one's own subjects to the offended state, there to receive justice, is pretty generally observed, with respect to great crimes, or such as are equally contrary to the laws and the safety of all nations. Assassins, incendiaries and robbers, he says, are seized every where, at the desire of the sovereign in the place where the crime was committed, and delivered up to his justice. The sovereign who refuses to deliver up the guilty, renders himself, in some measure, an accomplice in the injury, and becomes responsible for it. Professor Martens also, in his Summary of the Law of Nations, p. 107., says, that according to modern custom, a criminal is frequently sent back to the place where the crime was committed, on the request of a power who offers to do the like service, and that we often see instances of this.

[34] "It may be regarded as settled doctrine that, in the United States, the extradition of fugitives from the justice of foreign countries is a subject within the exclusive control of the national government, under its constitutional power of conducting foreign intercourse and of making treaties. The question has by no means been free from controversy, and has never been actually decided by the Supreme Court of the United States. But, as the respective powers of the Federal and the State governments have in course of time been more clearly defined, there has been developed a general consensus of judicial and executive opinion that the States do not possess the power to surrender fugitive criminals to foreign governments. So that, if the question were actually to come before the Supreme Court for decision, the result could scarcely be regarded as doubtful." MOORE, Extradition, I, 53. See Holmes v. Jennison, 14 Pet. 540; Ex parte Holmes, 12 Vt. 631; People v. Curtis, 50 N. Y. 321.

Grotius, who is of still higher authority, declares, (b. 2. ch. 21. s. 3, 4, 5.) that the state is accountable for the crimes of its subjects, committed abroad, if it affords them protection; and, therefore, the state where the offender resides, or has fled to, ought, upon application and examination of the case, either punish him according to his demerit, or deliver him up to the foreign state. He says, further, that his doctrine applies equally to the subjects of the government in which the offender is found, and to fugitives from the foreign state. This learned jurist finally concludes, that this right of demanding fugitives from justice has, in modern times, in most parts of Europe, been confined, in practice, to crimes that concern the public safety, or which were of great atrocity, and that lesser offences were rather connived at, unless some special provision, as to them, existed by treaty.

Heineccius, in his commentary on these passages, (*Prælec. in Grot. h. t.*) admits that the surrender of a citizen, who commits a crime in a foreign country, is according to the law of nations; and he says further, that it is to be deduced from the principles of natural law. We ought either to punish the offender ourselves, or deliver him up to the foreign government for punishment. So Burlemaqui, (part 4. c. 3. s. 23 to 19.) follows the opinion of Grotius, and maintains that the duty of delivering up fugitives from justice is of common and indispensable obligation.

It has been frequently declared, that the law of nations was part of the common law of England. (3 Burr. 1481. 4 Burr. 2016.) And if we recur to the English decisions, which may be considered as declaratory of public law on the point, we shall perceive a full recognition of this general doctrine.

In Rex v. Hutchinson, Trin. 29. Car. 2. (3 Keb. 785.) it appeared to the K. B. on *habeas corpus*, that the defendant was committed on suspicion of murder, in Portugal, and the court refused to bail him. And again, in the case of Colonel Lundy, (2 Vent. 314.) it was agreed, on a consultation of all the judges, that there was nothing in the *habeas corpus* act to prevent a person guilty of a capital offence in Ireland, (then a distinct kingdom, though under the same king,) to be sent there to be tried. In the case of Rex v. Kimberly, (Str. 848. Barnard. K. B. vol. i. 225. Fitzgib. 111. S. C.) the same point underwent a further discussion. The defendant being committed by a magistrate, for a felony done in Ireland, "to be detained till there should be proper means found out to convey him to Ireland, to be tried," was brought into the K. B. by *habeas corpus*. Strange, for the prisoner, moved for his discharge, or for bail, insisting that justices of the peace had no power over crimes in Ireland, and that the *proviso* in the *habeas corpus* act gave no power as to offences in Ireland, which was a distinct kingdom, and that it was against the *habeas corpus* act to remove the prisoner to

Ireland. But the court referred to the above cases, and remanded the prisoner; observing that the form of the commitment was proper, and that if the prisoner was not removed to Ireland in a reasonable time, application might be again made to the court for his discharge. To the same effect are the observations of the Court of Exchequer, in East India Company v. Campbell, (1 Ves. 246.) in which it was said, that "a person may be sent abroad by government and tried, though not punishable in England; like a case of one who was concerned in a rape in Ireland, and sent over there by the government, to be tried, though the K. B. refused to do it. Government may send persons to answer for a crime wherever committed, that he may not involve his country, and to prevent reprisals."

In support of the same doctrine and practice, we may refer to the uncontradicted remark of Heath, J. in the late case of Mure v. Kaye, (4 Taunt. 34.) and which Mr. Chitty, in the book cited by the counsel, seems to regard as law. "It has generally been understood," he observes, "that wheresoever a crime has been committed, the criminal is punishable according to the *lex loci* of the country, against the law of which the crime was committed; and by the comity of nations, the country in which the criminal has been found, has aided the police of the county against which the crime was committed, in bringing the criminal to punishment. In Lord Loughborough's time, the crew of a Dutch ship mastered the vessel and ran away with her, and brought her into Deal, and it was held, we might seize them and send them to Holland. And the same has always been the law of all civilized countries."

Though these observations come in the shape of a *dictum* of a single judge, yet it ought to be understood, that Heath was a judge of very great experience, having sat upon the bench of the C. P., for the long period of forty years, and he was right, says Ch. J. Gibbs, in most cases that ever came before him. . . .

The 27th article of the treaty of 1795, between the United States and Great Britain, provided for the delivery of criminals charged with murder or forgery; but that article was only declaratory of the law of nations, as were also a number of other articles in the same treaty. This was the case, for instance, with the provision in the 21st article, that it should not be lawful for foreign privateers, who have commissions from a prince or state in enmity with either nation, to arm their ships in the ports of either; and, also, with the provision in the 25th article, that neither party should permit the ships or goods of the other to be taken by foreign force, within the bays, ports, or rivers, of their territories. These articles, to use the language of Wynne, were the recognition, not the creation of right, and are equally obligatory upon the two nations, under the sanction of public law, since the expiration of that treaty, as they were before. . . .

It has been suggested, that theft is not a felony of such an atrocious and mischievous nature, as to fall within the usage of nations on this point. But the crimes which belong to this cognizance of the law of nations, are not specially defined; and those which strike deeply at the rights of property, and are inconsistent with the safety and harmony of commercial intercourse, come within the mischief to be prevented, and within the necessity as well as the equity of the remedy. If larceny may be committed, and the fugitive protected, why not compound larceny, as burglary and robbery, and why not forgery and arson? They are all equally invasions of the rights of property, and incompatible with the ends of civil society. Considering the great and constant intercourse between this state and the provinces of Canada, and the entire facility of passing from one dominion to the other, it would be impossible for the inhabitants on the respective frontiers to live in security, or to maintain a friendly intercourse with each other, if thieves could escape with impunity, merely by crossing the territorial line. The policy of the nation, and the good sense of individuals, would equally condemn such a dangerous doctrine. During the existence of the treaty of 1795, it might well have been doubted, whether the two governments had not, by that convention, restricted the application of the rule to the two specified cases of murder and forgery, for it is a maxim of interpretation, that *enumeratio unius est exclusio alterius.* But if it were so, yet upon the expiration of that treaty, the general and more extensive rule of the law of nations revived.

2. The difficulty, then, in this case, is not as to a want of jurisdiction, but the proof is insufficient to detain the prisoner. There is no evidence that the bills offered in exchange at the bank in Troy, were the same bills that were stolen at Kingston, and however suspicious the conduct of the prisoner, and his associate, may be, and however untrue his allegations as to Parks, yet, as we have no proof that the prisoner committed the theft, or that he or his associate were in possession of the stolen goods, he must, on that ground, and on that ground alone, be discharged.

The evidence to detain the party, for the purpose of surrender, must be sufficient to commit the party for trial, if the offence was committed here. The admonition in Grotius, is not to be forgotten—*non decet homines dedere causa non cognita.*

Prisoner discharged.

The Commonwealth at the Instance of Edward Short against Deacon, Keeper of the Prison of the City and County of Philadelphia

United States. Supreme Court of Pennsylvania. 1823.

10 *Sergeant & Rawle's Reports* 125.

[The names of counsel and part of the opinion are omitted. The case is stated in the opinion.]

Tilghman C. J. It appears by the return to the *habeas corpus* in this case, that Edward Short is detained, by virtue of a warrant of commitment issued by Joshua Raybold, a justice of the peace, founded on the oath of John Wallace, by which Short is charged with the murder of James Trimble, in the county of Tyrone, in Ireland, and afterwards flying from justice. The murder is alleged to have been committed on or about the 26th July, 1821. John Wallace and other witnesses have been examined before me, and the cause has been well argued by counsel both for and against the prosecution. Two questions are to be considered. 1. Whether the evidence is such, as would warrant a commitment for trial for murder, if the offence had been committed in Pennsylvania. 2. Supposing the evidence sufficient, whether the warrant of commitment was legal.

I am by no means satisfied with the evidence. It proves, that about the 26th July, 1821, there was an affray at the town of Clogher, in the county of Tyrone, in Ireland in which James Tremble received one or more blows on the head, by which his skull was fractured, and in consequence of which he died in a short time. An inquest was held on his body, but no copy of it having been produced, we are ignorant of the finding of the jury. A reward was offered by private persons, for the apprehension of Short, who fled and could not be taken. Since his arrival in this country, he has confessed, that he was in the affray, but denied that he was guilty of murder. Now supposing that a homicide of some kind was committed, we are quite ignorant of its nature. And I think it might have been expected, that a copy of the coroner's inquest should have been produced. I certainly should have called for it, had the offence been committed in Pennsylvania. On the whole, then, I should have inclined against the commitment for murder, had the case rested solely on the evidence. But a much more important question remains. Ought the prisoner to have been committed, even if the evidence had been sufficient? He was arrested at the request of a private person, without the interference either of the British government, or that of the United States. It is a question in which the peace of many persons is deeply concerned; persons who have fled from Europe, and sought an asylum in this country, where they thought themselves sure of protection.

The counsel for the prosecution have rested their case upon the law of nations, by which as they contend, the government within whose territory any offence has been committed, has an absolute and perfect right to demand the person of the criminal, to be delivered up, by the government in whose dominions he shall be found. In support of this proposition, they rely on the opinion of respectable authors, the practice of nations, and judicial decisions. It is proper therefore, that each of these grounds should be examined.

Grotius is of opinion, that when a criminal has fled from justice, the government to which he flies, is bound either to punish him according to his crime, or force him to leave the country, or deliver him up. This he lays down in broad terms, without distinction as to the magnitude of the crime. Yet he confesses, that for some ages past, the right of demanding fugitive delinquents, has not been insisted on, in most parts of Europe, "except in crimes against the state, or those of a very heinous nature. As for lesser faults they are connived at, on both sides, unless it is otherwise agreed on by some particular treaty." Grot. Book. 2, ch. 20, sect. 3, 4, 5, 6. Burlamaqui follows the opinion of Grotius, *verbatim.* He adds, however, that Puffendorff is of different sentiments, "who pretends, that if we are obliged to deliver up a criminal, who takes shelter among us, it is rather in virtue of some treaty, than in consequence of a common and indispensable obligation." 2 Bur. part 4, sect. 23, 24, 25, 26, 27, 28. The opinion of Grotius, is adopted also by Heineccius, in his *prælect in Grot.* Vattel seems to have directed his attention principally to the case of sovereigns whose subjects have committed crimes within the dominions of others. And he is of opinion, that the offenders should either be punished at home, or delivered up. He does say, however, in general, "that the practice of delivering up, is pretty generally observed, with respect to great crime, which are equally contrary to the laws and safety of all nations," and that "assassins, incendiaries, and robbers, are seized every where, at the desire of the sovereign in whose territories the crime was committed, and delivered up to justice. Vatt. Book 2, Ch. 6. sect. 71 to 77. These are the opinions in support of the absolute and positive duty to deliver up the offender, upon the demand of the sovereign in whose territory the crime was committed. But we shall find, that it is a point on which all nations have not agreed. There are great names on both sides.[35] We have seen that Puffendorff, as quoted by Burlamaqui, founds the right of demanding a delivery of the offender, on treaty. Martens is of opinion, that a sovereign may punish foreigners, whether they commit a crime in his dominions, or fly to them, having committed a crime in the dominions of another; "but

[35] "Aeltere Publicisten haben öfters eine solche Verbindlichkeit behauptet, z. b. Groot, Vattel. Aber die neuere Doctrin ist überwiegend dagegen, wie die Praxis." HEFFTER, §63 n. See WHEATON, Dana's 8th ed., §115.

in neither case is he perfectly obliged to send them for punishment to their own country, nor to the place where the crime was committed, not even supposing them to have been condemned before their escape." He adds, however, that the general good seems to require, that those who attack immediately the safety of the state, should not go unpunished; and accordingly, in case of requisition, no sovereign refuses directly, to take cognizance of such a crime." Marten's Book 2, ch. 3, sect. 22, pa. 107, Philadelphia Ed. Lord Coke in his 3 Inst. pa. 180, is strong and positive against delivering up. "It is holden, (says he,) and so it hath been rendered, that divided kingdoms under several kings, in league one with another, are sanctuaries for servants, or subjects, flying for safety from one kingdom to another, and upon demand made by them, are not, by the laws and liberties of kingdoms, to be delivered; and this, (some hold,) is grounded upon the law in Deuteronomy, *non trades servum domino suo, qui ad te confugerit.*" Coke cites no case in which the point had been adjudged, but he mentions three memorable instances which show the opinions and practice of the sovereigns of that day. Queen Elizabeth, in the 34th year of her reign, demanded of the French King, (the great Henry 4th,) Morgan, and others, of her subjects, who had committed treason against her. The answer of the King was, "that if these persons had machinated any thing against the Queen, in France, he could lawfully proceed against them; but, if the offence was committed in England, he had no right to take cognizance of it. That all kingdoms were free to fugitives, and it was the duty of Kings, to defend, every one the liberties of his own kingdom, and that Elizabeth herself, had, not long before, received into her kingdom, Montgomery, the Prince of Conde, and other Frenchmen, &c. &c." And so, says Lord Coke, the matter rested. The second instance, was the demand made by Henry 8th of England, of the King of France, to deliver up to him the Cardinal Pool, being his subject and attainted of treason. This demand was not complied with, though it must have been well considered, since Henry had a treatise written in support of his claim. The third was the case of the Earl of Suffolk, attainted of high treason by parliament, and demanded by Henry 7th of England, of Ferdinand, King of Spain. Ferdinand refused to deliver him, but was afterwards induced to do so, in consequence of the promise of Henry, not to put the Earl of Suffolk to death. This promise was basely violated by Henry, who affecting to consider it as only personal, commanded his son Henry 8th, to execute the Earl after his decease, who as basely carried this command into effect in the 5th year of his reign. These are the cases mentioned by Lord Coke, to which he might have added that of Perkin Warbeck, an impostor, who contended with Henry the 7th for the throne of England, and having fled to Scotland, was protected by the King of that country, against Henry, who demanded him. In opposition to the opinion of

Lord Coke, has been cited a treatise by Mr. Wynne, entitled "Eunomus," Dialogue 3, sect. 67, page 317. In this treatise, the author makes very free with the judge's opinion, he remarks, that Coke says, "it is holden, and so it hath been resolved," but neither tells us when nor where it was resolved, and that his examples from history are far from proving the point. Although Lord Coke was as great a common lawyer as England ever produced, yet certainly he was not equally profound in his knowledge of equity, or of the law of nations. Perhaps, indeed, his attachment to the common law, gave him a prejudice against all others. Yet, when he says, a matter has been resolved, I should think he might be relied on; for he certainly was not apt to speak without book. It may be remarked, by the bye, that Mr. Wynne does not seem to have been in all respects master of the law of nations. For, in his argument against Lord Coke's opinion, we find the following passage: "If a criminal flies from his own to another state, for refuge, his own cannot seize him there, by violence. The case, in this respect, is much the same, though stronger than that of pursuing an enemy's ship, under the protection of a neutral port. In both cases you are to apply to the justice of the country, if that is refused, you may resort to war, at your option." This would be reckoned strange doctrine, at the present day. The Marquis of Beccaria gives no direct opinion as to the right of a sovereign to demand the delivery of the fugitive, but from the whole scope and spirit of his thoughts it is plainly to be seen that he was against it. Beccaria, ch. 35. pa. 134. Ward, in his treatise on the law of nations seems to rest the matter on treaties or conventions.

I will now take notice of what may be called adjudged cases, and they are but few. Col. Lundy's Case, in the 1st year of William & Mary, is in 2 Vent. 314. Col. Lundy committed a capital offence in Ireland, and fled to Scotland, where he was arrested and sent to England. The judges were consulted, and all agreed, that he might be sent to Ireland for trial. The King v. Kimberley, is reported in 2 Str. 848, 1 Barnard. K. B. 225, and Fitzg. 111. Kimberley committed a capital felony in Ireland, and having fled to England, was arrested on a warrant of a justice of the peace, and on a *habeas corpus*, the Court of King's Bench refused to bail him. He was sent to Ireland by virtue of a warrant from the secretary of state. In the case of the East India Company v. Campbell, 6 Vez. 246, it was said by the Court of Exchequer, that one may be sent from England to Calcutta, to be tried for an offence committed there. The principle of these cases is plain, and undeniable. The territories where the crime was committed, and to which the criminal fled, were parts of the same empire, and under one common sovereign. The King of England could have no privilege against the king of Ireland; being one and the same person. Calcutta is part of the British empire. The common good of the whole, forbids an asylum, in one part for the

crimes committed in another. So, prior to the American revolution, a criminal who fled from one colony, found no protection in another. He was arrested wherever found, and sent for trial to the place where the offence was committed. On this principle the Court of Cassation, in Paris, decided O'Done's Case, in the year 1808. 2 Hall's Law Journ. 112. O'Done was convicted of robbery in Genoa, and sentenced to seven years labour in irons, while Genoa was an independent government. He fled to France, enlisted in the army, and there did meritorious service. Afterwards, Genoa became united to the French empire, and it was made a question whether O'Done was entitled to protection in France. It was held that he was not, that the right of asylum was founded, not on the privilege of the fugitive, but of the sovereign to whom he fled, and therefore ceased on the union of Genoa with France. But there are two other judicial cases in England, in which it is supposed, that the right of demanding a fugitive from a foreign country, is recognised as the law of nations. The case of the King v. Hutchinson, is very shortly reported in 3 Keble, 785, 29th year of Charles 2d. The following is the whole of the report. "On a *habeas corpus* it appeared that the defendant was committed to Newgate, on suspicion of murder in Portugal, which, by Mr. Attorney, being a fact out of the King's dominions, is not triable by commission upon 35 Hen. 8. ch. 2, sect. 1, but by a constable and marshal; and the court refused to bail him." Now there is nothing here, like an intent to send the man to Portugal. But Sergeant Corbet, speaking of this case in the King v. Kimberley, cited before, said that Hutchinson was sent to Portugal for trial. What was his authority for this assertion we know not; so that the matter is at least doubtful. But the authority most relied on, is the dictum of Justice Heath, in Mure v. Kay, 4 Taunton, 34, 43, on which Chitty forms his opinion in his treatise on criminal law. 1 Chitty, 16. The Court of Common Pleas gave no opinion on the point in question, in Mure v. Kay, but Heath J. said, "it has generally been understood, that by the comity of nations, the country in which a criminal has been found, has aided the police of the country against whom the crime was committed, in bringing the criminal to punishment. In Lord Loughborough's time the crew of a Dutch ship mastered the vessel and brought her into Deal; and it was a question, whether we could seize them, and send them to Holland. And it was held that we might, and the same has been the law of all civilized nations."[36]

[36] "The law of England upon extradition is extremely modern, and lies in a very short compass:—There are only two English cases in which it was asserted, though even in those cases it was not decided that a power of delivering up a person suspected of crime to a foreign nation demanding his surrender exists at common law. These are East India Company v. Campbell (1 Ve. Sen. 246), and Mure v. Kay (4 Taunt. 34). . . . This faint trace of evidence of any such power existing by the common law has been entirely superseded by subsequent legislation." STEPHEN, History, II, 66.

Having now gone through all the European opinions, and authorities, I will make a few observations on them, before I consider what is far more important, the opinions and authorities in our own country.

That no crime should go unpunished, and that the government which protects a fugitive from justice, becomes the abettor and in some measure the partner of his crime, is a beautiful thing, but attended in practice with many difficulties. If all nations had the same idea of crimes, and of punishments, and if all were equally upright and impartial in the administration of justice, there could be no cause of complaint, if the accused were always sent for trial to the place of his offence, indeed that would be the most proper place, because in general, there the evidence is to be sought. But it is not so. What some consider as a slight offence, is by others deemed worthy of death. In some, an impartial trial may be expected. In others, trial is but a cruel mockery. For these and other reasons, the theory of Grotius has not been adhered to, in practice. He says himself, that for ages, it has not been the custom to demand the delivery of a fugitive except in case of crimes against the state and other heinous offences. And all who have adopted his opinion, mention crimes against the state, as peculiarly those in which an offender should find no protection. Now it must be confessed, that in a mild paternal government, treason is the greatest of crimes. But when government becomes oppressive, the best citizens, with the best intentions, may be implicated in treason; and therefore it is, that the very crime which Grotius denounces as that which should be cut off from all asylum, is precisely the one, to which, at the present day, an asylum is always granted by liberal and enlightened nations. . . .

[In an omitted part of the opinion the court commented further upon the difficulties involved in recognition of a general right to extradition and reviewed briefly the practice of the United States.]

[Referring to Matter of Washburn, 4 Johns. Ch. 106, the court continued:] I am sensible of the weight of an opinion delivered by Chancellor Kent, for whose character, both as a private citizen, and an eminent Judge, I entertain the very highest respect. No doubt he was strongly impressed with the convenience of that comity between New-York and Canada, which is the basis of the practice of nations of Europe, and the very great inconvenience which would result from the want of it. Whether the state of New-York, has tacitly consented to a mutual delivering up of criminals by her officers and those of Canada, I know not, nor is it my business to decide, whether she has a right to enter into such an arrangement. But if the principles laid down in Washburn's case, are to be applied to persons who fly from Europe, and take shelter in the United States, I cannot assent to them. The American government has never recognised the principles of delivering up fugitives, except when bound by treaty. By our consular convention with France, we

agree to give up seamen, &c. who deserted from French vessels, and by our treaty, with England, (Jay's treaty,) we agreed to give up persons charged with murder or forgery. Both these treaties have expired, and in our subsequent treaties with England, the article respecting delivering up has been omitted. I do not consider the treaty with England as merely declaratory, and, of course, I cannot agree, that on the expiration of that treaty, we were open to a demand of all fugitives from the British dominions, whatever might be their crimes. On the contrary, I suppose that the treaty was intended to give to each nation a right that did not before exist, and that on its expiration, that right ceased, on both sides. . . . I grant, that when the executive has been in the habit of delivering up fugitives, or is obliged by treaty, the magistrates may issue warrants of arrest, of their own accord, (on proper evidence,) in order the more effectually to accomplish the intent of the government, by preventing the escape of the criminal. On this principle, we arrest offenders, who have fled from one of the United States to another, even before a demand has been made by the executive of the state from which they fled. But what right is there to arrest, in cases where the government has declared that it will not deliver up? For what purpose is such an arrest? Can any judgment be given, by which the executive can be compelled to surrender a fugitive? Most certainly not. If the President of the United States should cause a person to be imprisoned for the purpose of delivering him to a foreign power, the Judges might issue a *habeas corpus*, and inquire into the legality of the proceeding. But they have no authority whatever, to make such delivery themselves, or to command the executive to make it. If these principles be just, it follows, that under existing circumstances, no magistrate in Pennsylvania has a right to cause a person to be arrested, in order to afford an opportunity to the President of the United States to deliver him to a foreign government. But what if the executive should hereafter be of opinion, in the case of some enormous offender, that it had a right, and was bound in duty to surrender him, and should make application to a magistrate for a warrant of arrest? That would be a case quite different from the one before me, and I should think it imprudent, at the present moment, to give an opinion on it. Every nation has an undoubted right, to surrender fugitives from other states. No man has a right to say, I will force myself into your territory, and you shall protect me. In the case supposed, the question would be, whether under the existing constitution and laws, the President has a right to act for the nation, or whether he must wait, until congress think proper to legislate on the subject. The opinion of the executive hitherto has been, that it has no power to act. Should it ever depart from that opinion, it will be for the judges to decide on the case as it shall then stand. Neither do I give any opinion, whether the executive of the State of Pennsylvania has power to cause a fugitive

criminal to be arrested, for the purpose of delivering him up. But confining myself to the case before me, in which the arrest was made, at the request of a private person, I am of opinion, that there is no law to support it, and therefore, the prisoner is entitled to his discharge.

Prisoner discharged.[37]

Case of Arguelles

Wheaton, Elements of International Law, Dana's Eighth Edition, Note 73, page 183.

The question still remains, whether, in the absence of treaties and statutes, the executive can surrender a fugitive criminal. The general tone of the judicial decisions and of political debate has been adverse to such a right; yet it was exercised in a remarkable case in 1864,—that of Arguelles. This person, being governor of a district in Cuba in which a cargo of Africans had been landed from a slave-ship and set free by the authorities, had reported officially to the government that one hundred and forty-one of them had died of small-pox; but it was discovered that he had sold them into slavery while in his charge, for large sums, with the aid of forged papers, and had escaped to New York. There was no treaty of extradition between Spain and the United States; but the Captain-General of Cuba and the Spanish Minister laid the matter before the Secretary of State, and requested the arrest and surrender of Arguelles, as an act of favor and comity, not only on account of the enormity of his offence, but because his presence in Cuba was found necessary to the liberation of the men he had sold into slavery. Mr. Seward, with the sanction of the President, ordered the arrest, as a purely executive act; and Arguelles was delivered to a special agent of

[37] See also Ex parte Dos Santos, 7 Fed. Cas. 949; Spanish Convicts' Case, Forsyth, 341; Story, J., in United States v. Davis, 2 Sumn. 482, 486; Forsyth, 369 n.; Moore, Extradition, I, 13; Stephen, in 2 Jurid. Soc. Papers 67, 76. "The result of the whole consideration of this subject is, that the Extradition of criminals is a matter of Comity, not of Right, except in the cases of special convention." Phillimore, 3d. ed., I, 522.

"I think, from the whole argument of the bench in the case of Holmes vs. Jennison, 14 Peters, 540, we may consider it as law: 1st. That no State can, without the consent of Congress, enter into any agreement or compact, express or implied, to deliver up fugitives from justice from a foreign State who may be found within its limits; 2d. That, according to the practice of the executive department, . . . the President is not considered as authorized, in the absence of any express provision by treaty, to order the delivering up of fugitives from justice." Attorney-General Legare, in Dewit's Case, 3 Op. Atty. Gen. 661.

"It is the established rule of the United States, neither to grant, nor to ask for, extradition of criminals, as between us and any foreign government, unless in cases for which stipulation is made by express convention." Attorney-General Cushing, in Hamilton's Case, 6 Op. Atty. Gen. 431. See also Wing's Case, 6 *ibid.* 85; Moore, Extradition, I, 40, 41, 50.

the Spanish Government, and by him taken to Cuba. The Senate, on the 28th May, 1864, adopted a resolution requesting the President to inform them whether such a surrender had been made, and, if so, under what authority of law or treaty it was done. The President transmitted a reply, covering a report from the Secretary of State, and the documents showing the guilt of Arguelles, and the request of the Spanish Government. Mr. Seward, in his report, says: "There being no treaty of extradition between the United States and Spain, or any act of Congress directing how fugitives from justice in Spanish dominions shall be delivered up, the extradition in this case is understood by this department to have been made in virtue of the law of nations and the Constitution of the United States. Although there is a conflict of authorities concerning the expediency of exercising comity towards a foreign government, by surrendering at its request one of its own subjects charged with the commission of crime within its territory, and although it may be conceded that there is no national obligation to make such a surrender upon a demand therefor, unless it is acknowledged by treaty or by statute law, yet a nation is never bound to furnish asylum to dangerous criminals, who are offenders against the human race; and it is believed that if in any case the comity could with propriety be practised, the one which is understood to have called forth the resolution furnished a just occasion for its exercise." U. S. Dip. Corr. 1864, Part II. 60–74: Cong. Globe 1864.

A resolution introduced into the House of Representatives, condemning this act, as a violation of the Constitution and in derogation of the right of asylum, was rejected by a large majority, and the subject referred to a committee; but it was followed by no action of Congress. An indictment was found in New York against the officer who made the arrest under the Secretary's warrant, on a charge of kidnapping, but the case has not been adjudicated; and, as no petition for *habeas corpus* was filed in behalf of Arguelles before his removal from the country, the legality of the act of the Secretary has not been judicially passed upon.[38]

TREATY BETWEEN GREAT BRITAIN AND THE UNITED STATES

Article 27. London, November 19, 1794.

8 *United States Statutes at Large*, 116, 129.

Art. 27. It is further agreed, that his Majesty and the United States, on mutual requisitions, by them respectively, or by their respective ministers or officers authorized to make the same, will deliver up to justice all persons, who, being charged with murder or forgery, committed within the jurisdiction of either, shall seek an asylum within any of the

[38] See MOORE, Extradition, I, 21, 36.

countries of the other, provided that this shall only be done on such evidence of criminality, as, according to the laws of the place, where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offence had there been committed. The expence of such apprehension and delivery shall be borne and defrayed, by those who make the requisition and receive the fugitive.[39]

Treaty between Great Britain and the United States

Article 10. Washington, August 9, 1842.

8 *United States Statutes at Large*, 572, 576.

Art. 10. It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other: provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed: and the respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper Executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition, and receives the fugitive.

[39] "The treaty with Great Britain of 1794 was the first concluded by the United States with any foreign power, that contained a provision for the surrender of criminals." Moore, Extradition, I, 89.

CONVENTION BETWEEN GREAT BRITAIN AND THE UNITED STATES

Articles 1, 4, 5, 6, and 7. Washington, July 12, 1889.

26 *United States Statutes at Large* 1508.

Preamble. Whereas by the Tenth Article of the Treaty concluded between the United States of America and Her Britannic Majesty on the ninth day of August, 1842, provision is made for the extradition of persons charged with certain crimes;

And Whereas it is now desired by the High Contracting Parties that the provisions of the said article should embrace certain crimes not therein specified, and should extend to fugitives convicted of the crimes specified in the said Article and in this Convention; . . .

Art. 1. The provisions of the said Tenth Article are hereby made applicable to the following additional crimes:

1. Manslaughter, when voluntary.

2. Counterfeiting or altering money; uttering or bringing into circulation counterfeit or altered money.

3. Embezzlement; larceny; receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained.

4. Fraud by bailee, banker, agent, factor, trustee, or director or member or officer of any company, made criminal by the laws of both countries.

5. Perjury, or subornation of perjury.

6. Rape; abduction; child-stealing; kidnapping.

7. Burglary; house-breaking or shop-breaking.

8. Piracy by the law of nations.

9. Revolt, or conspiracy to revolt by two or more persons on board a ship on the high seas, against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.

10. Crimes and offences against the laws of both countries for the suppression of slavery and slave-trading.

Extradition is also to take place for participation in any of the crimes mentioned in this Convention or in the aforesaid Tenth Article, provided such participation be punishable by the laws of both countries. . . .

[Art. 2, dealing with offenses of a political character, is reproduced *infra*, 763.]

[Art. 3, dealing with the trial of an extradited fugitive for an offence other than that for which he was surrendered, is reproduced *infra*, 744.]

Art. 4. All articles seized which were in the possession of the person to be surrendered at the time of his apprehension, whether being the

proceeds of the crime or offence charged, or being material as evidence in making proof of the crime or offence, shall, so far as practicable, and if the competent authority of the State applied to for the extradition has ordered the delivery thereof, be given up when the extradition takes place. Nevertheless, the rights of third parties with regard to the articles aforesaid shall be duly respected.

Art. 5. If the individual claimed by one of the two High Contracting Parties, in pursuance of the present Convention, should also be claimed by one or several other Powers on account of crimes or offences committed within their respective jurisdictions, his extradition shall be granted to that State whose demand is first received.

The provisions of this Article, and also of Articles II to IV, inclusive, of the present Convention, shall apply to surrender for offences specified in the aforesaid Tenth Article, as well as to surrender for offences specified in this Convention.

Art 6. The extradition of fugitives under the provisions of this Convention and of the said Tenth Article shall be carried out in the United States and in Her Majesty's dominions, respectively, in conformity with the laws regulating extradition for the time being in force in the surrendering States.

Art. 7. The provisions of the said Tenth Article and of this Convention shall apply to persons convicted of the crimes therein respectively named and specified, whose sentence therefor shall not have been executed.

In case of a fugitive criminal alleged to have been convicted of the crime of which his surrender is asked, a copy of the record of the conviction and of the sentence of the court before which such conviction took place, duly authenticated, shall be produced, together with the evidence proving that the prisoner is the person to whom such sentence refers.

Treaty between Great Britain and the United States

Washington, December 13, 1900.

32 *United States Statutes at Large* 1864.

Art. 1. The following crimes are added to the list of crimes numbered 1 to 10 in the first Article of the said Convention of July 12, 1889, on account of which extradition may be granted, that is to say:

11. Obtaining money, valuable securities or other property by false pretenses.

12. Wilful and unlawful destruction or obstruction of railroads which endangers human life.

13. Procuring abortion.

Art. 2. The present Convention shall be considered as an integral part of the said Extradition Convention of July 12, 1889, and the first Article of the last mentioned Convention shall be read as if the list of crimes therein contained had originally comprised the additional crimes specified and numbered 11 to 13 in the first Article of the present Convention.

CONVENTION BETWEEN GREAT BRITAIN AND THE UNITED STATES

London, April 12, 1905.

34 *United States Statutes at Large* 2903.

Art. 1. The following crimes are added to the list of crimes numbered 1 to 10 in the 1st Article of the said Convention of the 12th July, 1889, and to the list of crimes numbered 11 to 13 in Article 1 of the Supplementary Convention concluded between the United States and Great Britain on the 13th December, 1900, that is to say:

14. Bribery, defined to be the offering, giving or receiving of bribes made criminal by the laws of both countries.

15. Offences, if made criminal by the laws of both countries, against bankruptcy law.

Art. 2. The present Convention shall be considered as an integral part of the said Extradition Conventions of the 12th July, 1889, and the 13th December, 1900, and the 1st Article of the said Convention of the 12th July, 1889, shall be read as if the lists of crimes therein contained had originally comprised the additional crimes specified and numbered 14 and 15 in the 1st Article of the present Convention.

CONVENTION BETWEEN GREAT BRITAIN AND THE UNITED STATES

London, May 15, 1922.

42 *United States Statutes at Large* 2224.

Art. 1. The following crimes are, subject to the provision contained in Article 2 hereof, added to the list of crimes numbered 1 to 10 in the 1st Article of the said Convention of the 12th July, 1889, and to the list of crimes numbered 11 to 13 in Article 1 of the Supplementary Convention concluded between the United States and Great Britain on the 13th December, 1900, and to the list of crimes numbered 14 to 15 in Article 1 of the Supplementary Convention concluded between the United States and Great Britain on the 12th April, 1905, that is to say:—

16. Wilful desertion or wilful non-support of minor or dependent children.

Art. 2. The operation of the present Convention is confined to cases in which the offences mentioned in the preceding Article having been

committed in the United States or in the Dominion of Canada, the person charged with the offence is found in the Dominion of Canada or in the United States respectively.

Art. 3. The present Convention shall be considered as an integral part of the said Extradition Conventions of the 12th July, 1889, and the 13th December, 1900, and the 12th April, 1905, and the 1st Article of the said Convention of the 12th July, 1889, shall be read as if the lists of crimes therein contained had originally comprised the additional crimes specified and numbered 16 in the 1st Article of the present Convention, subject to the provision contained in Article 2.[40]

SECTION 3. SCOPE OF EXTRADITION UNDER TREATIES

TWISS, THE LAW OF NATIONS

Second Edition, page 411, section 240. 1892.

Every Treaty of Extradition takes effect in regard to crimes committed before it was concluded, unless its operation shall be expressly restricted, but with regard to the character of any crime alleged as warranting the demand for the surrender of a Fugitive from Justice, all Treaties of Extradition are *stricti juris*, being penal in their character and in exception to the Common Law of Nations. Their operation accordingly may not be extended beyond the letter of their stipulations.

[40] See also the following extradition conventions concluded between France and the United States: Nov. 9, 1843, 8 U. S. Stat. L. 580; Feb. 24, 1845, 8 *ibid.* 617; Feb. 10, 1858, 11 *ibid.* 741; Jan. 6, 1909, 37 *ibid.* 1526; Jan. 15, 1929, 70 Congressional Record 4773; between Germany, or states of the earlier Germanic Confederation, and the United States: June 16, 1852, 10 U. S. Stat. L. 964; Feb. 22, 1868, art. 3, 15 *ibid.* 615, 616; between Italy and the United States: March 23, 1868, 15 U. S. Stat. L. 629; Jan. 21, 1869, 16 *ibid.* 767; June 11, 1884, 24 *ibid.* 1001; between Japan and the United States: April 29, 1886, 24 U. S. Stat. L. 1015; May 17, 1906, 34 *ibid.* 2951; between Mexico and the United States: Dec. 11, 1861, 12 U. S. Stat. L. 1199; Feb. 22, 1899, 31 *ibid.* 1818; June 25, 1909, 1 U. S. Treaties 1193; Dec. 23, 1925, 44 U. S. Stat. L. 2409.

Statutory enactments giving effect to extradition conventions and providing extradition procedure are embodied in Canada in the Extradition Act, 1 Can. Rev. Stat., 1927, c. 37; in Great Britain in the Extradition Acts, 1870 to 1906, 33 & 34 Vict. c. 52, 36 & 37 Vict. c. 60, 58 & 59 Vict. c. 33, 6 Edw. VII. c. 15; and in the United States in U. S. Rev. Stat., §§5270–5280, 18 U. S. Code Ann. §§651–668.

The Canadian Extradition Act provides also for the surrender without reference to treaty of fugitives charged with any of an appended list of twenty-two offences. 1 Can. Rev. Stat., 1927, c. 37, §§35–40. See also the Austrian Penal Code, 1852, §39, *supra*, 691, and the French Law of Extradition, 1927, 27 Duvergier N. S. 129. *Cf.* MOORE, Extradition, I, 80.

Between states whose systems of penal law and procedure have little in common, extradition conventions may be impracticable for obvious reasons. See the proposal of the Chinese Minister, March 18, 1887, and the reply of the United States Department of State. U. S. For. Rel. (1888) Pt. I, 366, 370; *ibid.*, 372, 375.

MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION

Volume I, page 113, section 97. 1891.

While admitting that extradition treaties, in the absence of an express restriction, apply to offences committed prior to the date of the taking effect of such treaties, Sir Travers Twiss holds that with regard to the character of any crime alleged as warranting a demand for surrender, they are *stricti juris*, "being penal in their character and in exception to the common law of nations. Their operation accordingly may not be extended beyond the letter of their stipulations." This statement appears to go further than the law and practice of nations now warrant. Extradition treaties can scarcely be regarded as penal laws, or as constituting an exception to the common law of nations as at present understood and administered. While it may be true that the surrender of fugitives is not an absolute duty, the performance of which may be demanded in the absence of a treaty, yet there is a moral duty on the subject, of which the multitude of extradition treaties now in existence is an ample recognition. Moreover, it is held to be always within the discretion of a government to surrender fugitives from justice, provided that its authorities possess the necessary powers in respect to arrest and rendition under its laws.

CASE OF THOMAS ALLSOP

Great Britain. Joint Opinion of the Queen's Advocate, Sir J. D. Harding, and the Attorney and Solicitor General, Sir Fitz-Roy Kelly and Sir Hugh McC. Cairns. 1858.

Forsyth, Cases and Opinions on Constitutional Law and Various Points of English Jurisprudence, page 368.

I am directed by Mr. Secretary Walpole to request that you will submit the following statement to the Attorney and Solicitor General and the Queen's Advocate, *viz.*:—

A warrant has been issued by a police magistrate for the apprehension of Thomas Allsop, a British subject, upon the charge of being accessory before the fact, in this country, to the murder, by Orsini and others, Italians, of a Frenchman in Paris. Allsop has escaped to the United States of America; and it is suggested that his extradition may be demanded of the American Government under the treaty between Her Majesty and the United States made in the year 1842.[41]

And that you will move the Attorney and Solicitor General and the Queen's Advocate to refer to the treaty in question, and to advise whether

[41] Art. 10, *supra*, 708.

Allsop is a person charged with the crime of murder committed within the jurisdiction of the British Crown within the meaning of the convention, whose extradition may be properly demanded.

Opinion.—We are of opinion that Allsop is not a person charged with the crime of murder committed within the jurisdiction of the British Crown, within the meaning of the treaty of 1842, and that his extradition cannot properly be demanded of the United States under that treaty.[42]

[42] *Quaere:* what should be the decision in such a case under the British Accessories Act of 1861, 24 & 25 Vict. c. 94, §1, the Offences Against the Person Act of 1861, 24 & 25 Vict. c. 100, §9, and the Extradition Convention of 1889, art. 1, last paragraph, *supra*, 709? Consider also the effect of the Offences Against the Person Act, §4 (see Queen v. Most, 7 Q. B. D. 244), and the Extradition Convention of 1889, *supra*, 709.

"It has been announced by the Department of State that an offence committed in a country where extraterritorial jurisdiction is exercised by foreign powers is not committed within the jurisdiction of such powers in the sense of the extradition treaties, so as to give the government of the country of which the offender is a citizen or subject the right to demand his surrender from the territory of the United States. This doctrine was laid down in the case of a British subject who committed the crime of embezzlement in Japan and took refuge in the State of California." Moore, Extradition, I, 139. See U. S. For. Rel. (1875) 821. And see Case of Jackson, U. S. For. Rel. (1874) 301, 338, 347.

"Merchant vessels on the high seas and ships of war everywhere are constructively regarded as a part of the territory of the nation to which they belong, and consequently criminal offences committed upon them are considered as having been committed within the jurisdiction of such nation. This question was first decided by the government of the United States in the case of Robbins, under the treaty with Great Britain of 1794." Moore, *op. cit.*, I, 135. See "Proceedings in the Case of Jonathan Robbins," Wharton St. Tr. 392.

"In consequence of the interpretation of the term 'jurisdiction' as meaning territorial jurisdiction, the question has been much controverted whether, where a treaty provides for extradition for piracy simply, and not expressly for piracy by the law of nations, the surrender of a fugitive may be demanded except for piracy under municipal statute. This question has never been directly determined in the United States. There have been only three cases of extradition from the United States in which the offence of piracy was involved. These cases have all arisen under the treaty with Great Britain of 1842, which specifies 'piracy' simply, but have only involved offences made piracy by municipal statute." Moore, *op. cit.*, I, 141. See In re Tivnan, 5 B. & S. 645. *Cf.* Convention of 1889, art. 1, no. 8, *supra*, 709.

On the question who are fugitives within the meaning of the common treaty provision for the extradition of offenders who "shall seek an asylum, or shall be found, within the territories of the other," see David's Case, 8 Op. Atty. Gen. 306 (accused left demanding state before crime discovered); In re Ezeta, 62 Fed. 964 (accused detained and brought to asylum state on warship on which he sought asylum); Queen v. Nillins, 53 L. J. M. C. 157 (accused only constructively present in demanding state where crime was committed); King v. Godfrey [1923] 1 K. B. 24 (*ditto*). *Cf.* the rule in interstate rendition in the United States under U. S. Const., IV, ii, 2, and the Act of Congress giving effect thereto. State v. Hall, 115 N. C. 811; Hyatt v. Corkran, 188 U. S. 691; Keller v. Butler, 246 N. Y. 249.

Forsyth, Cases and Opinions on Constitutional Law and Various Points of English Jurisprudence

Notes to Chapter X, page 373. 1869.

In a case submitted to the Queen's Advocate (Dr. Twiss) and myself, in 1867, on the question whether a British subject who had committed an offence (alleged to come within the scope of the extradition treaty between Her Majesty and the United States in 1842, and the statute 6 & 7 Vict. c. 76) on board an American ship on the high seas, and who had landed in Calcutta, ought to be given up on a demand of the consul of the United States, we were of opinion that, as a British court of justice would take cognizance of the offence by reason of the nationality of the offender, the case was not within the scope of the treaty or the Act. See Statute 30 & 31 Vict. c. 124, s. 11, which provides that "if any British subject commits any crime or offence on board any British ship, or on board any foreign ship to which he does not belong, any court of justice in Her Majesty's dominions which would have had cognizance of such a crime or offence, if committed on board a British ship within the limits of the ordinary jurisdiction of such court, shall have jurisdiction to hear and determine the case as if the said crime or offence had been committed as last aforesaid."

Case of Carl Vogt

United States. Opinion of Attorney-General Williams. 1873.

14 *Opinions of Attorneys General* 281.

[The following opinion was in response to a request from the Acting Secretary of State. Part of the opinion is omitted.]

I have the honor to acknowledge the receipt of your communication of the 7th instant, in which you submit for my official opinion the following case and question:

"Carl Vogt, a Prussian citizen, charged with the commission of the crimes of murder, arson, and robbery, committed in Brussels, in the kingdom of Belgium, is found a fugitive in the United States. Can the German government, under the provisions of the treaty for the extradition of criminals concluded between the United States and Prussia and other states, June 16, 1852, rightfully demand the surrender by this Government of the fugitive Vogt, in order that he may be tried and punished in Prussia for the offense which he is alleged to have committed in Belgium?"

Those parts of the preamble and treaty applicable to this question are as follows:

Preamble. "Whereas it is found expedient for the better administration of justice and the prevention of crime within the territories and jurisdiction of the parties, respectively, that persons committing certain heinous crimes, being fugitives from justice, should, under certain circumstances, reciprocally be delivered up, and also to enumerate such crimes explicitly; and whereas the laws and constitution of Prussia and of the other German states, parties to this convention, forbid them to surrender their own citizens to a foreign jurisdiction, the Government of the United States, with a view of making the convention strictly reciprocal, shall be held equally free from any obligation to surrender citizens of the United States."

Article 1. "It is agreed that the United States and Prussia, and the other states of the Germanic Confederation included in, or which may hereafter accede to, this convention, shall, upon mutual requisitions by them or their ministers, officers, or authorities, respectively made, deliver up to justice all parties who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged papers, or the fabrication or circulation of counterfeit money, whether coin or paper money, or the embezzlement of public moneys, committed within the jurisdiction of either party, shall seek an asylum or shall be found within the territories of the other."

You state that "the surrender of Vogt is claimed by the German government on the ground that he is a Prussian and a subject of the Emperor of Germany; that by the law of Prussia at the date of the conclusion of the extradition treaty between the United States and Prussia and other German states, 16th of June, 1852, a Prussian subject who committed certain crimes (among which those with which Vogt is charged are included) within the territory of another nation and beyond the territories of Prussia, was, nevertheless, subject to be tried and punished in Prussia. This is also now the law of the German Empire."

The following appears to be the only point in controversy; Whether or not, according to the true intent and meaning of said treaty, the crimes committed by Vogt in the kingdom of Belgium were committed within the jurisdiction of Germany.

To affirm that the jurisdiction of Germany, by virtue of its own laws for the punishment of crimes, extends over the territory of Belgium, is equivalent to holding that the same jurisdiction extends to France, Great Britain, and the United States, and indeed to every nation and country of the world. Manifestly, the words "committed within the jurisdiction" imply that the crimes named in the treaty may be committed without the jurisdiction of the parties thereto. But if the crimes committed in Belgium were committed within the jurisdiction of Germany, then it follows, as Belgium is as independent of Germany as any

other nation, that it is impossible for crimes to be committed outside the jurisdiction of the German Empire.

I think, too, that the treaty clearly contemplates that the fugitive claimed must be a person escaping from the jurisdiction of the party making the claim to the jurisdiction of the other party, recognizing two distinct and independent jurisdictions. But if the claim of Germany is correct in this case, Vogt is as much within her jurisdiction now as he was when the crimes charged upon him were committed, for the laws under which she claims have as much force within the United States as they have in Belgium. The laws of Germany, which provide for the punishment there of crimes committed elsewhere by her subjects, imply, *ex necessitate*, as a condition for the exercise of that power, that such guilty subjects must come or be conveyed from a foreign place or jurisdiction where the crimes are committed to some place where they can be taken or received and held by German authority. Germany has an unquestioned right to punish her subjects, if she chooses, for crimes committed in Belgium or the United States, but it would not be proper, therefore, to say that Belgium and the United States are within her jurisdiction; but it would be proper to say that she has made provisions to punish her subjects for crimes committed without as well as within her jurisdiction.

I am quite clear that the words "committed within the jurisdiction," as used in the treaty, do not refer to the personal liabilities of the criminal, but to *locality*. The *locus delicti*, the *place* where the crime is committed, must be within the jurisdiction of the party demanding the fugitive.

Stress is put upon the supposed difference in the meaning of the words "territory" and "jurisdiction," and it is argued that the latter is more comprehensive than the former term. This is not necessarily, but probably, so; but it does not follow that Belgium is within the jurisdiction of Germany. All nations have jurisdiction beyond their physical boundaries. Vessels upon the high seas and ships of war everywhere are within the jurisdiction of the nations to which they belong. Limited jurisdiction by one nation upon the territory of another is sometimes ceded by treaty, as appears from the treaties between the United States, Turkey, China, Siam, and other powers. Constructive jurisdiction may possibly exist in special cases, arising in barbarous countries or uninhabited places; so that effect can be given to the word "jurisdiction," as meaning more than territory, without holding that Germany has jurisdiction over crimes committed in Paris, London, or Washington.

Local claims or definitions cannot be allowed to govern this case. When nations discuss and treat of their respective jurisdictions, they do not refer to those duties and responsibilities which a Government imposes upon its own citizens, but they contemplate those portions of the earth and places upon its surface where they have respectively sovereign power, or, in other words, the right of government.

To recognize the claim of Germany in this case would establish a precedent that might lead to serious international complications. We have no extradition treaty with Belgium, but we have with Great Britain, like that under consideration. Suppose Vogt had committed the crimes with which he is charged in England, instead of Belgium, and the British authorities contemporaneously with Germany had demanded his extradition on that account; could the United States deny that the crimes were committed "within the jurisdiction" of Great Britain, and not "within the jurisdiction" of Germany? Could not Great Britain justly complain if, after the murder of her citizens and the destruction of her property by the fugitive, her claim to him for the purposes of justice should be denied by the United States, and he should be turned over for trial to Germany, where there is no evidence of his guilt, and where his friends and sympathizers, if he has any, may be supposed to be?

Law-writers generally define the jurisdiction of a court to be the power to hear and determine a cause, and it is argued that as by the laws of Germany her courts have power to hear and determine the case of Vogt, therefore his crimes were committed within her jurisdiction. One conclusive answer to this view is, that the word "jurisdiction" in the treaty is not used with reference to governmental power over the subjects of judicial procedure, but with reference to the territory and places in which that power may be exercised. Again, the courts of Germany have never had the power to hear and determine the case of Vogt. Jurisdiction over a subject is one thing; that is conferred by law. Jurisdiction over the person is another; that is a fact which has never existed in this case. Whether the courts of Germany will or not hereafter acquire jurisdiction in Vogt's case depends upon facts hereafter to arise.

Germany and the United States intended that the convention in question should be "strictly reciprocal;" but if Germany can rightfully demand the delivery up by the United States of her citizens or subjects for crimes committed in Belgium, the convention is not reciprocal; for the United States cannot demand of Germany the delivery up of their citizens for crimes committed in Belgium. There is not a single crime enumerated in the treaty for the commission of which outside of this country the United States can claim one of their citizens from Germany; and there is not only no probability that Congress will ever pass an act to that end, but its constitutional power to do so is doubted.

Reference has been made to the act of Congress of August 18, 1856, which declares that perjury committed before a secretary of legation or consular officer of the United States in a foreign country may be prosecuted and punished in this country as though committed here, and this, it is said, shows that the United States as well as Germany claim an extra-territorial jurisdiction. There seems to be no point in this reference. According to international law, the domicile of an ambassa-

dor, minister extraordinary, or consul is a part of the territory he represents, for many purposes; but independent of this, the question here is not whether a sovereign country may not punish persons coming into its hands, for crimes committed in another sovereignty, but the question here is whether a crime committed upon the admitted territory, and within the exclusive government, of an independent nation, is committed within the jurisdiction of another nation. To facilitate the punishment of crime is desirable, but the United States cannot, with dignity and safety, admit that any foreign power can acquire jurisdiction of any kind within their territory by virtue of its local enactments. Objection is made to this construction of the treaty on the ground that it will make the United States an asylum for European criminals. But this objection is not matter of law, nor is it true as matter of fact; and if it was, the United States, as an act of comity, may deliver up a fugitive from justice, or the subject may be regulated by an extradition treaty as comprehensive as the parties thereto see proper to make it; or if it should appear necessary, Congress might possibly interpose by legislation.

To recognize the claim to jurisdiction accompanying the requisition in this case, may open the door to confusion and controversy as to claims of jurisdiction in other respects made under their local laws by foreign governments. The plain and practical rule upon the subject seems to be that the jurisdiction of a nation is commensurate with, and confined to, its actual or constructive territory, excepting changes made by agreement; and to this effect are the authorities. . . .

[In an omitted part of the opinion Attorney-General Williams referred to In re Tivnan, 5 B. & S. 645; Allsop's Case, Forsyth 368, *supra*, 713; In re Stupp, 11 Blatch. 124; Phillimore, I, 432; Wharton, Conflicts, §957; and other authorities.]

Conformably to what is above stated, I make a negative answer to your question.[43]

CHARLTON v. KELLY, SHERIFF OF HUDSON COUNTY, NEW JERSEY

United States. Supreme Court. 1913.

229 *United States Reports* 447.

This is an appeal from a judgment dismissing a petition for a writ of *habeas corpus* and remanding the petitioner to custody under a warrant for his extradition as a fugitive from the justice of the Kingdom of Italy.

The proceedings for the extradition of the appellant were begun upon a complaint duly made by the Italian Vice-Consul, charging him with

[43] *Cf.* In re Stupp, 11 Blatchf. 124. See Attorney-General v. Kwok-a-Sing, 5 P. C. 179.

the commission of a murder in Italy. A warrant was duly issued by the Hon. John A. Blair, one of the judges of New Jersey, qualified to sit as a committing magistrate in such a proceeding, under §5270, Rev. Stat. At the hearing, evidence was produced which satisfied Judge Blair that the appellant was a fugitive from justice and that he was the person whose return to Italy was desired, and that there was probable cause for holding him for trial upon the charge of murder, committed there. He thereupon committed the appellant, to be held until surrendered under a warrant to be issued by the Secretary of State. A transcript of the evidence and of the findings was duly certified as required by §5270, Rev. Stat., and a warrant in due form for his surrender was issued by the Secretary of State. Its execution has, up to this time, been prevented by the *habeas corpus* proceedings in the court below and the pendency of this appeal. . . .

[Part of the statement of the case, the arguments of counsel, and part of the opinion are omitted.]

Mr. Justice Lurton, after making the foregoing statement, delivered the opinion of the court. . . .

The objections which are relied upon for the purpose of defeating extradition may be conveniently summarized and considered under four heads:

1. That evidence of the insanity of the accused was offered and excluded.

2. That the evidence of a formal demand for the extradition of the accused was not filed until more than forty days after the arrest.

3. That appellant is a citizen of the United States, and that the treaty in providing for the extradition of "persons" accused of crime does not include persons who are citizens or subjects of the nation upon whom the demand is made.

4. That if the word "person" as used in the treaty includes citizens of the asylum country, the treaty, in so far as it covers that subject, has been abrogated by the conduct of Italy in refusing to deliver up its own citizens upon the demand of the United States, and by the enactment of a municipal law, since the treaty, forbidding the extradition of citizens. . . .

[Only so much of the opinion is reproduced here as deals with the third objection.]

3. By Article I of the extradition treaty with Italy the two governments mutually agree to deliver up all persons, who, having been convicted of or charged with any of the crimes specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum in the other, etc. It is claimed by counsel for the appellant that the word "persons" as used in this article does not include persons who are citizens of the asylum country.

That the word "persons" etymologically includes citizens as well as those who are not, can hardly be debatable. The treaty contains no reservation of citizens of the country of asylum. The contention is that an express exclusion of citizens or subjects is not necessary, as by implication, from accepted principles of public law, persons who are citizens of the asylum country are excluded from extradition conventions unless expressly included. This was the position taken by the Foreign Minister of Italy in a correspondence in 1890 with the Secretary of State of the United States, concerning a demand made by the United States for the extradition of Bevivini and Villella, two subjects of Italy whose extradition was sought, that they might be tried for a crime committed in this country. Their extradition was refused by Italy on account of their Italian nationality. The Foreign Minister of Italy advanced in favor of the Italian position these grounds: (a) That the Italian Penal Code of 1890, in express terms provided that, "the extradition of a citizen is not permitted;" (b) That a crime committed by an Italian subject in a foreign country was punishable in Italy, and, therefore, there was no ground for saying that unless extradited the crime would go unpunished; and (c) That it has become a recognized principle of public international law that one nation will not deliver its own citizens or subjects upon the demand of another, to be tried for a crime committed in the territory of the latter, unless it has entered into a convention expressly so contracting, and that the United States had itself recognized the principle in many treaties by inserting a clause exempting citizens from extradition. (United States Foreign Relations 1890, p. 555.) Mr. Blaine, then Secretary of State of the United States, protested against the position of the Italian government and maintained the view that citizens were included among the persons subject to extradition unless expressly excluded. His defense of the position is full and remarkably able. It is to be found in United States Foreign Relations for 1890, pp. 557, 566.

We shall pass by the effect of the Penal Code in preventing the authorities of Italy from carrying out its international engagements to surrender citizens, for that has no bearing upon the question now under consideration, which is, whether under accepted principles of international law, citizens are to be regarded as not embraced within an extradition treaty unless expressly included. That it has come to be the practice with a preponderant number of nations to refuse to deliver its citizens, is true; but this exception is convincingly shown by Mr. Blaine in his reply to the Foreign Minister of Italy and by the thorough consideration of the whole subject by Mr. John Bassett Moore, in his treatise on extradition, ch. V, pp. 152, 193, to be of modern origin. The beginning of the exemption is traced to the practice between France and the Low Countries in the eighteenth century. Owing to the existence in the municipal law of many nations of provisions prohibiting the extradition

of citizens, the United States has in several of its extradition treaties clauses exempting citizens from their obligation. The treaties in force in 1910 may, therefore, be divided into two classes, those which expressly exempt citizens, and those which do not. Those which do contain the limitation are by far the larger number. Among the treaties which provide for the extradition of "persons," without limitation or qualification are the following:

With Great Britain, August 9, 1842, extended July 12, 1889, United States Treaties, 1910, pp. 650 and 740.

With France, November 9, 1843, *supra*, p. 526.

With Italy, February 8, 1868, *supra*, p. 961.

With Venezuela, August 27, 1860, *supra*, p. 1845.

With Ecuador, June 28, 1872, *supra*, p. 436.

With Dominican Republic, February 8, 1867, *supra*, p. 403.

The treaty with Japan of April 29, 1886, *supra*, p. 1025, contains a qualification in these words:

"Art. VII. Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention, but they shall have the power to deliver them up if in their discretion it be deemed proper to do so."

The conclusion we reach is, that there is no principle of international law by which citizens are excepted out of an agreement to surrender "persons," where no such exception is made in the treaty itself. Upon the contrary, the word "persons" includes all persons when not qualified as it is in some of the treaties between this and other nations. That this country has made such an exception in some of its conventions and not in others, demonstrates that the contracting parties were fully aware of the consequences unless there was a clause qualifying the word "persons." This interpretation has been consistently upheld by the United States and enforced under the several treaties which do not exempt citizens. That Italy has not conformed to this view, and the effect of this attitude will be considered later. But that the United States has always construed its obligation as embracing its citizens is illustrated by the action of the executive branch of the Government in this very instance. A construction of a treaty by the political department of the Government, while not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights, is nevertheless of much weight.

The subject is summed up by Mr. John Bassett Moore in his work on extradition, vol. 1, p. 170, §138, where he says:

"'Persons' includes citizens. In respect to the persons to be surrendered, the extradition treaties of the United States all employ the general term 'persons,' or 'all persons.' Hence, where no express exception is made, the treaties warrant no distinction as to nationality. Writing on the general subject of the extradition treaties of the United

States and the practice thereunder, Mr. Seward said: 'In some of the United States' extradition treaties it is stipulated that the citizens or subjects of the parties shall not be surrendered. Where there is no express reservation of the kind, there would not, it is presumed, be any hesitation in giving up a citizen of the United States to be tried abroad.' Such has been the uniform and unquestioned practice under the treaty with Great Britain of 1842, in which the term 'all persons' is used."

The effect of yielding to the interpretation urged by Italy would have brought about most serious consequences as to other treaties then in force. One of these was the extradition treaty with Great Britain made as far back as 1843. Inasmuch as under the law of that country, as of this, crimes committed by their citizens within the jurisdiction of another country were punishable only where the crime was committed, it was important that the Italian interpretation should not be accepted. . . .

Judgment affirmed.[44]

In re Windsor

Great Britain. Court of Queen's Bench. 1865.

6 *Best and Smith's Reports* 522.

Habeas corpus to the governor of Whitecross Street Prison, to bring up the body of Charles Windsor. The return shewed that he had been originally arrested under a *capias*, and was detained under a warrant issued by one of the magistrates of Bow Street, within the Metropolitan district, on a claim for his extradition, made by the Government of the United States of America, under stat. 6 & 7 Vict. c. 76., "for giving effect to a treaty between Her Majesty and the United States of America

[44] See Treaty between Great Britain and Spain, June 4, 1878, art. 1, Piggott, Extradition, App. 223; Treaty between Great Britain and Switzerland, Nov. 26, 1880, art. 1, *ibid.*, App. 237. On the exemption of nationals, in general, see Moore, Extradition, I, 152; Travers, V, 11.

"Where the person whose extradition is demanded is a citizen of a third state, it is held by some writers that, before granting the surrender, the government upon which the demand is made should ask the consent of such state. Such a provision is found in some of the treaties, but it has not been admitted in any of those of the United States. Bomboy and Gilbrin, in their recent work on extradition, take the view that while, to promote good relations, the third state may be consulted, its refusal to consent is not binding. They say, moreover, that the French government generally neglects to consult the third state, and that the proceedings are carried on as if the accused were a citizen of the demanding country. In the case of the United States there are geographical reasons which would render it exceedingly inconvenient and a hardship to the accused, in respect of many states, to consult them previously to surrendering their citizens." Moore, *op. cit.*, I, 177.

for the apprehension of certain offenders;" on a charge of forgery in this, that "he did feloniously with intent to defraud The Mercantile Bank of the city of New York make certain false and fraudulent entries in the books of accounts kept by the said bank, a monied corporation within the said state, whereby the said bank was defrauded of the sum of $200,000 and upwards contrary to the statutes of the said state of New York in that case made and provided." . . .

In the Revised Statutes of New York, part 4, c. 1, tit. 3, art. 3, §35, it is enacted, "Every person who, with intent to defraud, shall make any false entry, or shall falsely alter any entry made, in any book of accounts kept by any money corporation within this state, or in any book of accounts kept by any such corporation, or its officers, and delivered or intended to be delivered, to any firm dealing with such corporation, by which any pecuniary obligation, claim or credit, shall be, or shall purport to be, discharged, diminished, increased, created, or in any manner affected, shall, upon conviction, be adjudged guilty of forgery in the third degree." . . .

[Part of the statement of the case and the arguments of counsel are omitted.]

Cockburn C. J. We are here called on to put a construction on a statute relating to the extradition of criminals having committed offences within the jurisdiction of the United States of America, who are found in this country, and whose surrender is demanded by the American government. Among the offences to which the statute applies, "forgery" is specified. In this particular instance it is sought to obtain the discharge of the American citizen now in custody: it appears that he was guilty of making a false entry in a book kept by a money corporation of New York, in which it was his duty to keep an account of the moneys received by him as officer of the Corporation, and how they were disposed of. No doubt this was a false entry, and made for fraudulent purposes. But it is clear, for the reasons given by the members of the Court during the argument, that the offence in question did not amount to "forgery." And, there being nothing to shew the contrary, the same must be taken to be the law of the United States, which corresponds in general with that of this country. What was done in this case would therefore no more be a forgery in America than here; and it is only by an Act of the local legislature of New York that it is made one. The question we have to determine is, whether this is enough to bring the case within The Extradition Act, 6 & 7 Vict. c. 76., and call on the government of this country to deliver up this man. I think not. The true construction of this statute is, that its terms, specifying the offences for which persons may be given up, must be understood to apply to offences which have some common element in the legislation of both countries. And where a part only of one of the two nations thinks proper to make certain acts

an offence which do not fall within that offence as known to the general law of both, it will not be sufficient to bring a case within the statute.

We ought to interpret the statute according to the intention of both parties, and it would be going far to assume that before passing it the Legislature of this country went into an elaborate inquiry as to what by the law of every state of the American Union amounted to forgery, and made this statute with the intention to include each of them within its operation. I believe that in point of fact that was not done, and we ought not to assume that it was. We must assume that the terms used by the parties to this treaty, especially as they were parties speaking the same language and with laws so like, used them in the sense which they bear in our own law and in the law of the United States, and not in that which they have in any particular state of the Union. The applicant therefore ought not to be surrendered. He is also in custody under civil process, but we have nothing to do with that at present.

Blackburn J. I am of the same opinion. We have only power to surrender under statute 6 & 7 Vict. c. 76., which does not say that all criminals are to be given up, but that for some specified crimes they may. The crimes thus specified are those defined in a treaty previously entered into by the two high contracting parties. The charge against the applicant is, that being a clerk in a bank he did embezzle or steal a large sum of its money—that he made an entry in a book stating on his behalf that a certain quantity of specie was deposited in a vault, that statement being false. But that is not equivalent to forgery. Forgery is the falsely making or altering a document to the prejudice of another, by making it appear as the document of that person. Telling a lie does not become forgery because it is reduced to writing. Here this man has not made any false statement purporting to be on behalf of any other person, but a statement purporting to be what it is. It is true the Statute of New York says that such conduct shall be deemed forgery in the third degree; and observations have been made to shew that the act done here was not within that statute. I am inclined however to think it was; but then does the New York statute saying this make him guilty of forgery within the meaning of The Extradition Act? Two very high contracting parties make a treaty on which The Extradition Act is founded; but we must construe that treaty according to the words used by them when fairly understood, especially when we find both peoples speaking the same language. Forgery is one of the crimes specified, and that must be understood to mean any crimes recognised throughout the United States and in England as being in the nature of forgery. "Piracy" is another, which means offences committed on the high seas, and is so understood by both. But I do not think, if either country were to say that some crime committed on land should be piracy, this would come within the treaty. The meaning of the New York

statute is, the party shall be punished as if for forgery. I therefore agree with the Lord Chief Justice.

SHEE J. concurring,

Prisoner discharged.

WRIGHT v. HENKEL

United States. Supreme Court. 1903.

190 *United States Reports* 40.

[Whitaker Wright was arrested in New York in 1903 and held for extradition to Great Britain on a charge of fraud as a director of a company. Writs of *habeas corpus* and *certiorari* were dismissed after hearing by the United States Circuit Court and an application to be admitted to bail was denied. The case was taken to the Supreme Court by appeal.]

[The above statement is substituted for the statement of the case in the report. Part of the arguments of counsel and part of the opinion are omitted.]

Mr. Samuel Untermyer and Mr. Louis Marshall for appellant.

I. The crime charged against the appellant is not one which is "made criminal by the laws of both countries," to wit, the United States and the United Kingdom of Great Britain and Ireland, and does not, therefore, come within the terms of the extradition treaties between these governments. 1 Moore on Extradition, 21; United States v. Rauscher, 119 U. S. 407; Terlinden v. Ames, 184 U. S. 270; Art. X, Webster-Ashburton Treaty of 1842; Art. X, Supplemental Treaty of 1889. The language of the treaty cannot be enlarged by interpretation so as to include crimes which do not come within the limitation which the signatures of the treaty have expressly created. The whole subject of foreign intercourse is committed to the Federal government. Tucker v. Alexandroff, 183 U. S. 436; Doe v. Braden, 16 How. 657; People ex rel. Barlow v. Curtis, 50 N. Y. 321. . . .

Mr. Charles Fox for His Britannic Majesty's consul general at New York, appellee. . . .

The offence charged in the complaint is made criminal by the laws of both countries. §§83, 84, ch. 96, 24 & 25 Vict.; Companies Act of 1862, 25 & 26 Vict. ch. 89, §166; §5029 U. S. Rev. Stat.; Art. X, Treaty of 1842. That laws of New York are to govern, 4 Op. Atty. Genl. 330; Re Farez, 7 Blatch. 357; Re Wadge, 15 Fed. Rep. 865; Re Clarkson, 34 Fed. Rep. 533; and see as to evidence, Grin v. Shine, 187 U. S. 181. The treaty should be construed liberally. Tucker v. Alexandroff, 183 U. S. 424; Grin v. Shine, 187 U. S. 181. Under the laws of New York, where the appellant was found, the offence is a crime the same as in England.

Penal Code, N. Y. §611. See Re Arton, No. 2, 1896, 1 Q. B. D. 509. Re Windsor, distinguished. The same construction was applied to treaty between France and Great Britain. Re Bellecontre, 17 Cox C. C. 253; Ex parte Piot, 15 Cox C. C. 208. . . .

Mr. Chief Justice Fuller . . . delivered the opinion of the court.

The writ of *habeas corpus* cannot perform the office of a writ of error, but the court issuing the writ may inquire into the jurisdiction of the committing magistrate in extradition proceedings, Ornelas v. Ruiz, 161 U. S. 502; Terlinden v. Ames, 184 U. S. 270; and it was on the ground of want of jurisdiction that the writ was applied for in this instance before the commissioner had entered upon the examination; as also on the ground that petitioner should have been admitted to bail.

The contention is that the complaint and warrant did not charge an extraditable offence within the meaning of the extradition treaties between the United States and the United Kingdom of Great Britain and Ireland, because the offence was not criminal at common law, or by acts of Congress, or by the preponderance of the statutes of the States.

Treaties must receive a fair interpretation, according to the intention of the contracting parties, and so as to carry out their manifest purpose. The ordinary technicalities of criminal proceedings are applicable to proceedings in extradition only to a limited extent. Grin v. Shine, 187 U. S. 181; Tucker v. Alexandroff, 183 U. S. 424.

The general principle of international law is that in all cases of extradition the act done on account of which extradition is demanded must be considered a crime by both parties, and as to the offence charged in this case the treaty of 1889 embodies that principle in terms. The offence must be "made criminal by the laws of both countries."

We think it cannot be reasonably open to question that the offence under the British statute is also a crime under the third paragraph of section 611 of the Penal Code of New York, brought forward from section 603 of the Code of 1882. Fraud by a bailee, banker, agent, factor, trustee or director, or member or officer of any company, is made the basis of surrender by the treaty. The British statute punishes the making, circulating or publishing with intent to deceive or defraud, of false statements or accounts of a body corporate or public company, known to be false, by a director, manager or public officer thereof. The New York statute provides that if an officer or director of a corporation knowingly concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition, containing any material statement which is false, he is guilty of a misdemeanor. The two statutes are substantially analogous. The making of such a false statement knowingly, under the New York act, carries with it the inference of fraudulent intent, but even if this were not so, criminality under the British act would certainly be such under that of New York. Absolute

identity is not required. The essential character of the transaction is the same, and made criminal by both statutes.

It may be remarked that the statutes of several other States agree with that of New York on this subject; and that sections 73 and 74 of the act of Congress to define and punish crimes in the District of Alaska, 30 Stat. 1253, c. 429, and section 5209 of the Revised Statutes, in respect of the officers of National Banks, are largely to the same effect as the English statute.

As the State of New York was the place where the accused was found and in legal effect the asylum to which he had fled, is the language of the treaty, "made criminal by the laws of both countries," to be interpreted as limiting its scope to acts of Congress, and eliminating the operation of the laws of the States? That view would largely defeat the object of our extradition treaties by ignoring the fact that for nearly all crimes and misdemeanors the laws of the States, and not the enactments of Congress, must be looked to for the definition of the offence. There are no common law crimes of the United States, and, indeed, in most of the States the criminal law has been recast in statutes, the common law being resorted to in aid of definition. Benson v. McMahon, 127 U. S. 457.

In July, 1844, Attorney General Nelson advised the Secretary of State, then Mr. Calhoun, that "cases as they occur necessarily depend upon the laws of the several States in which the fugitive may be arrested or found;" and in December of that year, Mr. Calhoun wrote to the French mission: "What evidence is necessary to authorize an arrest and commitment depends upon the laws of the State or place where the criminal may be found." Moore on Extradition, §344; United States v. Warr, 28 Fed. Cas. 411.

So Mr. Secretary Fish, in November, 1873, in replying to certain specified questions of the minister of the Netherlands, among other things, said: "That in every treaty of extradition the United States insists that it can be required to surrender a fugitive criminal only upon such evidence of criminality as, according to the laws of the place where he shall be found, would justify his apprehension and commitment for trial if the crime had there been committed;" and "that the criminal code of the United States applies only to offences defined by the general government, or committed within its exclusive jurisdiction, or upon the high seas, or some navigable water, and that each State establishes and regulates its own criminal procedure as well with respect to the definition of crimes, as to the mode of procedure against criminals, and the manner and extent of punishment." Moore on Extradition, §337 n.

In Muller's case, 5 Phila. 289, 292, the definition of the offence in the State where the fugitive was found was applied by the District Court for the Eastern District of Pennsylvania, and Judge Cadwalader said:

"In the series of treaties which have been mentioned, certain offences, including forgery, are named with reference to their definitions in the system of general jurisprudence. But the treaties require the specific application of the definitions to be conformable, in particular cases, to the jurisprudence and legislation of the respective places where the parties may be arrested; and likewise require the application of local rules of decision as to the sufficiency of the evidence. The act in question—though generically forgery wherever criminal—might be specifically criminal in one place, but not in another. I thought that the question depended upon the law of Pennsylvania under the statute of 1860, and that the case, on the part of the Saxon Government had, therefore, been made out.

"There is no jurisprudence or common law of the government of the United States. . . . No legislation of their government, independently of the jurisprudence and legislation of the several States, can have been expected by those who made the treaties ever to give specific definitions of certain crimes mentioned in them. No such legislation as to forgery of private writings, which is the offence here charged, can have been expected. As to this crime, and others, local definitions and rules might be not less different in Ohio and in Pennsylvania than in Scotland and in England, or might be more different. In framing the treaty of 1842 with Great Britain, these local differences must have been mutually considered by the governments of the two contracting nations."

And this language is strikingly applicable to the supplemental treaty of 1889, framed as it was by Mr. Secretary Blaine, and that accomplished lawyer and publicist, then Sir Julian Pauncefote, who was thoroughly familiar with the dual system of this government. Where there was reason to doubt whether the generic term embraced a particular variety, specific language was used. As for instance, as to the slave trade, though criminal, yet, apparently because there had been peculiar local aspects, the crime was required to be "against the laws of both countries;" and so as to fraud and breach of trust, which had been brought within the grasp of criminal law in comparatively recent times. But it is enough if the particular variety was criminal in both jurisdictions, and the laws of both countries included the laws of their component parts.

In Grin v. Shine we applied the definition of embezzlement given by the laws of California, but there the petitioner himself appealed to that definition, and the case, though in many respects of value here, did not rule the precise point before us.

But we rule it now, and concur with Judge Lacombe, that when by the law of Great Britain, and by the law of the State in which the fugitive is found, the fraudulent acts charged to have been committed are made criminal, the case comes fairly within the treaty, which otherwise would manifestly be inadequate to accomplish its purposes. And we cannot

doubt that if the United States were seeking to have a person indicted for this same offence under the laws of New York extradited from Great Britain, the tribunals of Great Britain would not decline to find the offence charged to be within the treaty because the law violated was a statute of one of the States and not an act of Congress.

It is true that in the case of Windsor, 6 B. & S. 522, (1865,) a contrary view was expressed, but it should be observed that the charge was forgery, and it was held that the facts did not constitute forgery in England, and that the statute of New York defining the offence of forgery in the third degree could not properly be regarded as extending the force of the treaty to offences not embraced within the definition of forgery at the time when the treaty was executed. So far as the conclusion is expressed by the eminent judges who united in that decision, that the treaty did not comprise offences made such only by the legislation of particular States of the United States, it does not receive our assent.

The result is that we hold that the commissioner had jurisdiction. . . .

[In an omitted part of the opinion the court considered the question of bail and concluded that there was no error in denying the application.]

Order affirmed.

Regina v. Jacobi and Hiller

Great Britain. High Court of Justice; Queen's Bench Division. 1881.

46 *Law Times Reports, New Series,* 595 *note.*

[Jacobi and Hiller of Amsterdam procured a shipment of furniture from Heininger and Co. in Germany by false representations as to their credit. The furniture was not paid for, when it reached Amsterdam, but was promptly reshipped to England. Soon afterwards Jacobi and Hiller absconded to England. A warrant for Jacobi's arrest was issued by a competent German court in the following terms: "Jacobi, the alleged proprietor of the firm of O. Jacobi and Co., at Amsterdam, who is suspected of fraud, by having with intent to procure for himself some illegal pecuniary profit, and by the pretence of doing business, that is to say, by a promise of payment given in writing falsely and in bad faith, induced the firm of J. Heininger, at Mayence, to forward him on the 11th Dec. 1880 a quantity of furniture of the value of 3838 francs 20 cents., thus causing a pecuniary prejudice to the said firm amounting to the above-stated sum, shall be taken into custody and detained during the investigation of the case. The arrest of the accused during the investigation of the case is ordered because, after having perpetrated the said crime, he has absconded with the goods thus obtained to a foreign country." Another warrant for the arrest of Hiller was issued in the same terms with the exception of the substitution of his name for that of Jacobi.

The German government made a formal requisition upon Great Britain for the extradition of Jacobi and Hiller; when apprehended the above charge was preferred against them; and they were committed for extradition upon a *prima facie* case of obtaining goods by false pretences. An application for two rules *nisi* for two writs of *habeas corpus* was made on behalf of the prisoners. The grounds of the application were: (1) that no offence had been committed in Germany; (2) that the warrant of arrest issued by the German authorities asking for the extradition of the prisoners did not contain a statement showing that the offence for which the prisoners were sought to be extradited was an offence within the extradition treaty between England and Germany.]

[The above statement of the case is substituted for the statement in the report. The arguments of counsel, the opinion of Pollock, B., and part of the opinion of Stephen, J., are omitted.]

STEPHEN, J.— . . . It seems to me that there are two objections in this case, the one to the warrant, the other as to the place where the crime was committed. With regard to the warrant, it is said that it does not set forth such a crime as is contained in the schedule of extradition offences. . . . That objection appears to me to be a fallacy. I think that the warrant and the evidence are two distinct things. I think that the warrant need show nothing more than the fact that it has been issued by some competent authority, and is, in fact, an official document for the arrest of the prisoner. Then I think that the provisions relating to evidence provide the real safeguard against improper extraditions. I think that it is essential to the delivery up of the prisoner that it should appear upon the evidence given before the magistrate that he might have been committed for trial for one or other of the crimes mentioned in the first schedule if he had done in England the act which he is alleged to have done in a foreign country. Every one of the extradition crimes, when you come to look at them, are taken from English law, and everybody who is at all familiar with such subjects must be well aware of the fact that the definitions of crimes given in the law of England are peculiar to English law, and to the law of those countries which like America have derived the greater part of their criminal law from our own. For instance, in some cases, the English definitions are wider, and in other cases the English definitions are narrower, than those which prevail upon the Continent. If it were necessary for the warrant to set forth precisely the crime for which the magistrate is bound to see that there is sufficient evidence to put a man upon his trial, every foreign magistrate who issued a warrant available for the purposes of this Act would have to be acquainted with the law of England. I take it both ways. For instance, the definition of manslaughter, which is one of the crimes for which extradition may be made, according to English law is exceedingly wide. Suppose it should be a fact, as I rather think it is, a foreign

magistrate, acting according to the French or the German Penal Code, were to issue a warrant for a man's apprehension for having in some way assaulted or wounded another, which wound had been followed by death; and suppose that assaulting and wounding was not an extradition crime, if it appeared in evidence before the magistrate that death had followed upon such assaulting or wounding, then, although the man might be tried, and probably would be tried for something very much less than causing death, *viz.*, for causing the injury which led to death, I think that the magistrate, if he saw his way to commit him for manslaughter, or would have seen his way to committing him for manslaughter if the act had been done in England, would have to issue his warrant for his extradition. There are many other things, and I might give illustrations taken from nearly every offence mentioned in the schedule. Here the prisoner is accused of a fraud. Upon the face of the warrant the prisoner is accused of a fraud, and of obtaining money by written promises which were given without apparently the intention of being fulfilled; in fact, he is accused of an offence very like what we call obtaining credit by false pretences. That is what is said on the face of the warrant. When you bring him before the magistrate, it appears that he did acts for which the magistrate thinks he ought to be committed for trial for obtaining goods by false pretences, which is an extradition crime. That being so, it seems to me that, although the warrant is for a different offence, his committal within the Act is proper.[45]

[45] "The substance of the treaty and of the Act of Parliament are in unison. In order to give the magistrate jurisdiction there must be a crime charged which is within the treaty, and the magistrate must have before him such evidence as would justify according to the law of England the committal for trial of the prisoner if the crime had been committed in England, and there must be a foreign warrant authorising the arrest duly authenticated according to the provisions of the Act." MANISTY, J., in Queen v. Ganz, 9 Q. B. D. 93, 105. See Ex parte Piot, 15 Cox C. C. 208.

"It is important to observe that when the extradition of an offender suspected of a crime is demanded, the definition upon which he is delivered up differs from the definition upon which he is tried. For instance, if the French government demanded the extradition of a Frenchman for obtaining goods by false pretences in France, they must give such evidence as would justify his committal for that offence in England. Now by the law of England the goods to be obtained must, in order to constitute the offence, be such goods as are at common law the subject of larceny. To obtain sporting dogs by false pretences, for instance, is not an offence within the statute, because such dogs were not the subject of larceny at common law. Extradition, therefore, could not be granted in respect of such an offence supposing it to be a crime in France. This principle may act either favourably or unfavourably to an accused person. Suppose, for instance, extradition to France were demanded on a charge of murder, and the evidence was that the person against whom the charge was made had killed a man in a duel. It would be of no avail for him to argue that such an act was not murder by the law of France. That would be a question for the French courts. To kill a man in a duel is undoubtedly murder by the law of England, and this is enough

Then comes the further question as to the place where the act was committed. What the man actually did at Mayence was this: He wrote letters which we may, upon the evidence, very fairly consider was making a false pretence. The letters speak of the place where the goods are to be delivered, *viz.*, Mayence; he writes letters asking the person with whom he is dealing there to send this property to Amsterdam, and the property is actually parted with by the people at Mayence; it is sent by the railway to Amsterdam, and there it is taken by the prisoner and sent to London. I do not think we ought to import the whole of the English law of venue into these Extradition Acts, or that we ought to consider every independent country as forming so many distinct counties, each with its own grand jury, which would be necessary in order to make the English law of venue intelligible. I think questions might arise upon which at present I express no opinion; I indicated some such, for instance, as a duel fought across a frontier. I will settle any question which may arise upon that when the case happens. For the present purpose I think it is enough to say that the crime of obtaining goods by false pretences appears to me, for the reasons given at length by my brother Pollock, to have been committed at Mayence on this occasion,[46] and therefore I agree in the opinion that the prisoners ought to be remitted to custody.

Rules discharged.[47]

COLLINS v. LOISEL, UNITED STATES MARSHALL FOR THE EASTERN DISTRICT OF LOUISIANA

United States. Supreme Court. 1922.

259 *United States Reports* 309.

Appeal from a judgment of the District Court in *habeas corpus*, remanding the appellant to the custody of the marshal under a commitment issued in an extradition proceeding.

[The names of counsel and part of the opinion are omitted.]

MR. JUSTICE BRANDEIS delivered the opinion of the court.

This is the second appeal by Collins in this case. The first was dismissed in Collins v. Miller, 252 U. S. 364, for want of jurisdiction. There the earlier proceedings and the nature of the controversy are

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to justify the extradition of a person claimed by the French on the grounds of his having committed murder." STEPHEN, History, II, 68.

See LEWIS, Foreign Jurisdiction and the Extradition of Criminals, 52; BRIERLY, in Report on Extradition, L. of N. Doc., C. 51. M. 28, 1926, V, p. 3, 20 Am. Jour. Int. L. Spec. Suppl. 242, 246.

[46] *Accord:* Queen v. Nillins, 53 L. J. M. C. 157; King v. Godfrey [1923] 1 K. B. 24.

[47] See Gerk's Case, 7 Op. Atty. Gen. 6. *Cf.* Sucillon's Case, 7 *ibid.* 285.

fully set forth. After our decision the case was again heard by the District Court, on the same record and the same evidence; and on October 25, 1921, judgment was entered. By that judgment the writ of *habeas corpus* was granted, so far as the commitment was based on charges of obtaining property by false pretenses from Pohoomull Brothers and from Ganeshi Lall & Sons; and as to these commitments the court discharged Collins. But as to the commitment based on the charge of obtaining property by false pretenses from Mahomed Ali Zaimal Ali Raza, the court dismissed the application for *habeas corpus* and remanded Collins to the custody of Loisel, the marshal. The British Consul General acquiesced in this judgment. Collins appealed from so much thereof as recommitted him to the custody of the marshal. As the judgment below was final and disposed of the whole case, we now have jurisdiction. It is insisted, on several grounds, that the committing magistrate was without jurisdiction, and that consequently the appellant should have been discharged.

First. Collins contends that the affidavit of the British Consul General does not charge an extraditable offense. The argument is that the affidavit charges cheating merely; that cheating is not among the offenses enumerated in the extradition treaties; that cheating is a different offense from obtaining property under false pretenses which is expressly named in the Treaty of December 13, 1900, 32 Stat. 1864; that to convict of cheating it is sufficient to prove a promise of future performance which the promisor does not intend to perform, while to convict of obtaining property by false pretense it is essential that there be a false representation of a state of things past or present. See State v. Colly, 39 La. Ann. 841. It is true that an offense is extraditable only if the acts charged are criminal by the laws of both countries. It is also true that the charge made in the court of India rests upon §420 of its Penal Code, which declares: "Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person . . . shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine," whereas §813 of the Revised Statutes of Louisiana declares: "Whoever, by any false pretence, shall obtain, or aid and assist another in obtaining, from any person, money or any property, with intent to defraud him of the same, shall, on conviction, be punished by imprisonment at hard labor or otherwise, not exceeding twelve months." But the affidavit of the British Consul General recites that Collins stands charged in the Chief Presidency Magistrate's Court with having feloniously obtained the pearl button by false pretenses: and the certificate of the Secretary to the Government of India, which accompanies the papers on which Collins' surrender is sought, describes the offense with which he is there charged as "the crime of obtaining valuable property by false pretenses."

The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions. This was held with reference to different crimes involving false statements in Wright v. Henkel, 190 U. S. 40, 58; Kelly v. Griffin, 241 U. S. 6, 14; Benson v. McMahon, 127 U. S. 457, 465; and Greene v. United States, 154 Fed. 401. Compare Ex parte Piot, 15 Cox C. C. 208. The offense charged was, therefore, clearly extraditable.

Second. Collins contends that the evidence introduced was wholly inadmissible. That particularly objected to on this ground is the warrant of arrest and copies of *prima facie* proceedings in the Court of the Chief Presidency Magistrate, Bombay, which accompanied the affidavit of the British Consul General. The Consul General for the United States in Calcutta had certified that these papers proposed to be used upon an application for the extradition of Collins "charged with the crime of obtaining valuable property by false pretenses alleged to have been committed in Bombay" were "properly and legally authenticated so as to entitle them to be received in evidence for similar purposes by the tribunals of British India, as required by the Act of Congress of August 3, 1882." That act, c. 378, §5, 22 Stat. 215, 216, declares that "depositions, warrants, and other papers, or the copies thereof" so authenticated, shall be received and admitted as evidence for all purposes on hearings of an extradition case if they bear "the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country." . . . The papers were, therefore, properly authenticated and were admissible. Compare In re Behrendt, 22 Fed. 699; In re Charleston, 34 Fed. 531; In re Orpen, 86 Fed. 760.

Third. Collins contends that the evidence introduced did not support the charge of obtaining property by false pretenses. The papers introduced tended to prove that Collins obtained the pearl button from the jewelers as a result of his representing that he was a wealthy man; that he was a partner in William Collins Sons & Company of Glasgow and London; that he was a colonel in the Howe Battalion of the Royal Naval Division and was then on six months' leave; that he had a right to draw on Messrs. E. Curtice & Company, 8 Clarges Street, London, the draft of £1700 which he gave the jewelers; and that this was a firm of bankers. The papers tended to prove also that all these representations were false to Collins' knowledge. It is clear that evidence to this effect, if competent and believed, would justify a conviction not only for cheating, but also of obtaining property under false pretenses. State v. Tessier, 32 La. Ann. 1227; State v. Jordan, 34 La. Ann. 1219; State v. Will, 49 La. Ann. 1337; State v. Seipel, 104 La. 67. The contention of Collins is that the evidence established only a broken promise or, at most,

common-law cheating. It was not the function of the committing magistrate to determine whether Collins was guilty, but merely whether there was competent legal evidence which, according to the law of Louisiana, would justify his apprehension and commitment for trial if the crime had been committed in that State. Charlton v. Kelly, 229 U. S. 447, 456. If there was such evidence this court has no power to review his finding. Ornelas v. Ruiz, 161 U. S. 502, 508; Terlinden v. Ames, 184 U. S. 270, 278; McNamara v. Henkel, 226 U. S. 520. The papers tended to establish more than a broken promise or common-law cheating; and according to the law of Louisiana they furnished "such reasonable ground to suppose him guilty as to make it proper that he should be tried." See Glucksman v. Henkel, 221 U. S. 508, 512.[48]

Fourth. Finally Collins contends that the evidence of criminality was not such as under the law of Louisiana would have justified his apprehension and commitment for trial if the crime or offense had been committed there. The argument is that by the law of Louisiana a person charged with having committed an offense is entitled to make a voluntary declaration before the committing magistrate and also to present evidence in his own behalf (Revised Statutes 1870, §1010; Laws of 1886, Act No. 45); that this right to introduce such evidence is, therefore, secured to a prisoner by the treaty; and that this requirement as to evidence of criminality was not complied with, because Collins was not permitted to introduce evidence in his own behalf.

Collins was allowed to testify, and it was clearly the purpose of the committing magistrate to permit him to testify fully, to things which might have explained ambiguities or doubtful elements in the *prima facie* case made against him. In other words, he was permitted to introduce evidence bearing upon the issue of probable cause. The evidence excluded related strictly to the defense. It is clear that the mere wrongful exclusion of specific pieces of evidence, however important, does not render the detention illegal. Charlton v. Kelly, 229 U. S. 447, 461. The function of the committing magistrate is to determine whether there is competent evidence to justify holding the accused to await trial, and not to determine whether the evidence is sufficient to justify a conviction. Grin v. Shine, 187 U. S. 181, 197; Benson v. McMahon, 127

[48] "The evidence of criminality, to justify holding the accused for the action of the executive upon surrender, need not be such as would be required at the trial of the accused, but must be such evidence as ordinarily obtains at a preliminary examination, and amount to probable cause of his guilt; probable cause being such evidence of guilt as would furnish good reason to a cautious man, and warrant him in the belief, that the person accused is guilty of the offense with which he is charged." Morrow, J., in Re Ezeta, 62 Fed. 972, 982.

"Form is not to be insisted upon beyond the requirements of safety and justice. Competent evidence to establish reasonable grounds is not necessarily evidence competent to convict." Holmes, J., in Fernandez v. Phillips, 268 U. S. 311, 312.

U. S. 457, 461; Ex parte Glaser, 176 Fed. 702, 704. In In re Wadge, 15 Fed. 864, 866, cited with approval in Charlton v. Kelly, *supra*, 461, the right to introduce evidence in defense was claimed; but Judge Brown said: "If this were recognized as the legal right of the accused in extradition proceedings, it would give him the option of insisting upon a full hearing and trial of his case here; and that might compel the demanding government to produce all its evidence here, both direct and rebutting, in order to meet the defense thus gathered from every quarter. The result would be that the foreign government, though entitled by the terms of the treaty to the extradition of the accused for the purpose of a trial where the crime was committed, would be compelled to go into a full trial on the merits in a foreign country, under all the disadvantages of such a situation, and could not obtain extradition until after it had procured a conviction of the accused upon a full and substantial trial here. This would be in plain contravention of the intent and meaning of the extradition treaties." The distinction between evidence properly admitted in behalf of the defendant and that improperly admitted is drawn in Charlton v. Kelly, *supra*, between evidence rebutting probable cause and evidence in defense. The court there said, "To have witnesses produced to contradict the testimony for the prosecution is obviously a very different thing from hearing witnesses for the purpose of explaining matters referred to by the witnesses for the Government." And in that case evidence of insanity was declared inadmissible as going to defense and not to probable cause. Whether evidence offered on an issue before the committing magistrate is relevant is a matter which the law leaves to his determination, unless his action is so clearly unjustified as to amount to a denial of the hearing prescribed by law.

The phrase "such evidence of criminality" as used in the treaty refers to the scope of the evidence or its sufficiency to block out those elements essential to a conviction. It does not refer to the character of specific instruments of evidence or to the rules governing admissibility. Thus, unsworn statements of absent witnesses may be acted upon by the committing magistrate, although they could not have been received by him under the law of the State on a preliminary examination. Elias v. Ramirez, 215 U. S. 398; Rice v. Ames, 180 U. S. 371. And whether there is a variance between the evidence and the complaint is to be decided by the general law and not by that of the State. Glucksman v. Henkel, 221 U. S. 508, 513. Here the evidence introduced was clearly sufficient to block out those elements essential to a conviction under the laws of Louisiana of the crime of obtaining property by false pretenses. The law of Louisiana could not, and does not attempt to, require more. It is true that the procedure to be followed in hearings on commitment is determined by the law of the State in which they are held. In re Farez, 7 Blatchf. 345, Fed. Cas. No. 4645; In re Wadge,

supra; In re Kelley, 25 Fed. 268; In re Ezeta, 62 Fed. 972, 981. But no procedural rule of a State could give to the prisoner a right to introduce evidence made irrelevant by a treaty.

Affirmed.[49]

United States v. Rauscher

United States. Supreme Court. 1886.

119 *United States Reports* 407.

The case is stated in the opinion of the court.

[The names of counsel and part of the opinion are omitted.]

Mr. Justice Miller delivered the opinion of the court.

This case comes before us on a certificate of division of opinion between the judges holding the Circuit Court of the United States for the Southern District of New York, arising after verdict of guilty, and before judgment, on a motion in arrest of judgment.

The prisoner, William Rauscher, was indicted by a grand jury, for that, on the 9th day of October, 1884, on the high seas, out of the jurisdiction of any particular state of the United States, and within the admiralty and maritime jurisdiction thereof, he, the said William Rauscher, being then and there second mate of the ship J. F. Chapman, unlawfully made an assault upon Janssen, one of the crew of the vessel of which he was an officer, and unlawfully inflicted upon said Janssen cruel and unusual punishment. This indictment was found under §5347 of the Revised Statutes of the United States.

The statement of the division of opinion between the judges is in the following language:

"This cause coming on to be heard at this term, before judgment upon the verdict, on a motion in arrest of judgment, and also on a motion for a new trial before the two judges above mentioned, at such hearing the following questions occurred:

"First. The prisoner having been extradited upon a charge of murder on the high seas of one Janssen, under §5339 Rev. Stat., had the Circuit Court of the Southern District of New York jurisdiction to put him to trial upon an indictment under §5347 Rev. Stat., charging him with cruel and unusual punishment of the same man, he being one of the crew of an American vessel of which the defendant was an officer, and such punishment consisting of the identical acts proved in the extradition proceedings?

"Second. Did or not the prisoner, under the extradition treaty with Great Britain, having been surrendered upon a charge of murder, acquire a right to be exempt from prosecution upon the charge set forth in the

[49] See also Collins v. Loisel, 262 U. S. 426.

indictment, without being first afforded an opportunity to return to Great Britain?

"Third. Was it error on the part of the trial judge to overrule a plea to the jurisdiction of the court to try the indictment under §5347 of the United States Revised Statutes, charging the accused with cruel and unusual punishment of one Janssen, one of the crew of a vessel of which accused was an officer, it having been established upon said plea that the accused was extradited under the extradition treaty with Great Britain, upon the charge of murder of the same Janssen, under §5339 of the United States Revised Statutes? . . . "

[In an omitted part of the opinion the court reproduced the treaty provision under which the defendant was extradited.[50]]

It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the States where their crimes were committed, for trial and punishment. This has been done generally by treaties made by one independent government with another. Prior to these treaties, and apart from them, it may be stated as the general result of the writers upon international law, that there was no well-defined obligation on one country to deliver up such fugitives to another, and though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked; and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law. . . .

[In an omitted part of the opinion the court referred to Matter of Washburn, 4 Johns. Ch. 106, *supra*, 694; Commonwealth v. Deacon, 10 S. & R. 125, *supra*, 699; Holmes v. Jennison, 14 Pet. 540; Ex parte Holmes, 12 Vt. 631; and People v. Curtis, 50 N. Y. 321.]

The case we have under consideration arises under one of these treaties made between the United States and Great Britain, the country with which, on account of our intimate relations, the cases requiring extradition are likely to be most numerous. This treaty of 1842 is supplemented by the acts of Congress of August 12, 1848, 9 Stat. 302, and March 3, 1869, 15 Stat. 337, the provisions of which are embodied in §§5270, 5272, and 5275 of the Revised Statutes, under Title LXVI, Extradition. . . .

[In an omitted part of the opinion the court reviewed negotiations between Great Britain and the United States in the cases of Winslow and Lawrence, referred to discussions of the question at issue in treatise and periodical literature, and emphasized the effect of a treaty in the United States as part of the supreme law of the land.]

The treaty of 1842 being, therefore, the supreme law of the land, which the courts are bound to take judicial notice of, and to enforce in any

[50] Treaty of Washington, Aug. 9, 1842, art. 10, *supra*, 708.

appropriate proceeding the rights of persons growing out of that treaty, we proceed to inquire, in the first place, so far as pertinent to the questions certified by the circuit judges, into the true construction of the treaty. We have already seen that, according to the doctrine of publicists and writers on international law, the country receiving the offender against its laws from another country had no right to proceed against him for any other offence than that for which he had been delivered up. This is a principle which commends itself as an appropriate adjunct to the discretionary exercise of the power of rendition, because it can hardly be supposed that a government which was under no treaty obligation nor any absolute obligation of public duty to seize a person who had found an asylum within its bosom and turn him over to another country for trial, would be willing to do this, unless a case was made of some specific offence of a character which justified the government in depriving the party of his asylum. It is unreasonable that the country of the asylum should be expected to deliver up such person to be dealt with by the demanding government without any limitation, implied or otherwise, upon its prosecution of the party. In exercising its discretion, it might be very willing to deliver up offenders against such laws as were essential to the protection of life, liberty, and person, while it would not be willing to do this on account of minor misdemeanors or of a certain class of political offences in which it would have no interest or sympathy. Accordingly, it has been the policy of all governments to grant an asylum to persons who have fled from their homes on account of political disturbances, and who might be there amenable to laws framed with regard to such subjects, and to the personal allegiance of the party. In many of the treaties of extradition between the civilized nations of the world, there is an express exclusion of the right to demand the extradition of offenders against such laws, and in none of them is this class of offences mentioned as being the foundation of extradition proceedings. Indeed, the enumeration of offences in most of these treaties, and especially in the treaty now under consideration, is so specific, and marked by such a clear line in regard to the magnitude and importance of those offences, that it is impossible to give any other interpretation to it than that of the exclusion of the right of extradition for any others.

It is, therefore, very clear that this treaty did not intend to depart in this respect from the recognized public law which had prevailed in the absence of treaties, and that it was not intended that this treaty should be used for any other purpose than to secure the trial of the person extradited for one of the offences enumerated in the treaty. This is not only apparent from the general principle that the specific enumeration of certain matters and things implies the exclusion of all others, but the entire face of the treaty, including the processes by which it is to be carried into effect, confirms this view of the subject. It is unreasonable

to suppose that any demand for rendition framed upon a general representation to the government of the asylum, (if we may use such an expression,) that the party for whom the demand was made was guilty of some violation of the laws of the country which demanded him, without specifying any particular offence with which he was charged, and even without specifying an offence mentioned in the treaty, would receive any serious attention; and yet such is the effect of the construction that the party is properly liable to trial for any other offence than that for which he was demanded, and which is described in the treaty. There would, under that view of the subject, seem to be no need of a description of a specific offence in making the demand. But, so far from this being admissible, the treaty not only provides that the party shall be charged with one of the crimes mentioned, to wit, murder, assault with intent to commit murder, piracy, arson, robbery, forgery, or the utterance of forged paper, but that evidence shall be produced to the judge or magistrate of the country of which such demand is made, of the commission of such an offence, and that this evidence shall be such as according to the law of that country would justify the apprehension and commitment for trial of the person so charged. If the proceedings under which the party is arrested in a country where he is peaceably and quietly living, and to the protection of whose laws he is entitled, are to have no influence in limiting the prosecution in the country where the offence is charged to have been committed, there is very little use for this particularity in charging a specific offence, requiring that offence to be one mentioned in the treaty, as well as sufficient evidence of the party's guilt to put him upon trial for it. Nor can it be said that, in the exercise of such a delicate power under a treaty so well guarded in every particular, its provisions are obligatory alone on the State which makes the surrender of the fugitive, and that that fugitive passes into the hands of the country which charges him with the offence, free from all the positive requirements and just implications of the treaty under which the transfer of his person takes place. A moment before he is under the protection of a government which has afforded him an asylum from which he can only be taken under a very limited form of procedure, and a moment after he is found in the possession of another sovereignty by virtue of that proceeding, but divested of all the rights which he had the moment before, and of all the rights which the law governing that proceeding was intended to secure.

If upon the face of this treaty it could be seen that its sole object was to secure the transfer of an individual from the jurisdiction of one sovereignty to that of another, the argument might be sound; but as this right of transfer, the right to demand it, the obligation to grant it, the proceedings under which it takes place, all show that it is for a limited and defined purpose that the transfer is made, it is impossible to

conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his extradition. No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them.

The opposite view has been attempted to be maintained in this country upon the ground that there is no express limitation in the treaty of the right of the country in which the offence was committed to try the person for the crime alone for which he was extradited, and that once being within the jurisdiction of that country, no matter by what contrivance or fraud or by what pretence of establishing a charge provided for by the extradition treaty he may have been brought within the jurisdiction, he is, when here, liable to be tried for any offence against the laws as though arrested here originally. This proposition of the absence of express restriction in the treaty of the right to try him for other offences than that for which he was extradited, is met by the manifest scope and object of the treaty itself. The caption of the treaty, already quoted, declaring that its purpose is to settle the boundary line between the two governments; to provide for the final suppression of the African slave trade; adds, "and for the giving up of criminals, fugitive from justice, in certain cases." The treaty, then, requires, as we have already said, that there shall be given up, upon requisitions respectively made by the two governments, all persons charged with any of the seven crimes enumerated, and the provisions giving a party an examination before a proper tribunal, in which, before he shall be delivered up on this demand, it must be shown that the offence for which he is demanded is one of those enumerated, and that the proof is sufficient to satisfy the court or magistrate before whom this examination takes place that he is guilty, and such as the law of the State of the asylum requires to establish such guilt, leave no reason to doubt that the fair purpose of the treaty is, that the person shall be delivered up to be tried for that offence and for no other.

If there should remain any doubt upon this construction of the treaty itself, the language of two acts of Congress, heretofore cited, incorporated in the Revised Statutes, must set this question at rest. It is there declared, Rev. Stat. §5272, the two preceding sections having provided for a demand upon this country and for the inquiry into the guilt of the party, that "it shall be lawful for the Secretary of State, under his hand and seal of office, to order the person so committed to be delivered to such person or persons as shall be authorized, in the name and on behalf of such foreign government, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly.

For the protection of persons brought into this country by extradition proceedings from a foreign country, §5275 of the Revised Statutes provides:

"Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safe keeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offences specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offences, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe keeping and protection of the accused."

The obvious meaning of these two statutes, which have reference to all treaties of extradition made by the United States, is that the party shall not be delivered up by this government to be tried for any other offence than that charged in the extradition proceedings; and that, when brought into this country upon similar proceedings, he shall not be arrested or tried for any other offence than that with which he was charged in those proceedings, until he shall have had a reasonable time to return unmolested to the country from which he was brought. This is undoubtedly a congressional construction of the purpose and meaning of extradition treaties such as the one we have under consideration, and whether it is or not, it is conclusive upon the judiciary of the right conferred upon persons brought from a foreign country into this under such proceedings.

That right, as we understand it, is that he shall be tried only for the offence with which he is charged in the extradition proceedings and for which he was delivered up, and that if not tried for that, or after trial and acquittal, he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime committed previous to his extradition. . . .

[In an omitted part of the opinion the court reviewed United States v. Caldwell, 8 Blatchf. 131; United States v. Lawrence, 13 Blatchf. 295; United States v. Watts, 8 Sawy. 370; Ex parte Hibbs, 26 Fed. 421; Adriance v. Lagrave, 59 N. Y. 110; Commonwealth v. Hawes, 13 Bush. 697; Blandford v. State, 10 Tex. Ct. of App. 627; State v. Vanderpool, 39 Ohio St. 273.]

Upon a review of these decisions of the Federal and State courts, to which may be added the opinions of the distinguished writers which we have cited in the earlier part of this opinion, we feel authorized to state that the weight of authority and of sound principle are in favor of the

proposition, that a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offences described in that treaty, and for the offence with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings. . . .

The result of these considerations is, that the first of the questions certified to us is answered in the negative; the second and third are answered in the affirmative; and it is ordered to be so certified to the judges of the Circuit Court.[51]

[The opinions of Mr. Justice Gray, concurring, and of Mr. Chief Justice Waite, dissenting, are omitted.]

CONVENTION BETWEEN GREAT BRITAIN AND THE UNITED STATES

Article 3. Washington, July 12, 1889.

26 *United States Statutes at Large* 1508, 1509.

Art. 3. No person surrendered by or to either of the High Contracting Parties shall be triable or be tried for any crime or offence, committed prior to his extradition, other than the offence for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered.[52]

[51] See Re Alice Woodall, 16 Cox C. C. 478. See also Cosgrove v. Winney, 174 U. S. 64; Johnson v. Browne, 205 U. S. 309. *Cf.* Collins v. O'Neil, 214 U. S. 113. *Cf.* also MOORE, Extradition, I, 246.

[52] "But it is questionable whether the rule, as above explained, of the strict exclusion of trial for any other than the extradition offence should be adhered to among nations. Arising out of the anxiety of governments to prevent the perversion of extradition process, especially for the purpose of trying fugitives for political offences, experience has shown that a rigid adherence to the rule often works a defeat of justice. The ways in which such a result may occur are many. Thus A. is extradited on the charge of larceny of the goods of B. It turns out that the goods belonged to B. and C. A. is acquitted on the ground of variance between the indictment and evidence. This exhausts the extradition process, and the culprit is discharged. The same result might occur if A. were surrendered on the charge of stealing the goods of B., who turns out to be a married woman. Or, if A. is surrendered for larceny, and it is shown on the trial that he took an express package which had been placed in his hands to be delivered to his master. In accordance with the common-law principle, this would not be larceny, as the goods were never in the master's hands. Thus A. would go free. Likewise if, being a carrier, he appropriated goods in his care without breaking bulk. He is extradited for larceny, and acquitted. He cannot be tried for embezzlement, although it is clearly proved. The same result would take place if, being surrendered for forgery, it should be shown that, as in the case of a clerk in a bank, with discretionary powers, his offence was only embezzlement. Other cases might be stated almost without end. The trouble and expense of extradition have

Greene et al. v. United States

United States. Circuit Court of Appeals, Fifth Circuit. 1907.

154 *Federal Reporter* 401.

In Error to the District Court of the United States for the Southern District of Georgia. . . .

[The names of counsel and part of the opinion are omitted.]

Shelby, Circuit Judge. A brief statement of the case must be made, to be supplemented later by a fuller statement of the issues and facts pertinent to each contention considered and decided.

In the court below four indictments were found against the plaintiffs in error, Benjamin D. Greene and John F. Gaynor, who will hereafter be called the "defendants." One of the indictments, No. 477, was dismissed, and need not be mentioned again. In two of the remaining cases the defendants were jointly indicted with Oberlin M. Carter, a captain in the Corps of Engineers of the United States Army, who, before the finding of the indictment, had been in charge of the river and harbor improvements in the Savannah, Ga., district, and, while so employed as an officer and agent of the United States, had large sums of money placed in his hands and under his control for disbursement. The several counts of the three indictments all relate to money of the government which passed into his hands and under his control as an officer and agent of the United States. Each of the counts contains charges of the successful conspiracies of the defendants to fraudulently obtain possession of these funds, the presentation of false and fraudulent claims for payment out of them, or for the embezzlement of $575,749.90 of such funds. On motion of the United States attorney, the indictments were consolidated. Rev. St. §1024 (U. S. Comp. St. 1901, p. 720), 146 Fed. 781. The defendants were tried on the three indictments so consolidated. Indictment No. 322, hereafter called the first indictment, contains, as numbered thereon, 10 counts. The last two counts were stricken out, and the defendants were put to trial on the remaining counts numbered from 1 to 8, inclusive, which charged violations of Rev. St. §§5438 and 5440.[53] Indictment No. 371, hereafter called the

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been incurred, and the culprit is discharged, although the very evidence that gives him his freedom establishes his criminality. In view of these facts, it may well be argued that the strict rule against trial for other than the extradition offence should be modified, so that the ends of justice may be secured." Moore, Extradition, I, 247.

[53] Section 5438 of U. S. Rev. Stat. provides for the punishment of those who make or present false claims upon the United States government, conspire to defraud by obtaining allowance or payment of false claims, or give or receive false receipts for government funds or property, etc. Section 5440 provides for the punishment of conspiracy to commit an offence against or to defraud the United States. See note 5, *supra*, 651.

second indictment, was evidently framed to cover the same offenses charged in the first indictment. The charges in the second indictment are made more elaborately, and apparently with the purpose of meeting objections which had been made to the first indictment. It contains six counts, four for violations of Rev. St. §5440, and two for offenses under Rev. St. §5438. Indictment No. 476, the third indictment, contains four counts, each charging embezzlement. Rev. St. §§5497, 5488. After the court had disposed of preliminary questions, the defendants pleaded "not guilty" to these several charges. The jury found the defendants "guilty as charged" in all of the 18 counts submitted to them. By the judgment entered on the verdict, each of the defendants was sentenced (a) on the counts of the first and second indictments, held to be under the provisions of section 5440, Rev. St., to two years' imprisonment in the United States penitentiary at Atlanta, Ga., and to pay a fine of $10,000; (b) on the counts of the second indictment, held to be under the provisons of section 5438, Rev. St., to four years' imprisonment in the United States penitentiary at Atlanta, Ga.; (c) on the third indictment, held to be under sections 5488 and 5497, Rev. St., to four years' imprisonment in the United States penitentiary at Atlanta, Ga., and to pay a fine of $575,749.90, that being the amount alleged to have been embezzled. The several terms of imprisonment run concurrently, and begin at the date when the prisoners should be received by the warden of the penitentiary.

The defendants were extradited from Canada under the treaty of 1889–90 between the United States and Great Britain. We copy here parts of the treaty to which reference is necessary:

"The provisions of the said 10th article (of the treaty of 1842) are hereby made applicable to the following additional crimes: . . .

"(3) Embezzlement; larceny; receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained.

"(4) Fraud by bailee, banker, agent, factor, trustee, or director or member or officer of any company, made criminal by the laws of both countries. . . .

"Extradition is also to take place for participation in any of the crimes mentioned in this convention or in the aforesaid 10th article, provided such participation be punishable by the laws of both countries. . . .

"No person surrendered by or to either of the high contracting parties shall be triable or be tried for any crime or offense, committed prior to his extradition, other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered." 26 Stat. 1508.

The defendants presented certain defenses to the first and second indictments, which related to their extradition. These defenses had no application to the third indictment. The defenses were presented by pleas, which, so far as is necessary to state, were, in substance, that they had lately been in the Dominion of Canada and had been surrendered to the United States to be tried for "participation in fraud by an agent or trustee" and "participation in embezzlement," and that neither of these offenses is charged by the two indictments to which the pleas were addressed, and that the court had no right or authority to try them for any crime or offense for which they were not extradited. The government answered the pleas, admitting that the defendants were extradited for the offenses stated in the pleas, and averring that the indictments charged them with the offenses for which they had been extradited. The third indictment was not involved in these contentions, for it clearly charged embezzlement, and the extradition admittedly included that offense. By consent of counsel, the issues raised by these pleas to the first and second indictments were tried by the court. The United States offered in evidence the opinion of the Extradition Commissioner awarding their surrender; the judgment of the Privy Council; the judgment of the Court of King's Bench for Lower Canada on *mandamus* proceedings; *habeas corpus* proceedings instituted by Benjamin D. Greene and John F. Gaynor before Mr. Justice Ouimet, of the Court of King's Bench for Lower Canada, and Mr. Justice Ouimet's opinion and judgment sustaining the extradition; the requisition for surrender made by the American Secretary of State on the British Ambassador; the President's warrant to George F. White and Joseph F. Doyle to receive Benjamin D. Greene and John F. Gaynor from the Canadian authorities and deliver them to the proper authorities in the United States; George F. White's return on bench warrants; and the President's warrant showing the return of the defendants, Benjamin D. Greene and John F. Gaynor, before the District Court at Savannah on October 9, 1905. No other evidence was offered. The court overruled the pleas, and to this ruling the defendants excepted.

The first question raised by these pleas is: Do the first and second indictments charge an offense for which the defendants were extradited? This question must be answered by a comparison of the extradition proceedings and warrant with the indictments. The formal statement in the pleas admitted in the answers is that the defendants were surrendered to be tried for (1) "participation in fraud by an agent or trustee;" (2) "participation in embezzlement." The question here relates to the first charge, the charge of embezzlement appearing only in the third indictment. The words used are taken from the treaty as general descriptions of certain crimes that are made extraditable. The particular crimes or criminal acts that the Canadian government had in view when it sur-

rendered the defendants to be tried for "participation in fraud by an agent or trustee" can be ascertained by considering the demand that had been made on that government and the evidence that was submitted to it by the United States to sustain such demand, and, especially, the judgment or order of the extradition Commissioner upon which the warrant of extradition was based. The demand of the United States was made on the charge, among others, that the defendants had entered into corrupt agreements with Oberlin M. Carter to defraud the United States out of large sums of money held by Carter as the agent of the United States. The facts were placed fully before the Canadian authorities substantially as they were subsequently presented to the jury on the trial of the defendants. On such demand and upon such evidence the judgment or order of the Extradition Commissioner was rendered. A brief excerpt from the order or judgment will show what was meant in the extradition warrant by the words "participation in fraud by an agent or trustee:"

"I have determined that they should be surrendered . . . on the ground that they are accused of the following extradition crimes; that is to say, for that the said Benjamin D. Greene and John F. Gaynor: (1) Did, on or about July 1, 1897, within the Eastern Division of the Southern District of Georgia, in the United States of America, participate in fraud then and there committed by Oberlin M. Carter, a disbursing officer, agent, and trustee in the employment of the government of the United States, (a) by entering into a corrupt agreement (conspiracy) with the said Oberlin M. Carter, the said officer and agent of the United States, to defraud the United States in the discharge of the duties of his said office and employment, and for the payment by him, as such disbursing officer and agent of the United States, out of the public moneys of the United States intrusted and to be intrusted to him as such disbursing officer and agent, of fraudulent claims made and to be made against the United States for the benefit of said conspirators, and to be presented to said disbursing officer for his approval and payment; by which corrupt agreement and deceitful device the said officer and agent transferred the exercise of the discretions of his office, and the services of his employment, which he was in duty bound as such officer and agent to render honestly and faithfully to and in favor of the United States, from the United States, his principal and employer, to the said Benjamin D. Greene, John F. Gaynor, and others, so that the said United States, by said corrupt agreement itself, lost what it was entitled to have, the honest and faithful services of its said public officer and agent, to its injury."

It is not usual, nor would it be expedient or practicable, for the warrant of extradition to describe the crime with all the fullness that would be required in an indictment. The words "participation in fraud

by an agent or trustee" must be looked at and construed in connection with the proceedings which caused their use. When so considered, it becomes clear that the Canadian Minister of Justice, by the use of the words in the extradition warrant, referred to the charge made by the United States and the acts of the defendants proved in the case and described in the extradition judgment. The extradition warrant, in fact, refers to the judgment by its date, and as the "warrant of Ulric Lafontaine, Esquire, Commissioner under the 'Extradition Act.'" The indictments in question plainly charge the identical corrupt and fraudulent agreement or conspiracy for which the Extradition Commissioner committed the defendants, holding that such acts constituted participation by conspiracy in fraud committed by an agent or trustee. The indictments charge, as do the proceedings in Canada, a corrupt agreement or conspiracy to defraud the United States; that the conspiracy was between the defendants and Oberlin M. Carter, an officer and agent of the United States, and that the purpose was to defraud the United States in the discharge of the duties of his office; that the fraud concerned money intrusted and to be intrusted to Carter as such officer and agent, etc. It is not possible to read the indictments and the proceedings leading up to the extradition and not see that both charge and relate to the same acts and transactions as constituting an offense against the laws of the United States. It is contended by counsel that the extradition is for participation in fraud by an agent or trustee, and that the first and second indictments are for conspiracy. That is true, but it is not the whole truth. The conspiracy charged in the indictment is a conspiracy with an agent to defraud. The acts of the defendants charged as constituting the participation in fraud in the extradition are the same acts charged as a conspiracy to defraud in the indictments. While the extradition and the indictment must be for the same criminal acts, it does not follow that the crime must have the same name in both countries. The same crime often has different names in different countries. If the act in question is criminal in both countries and is within the terms of the treaty, nothing more is required. In deciding whether the indictment charges the same offense for which the defendants were extradited, the acts of the defendants alleged in the two proceedings must be considered. It is not a question of names. The technical niceties and distinctions recognized sometimes in criminal law as making a fatal variance cannot be applied. Cohn v. Jones (D. C.) 100 Fed. 639; State v. Spiegel, 111 Iowa, 701, 83 N. W. 722; State v. Rowe, 73 N. W. 833, 104 Iowa, 323; In re Cortes (C. C.) 42 Fed. 47. It is held that one extradited by the Mexican government as an accomplice may be, on the same facts, indicted and tried as a principal, the distinction between principals and accessories being abolished by local statutes. In re Rowe, 77 Fed. 161, 23 C. C. A. 103. In Bryant v. United States, 167 U. S. 104, 108, 17 Sup. Ct. 744,

42 L. Ed. 94, a fugitive from justice was charged under the treaty between the United States and Great Britain with the crimes of forgery, larceny, and embezzlement and false entries committed in London. The commissioner held the evidence sufficient to warrant the prisoner's commitment for extradition, and committed him generally on the charges made. The prisoner sought release on the ground that as he could only be tried for the particular offense for which he was surrendered, the demanding government and the commissioner should have elected, and that, if the latter deemed the evidence sufficient to commit upon the one, he should not have been committed upon the other. Responding to the objection, the Supreme Court said:

"So long as the prisoner is tried upon the facts which appeared in evidence before the commissioner, and upon the charges or one of the charges for which he is surrendered, it is immaterial whether the indictment against him shall contain counts for forgery, larceny, or embezzlement. That is a matter of practice with which we have nothing to do."

So the Canadian authorities considered and decided this case. They surrendered the defendants to be tried upon "the facts which appeared in evidence before the commissioner," and it was immaterial what practice or form of indictment was used in the courts of this country so long as the defendants were tried here for the same offense and upon the same facts. The defendants are tried, within the meaning of the treaty, for the same offense when they are tried for the same acts and for the same charge set out in the demand and shown by the evidence presented to the commissioner.

We are of opinion that the record shows that the first and second indictments charge the defendants with an offense for which they were extradited . . .

The judgment of the District Court is affirmed.[54]

PARDEE, CIRCUIT JUDGE (dissenting).

[The dissenting opinion is omitted.]

[54] See People v. Hanley, 207 N. Y. S. 176, 240 N. Y. 455; MOORE, Extradition, I, 194.

"A fugitive criminal, when arraigned in the country which has obtained his surrender, may allege that the judicial or other proceedings which resulted in his extradition were irregular and not in accordance with law. This is a plea which cannot be entertained. The method in which a foreign government may execute its laws does not concern the tribunals or the government of the country which obtains the extradition. Such was the answer made by France in the case of Lamirande, who was extradited to that country from Canada. [BILLET, Traité, etc., pp. 373–375.] There were other questions involved in that case, but the position of the French government on the point above mentioned was clear. It is obviously not the part of the demanding government to re-try the question whether the extradition of the fugitive was regular under the laws of the surrendering state." MOORE, *op. cit.*, I, 301.

Ker v. Illinois

United States. Supreme Court. 1886.

119 *United States Reports* 436.

The plaintiff in error, being convicted of embezzlement in a State court of Illinois, sued out this writ of error. The Federal question, which makes the case, is stated in the opinion of the court.

[The names of counsel and part of the opinion are omitted.]

Mr. Justice Miller delivered the opinion of the court.

This case is brought here by a writ of error to the Supreme Court of the State of Illinois. The plaintiff in error, Frederick M. Ker, was indicted, tried, and convicted in the Criminal Court of Cook County, in that State, for larceny. The indictment also included charges of embezzlement. During the proceedings connected with the trial the defendant presented a plea in abatement, which, on demurrer, was overruled, and the defendant refusing to plead further, a plea of not guilty was entered for him, according to the statute of that State, by order of the court, on which the trial and conviction took place.

The substance of the plea in abatement, which is a very long one, is, that the defendant, being in the city of Lima, in Peru, after the offences were charged to have been committed, was in fact kidnapped and brought to this country against his will. His statement is, that, application having been made by the parties who were injured, Governor Hamilton, of Illinois, made his requisition, in writing, to the Secretary of State of the United States, for a warrant requesting the extradition of the defendant, by the Executive of the Republic of Peru, from that country to Cook County; that, on the first day of March, 1883, the President of the United States issued his warrant, in due form, directed to Henry G. Julian, as messenger, to receive the defendant from the authorities of Peru, upon a charge of larceny, in compliance with the treaty between the United States and Peru on that subject; that the said Julian, having the necessary papers with him, arrived in Lima, but, without presenting them to any officer of the Peruvian government, or making any demand on that government for the surrender of Ker, forcibly and with violence arrested him, placed him on board the United States vessel Essex, in the harbor of Callao, kept him a close prisoner until the arrival of that vessel at Honolulu, where, after some detention, he was transferred in the same forcible manner on board another vessel, to wit, the City of Sydney, in which he was carried a prisoner to San Francisco, in the State of California. The plea then states, that, before his arrival in that city, Governor Hamilton had made a requisition on the Governor of California, under the laws and Constitution of the United States, for the delivery up of the defendant, as a fugitive from justice, who had

escaped to that State on account of the same offences charged in the requisition on Peru and in the indictment in this case. The requisition arrived, as the plea states, and was presented to the Governor of California, who made his order for the surrender of the defendant to the person appointed by the Governor of Illinois, namely, one Frank Warner, on the 25th day of June, 1883. The defendant arrived in the city of San Francisco on the 9th day of July thereafter, and was immediately placed in the custody of Warner, under the order of the Governor of California, and, still a prisoner, was transferred by him to Cook County, where the process of the Criminal Court was served upon him and he was held to answer the indictment already mentioned.

The plea is very full of averments that the defendant protested, and was refused any opportunity whatever, from the time of his arrest in Lima until he was delivered over to the authorities of Cook County, of communicating with any person or seeking any advice or assistance in regard to procuring his release by legal process or otherwise; and he alleges that this proceeding is a violation of the provisions of the treaty between the United States and Peru, negotiated in 1870, which was finally ratified by the two governments and proclaimed by the President of the United States, July 27, 1874. 18 Stat. 719. . . .

[In an omitted part of the opinion the court considered and disposed of the contentions respectively that the defendant had been denied due process of law and that the proceedings for extradition of the defendant from California to Illinois were not in accordance with the act of Congress.]

But the main proposition insisted on by counsel for plaintiff in error in this court is, that by virtue of the treaty of extradition with Peru the defendant acquired by his residence in that country a right of asylum, a right to be free from molestation for the crime committed in Illinois, a positive right in him that he should only be forcibly removed from Peru to the State of Illinois in accordance with the provisions of the treaty, and that this right is one which he can assert in the courts of the United States in all cases, whether the removal took place under proceedings sanctioned by the treaty, or under proceedings which were in total disregard of that treaty, amounting to an unlawful and unauthorized kidnapping.

This view of the subject is presented in various forms and repeated in various shapes, in the argument of counsel. The fact that this question was raised in the Supreme Court of Illinois may be said to confer jurisdiction on this court, because, in making this claim, the defendant asserted a right under a treaty of the United States, and, whether the assertion was well founded or not, this court has jurisdiction to decide it; and we proceed to inquire into it.

There is no language in this treaty, or in any other treaty made by this country on the subject of extradition, of which we are aware, which says in terms that a party fleeing from the United States to escape punishment for crime becomes thereby entitled to an asylum in the country to which he has fled; indeed, the absurdity of such a proposition would at once prevent the making of a treaty of that kind. It will not be for a moment contended that the government of Peru could not have ordered Ker out of the country on his arrival, or at any period of his residence there. If this could be done, what becomes of his right of asylum?

Nor can it be doubted that the government of Peru could of its own accord, without any demand from the United States, have surrendered Ker to an agent of the State of Illinois, and that such surrender would have been valid within the dominions of Peru. It is idle, therefore, to claim that, either by express terms or by implication, there is given to a fugitive from justice in one of these countries any right to remain and reside in the other; and if the right of asylum means anything, it must mean this. The right of the government of Peru voluntarily to give a party in Ker's condition an asylum in that country, is quite a different thing from the right in him to demand and insist upon security in such an asylum. The treaty, so far as it regulates the right of asylum at all, is intended to limit this right in the case of one who is proved to be a criminal fleeing from justice, so that, on proper demand and proceedings had therein, the government of the country of the asylum shall deliver him up to the country where the crime was committed. And to this extent, and to this alone, the treaty does regulate or impose a restriction upon the right of the government of the country of the asylum to protect the criminal from removal therefrom.

In the case before us, the plea shows, that, although Julian went to Peru with the necessary papers to procure the extradition of Ker under the treaty, those papers remained in his pocket and were never brought to light in Peru; that no steps were taken under them; and that Julian, in seizing upon the person of Ker and carrying him out of the territory of Peru into the United States, did not act nor profess to act under the treaty. In fact, that treaty was not called into operation, was not relied upon, was not made the pretext of arrest, and the facts show that it was a clear case of kidnapping within the dominions of Peru, without any pretence of authority under the treaty or from the government of the United States.

In the case of United States v. Rauscher, just decided, *ante*, 407, and considered with this, the effect of extradition proceedings under a treaty was very fully considered, and it was there held, that, when a party was duly surrendered, by proper proceedings, under the treaty of 1842 with Great Britain, he came to this country clothed with the protection which

the nature of such proceedings and the true construction of the treaty gave him. One of the rights with which he was thus clothed, both in regard to himself and in good faith to the country which had sent him here, was, that he should be tried for no other offence than the one for which he was delivered under the extradition proceedings. If Ker had been brought to this country by proceedings under the treaty of 1870–74 with Peru, it seems probable, from the statement of the case in the record, that he might have successfully pleaded that he was extradited for larceny, and convicted by the verdict of a jury of embezzlement; for the statement in the plea is, that the demand made by the President of the United States, if it had been put in operation, was for an extradition for larceny, although some forms of embezzlement are mentioned in the treaty as subjects of extradition. But it is quite a different case when the plaintiff in error comes to this country in the manner in which he was brought here, clothed with no rights which a proceeding under the treaty could have given him, and no duty which this country owes to Peru or to him under the treaty.

We think it very clear, therefore, that, in invoking the jurisdiction of this court upon the ground that the prisoner was denied a right conferred upon him by a treaty of the United States, he has failed to establish the existence of any such right.

The question of how far his forcible seizure in another country, and transfer by violence, force, or fraud, to this country, could be made available to resist trial in the State court, for the offence now charged upon him, is one which we do not feel called upon to decide, for in that transaction we do not see that the Constitution, or laws, or treaties, of the United States guarantee him any protection. There are authorities of the highest respectability which hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court. Among the authorities which support the proposition are the following: Ex parte Scott, 9 B. & C. 446 (1829); Lopez & Sattler's Case, 1 Dearsly & Bell's Crown Cases, 525; State v. Smith, 1 Bailey, So. Car., Law, 283 (1829); S. C. 19 Am. Dec. 679; State v. Brewster, 7 Vt. 118 (1835); Dow's Case, 18 Penn. St. 37 (1851); State v. Ross and Mann, 21 Iowa, 467 (1866); Ship Richmond v. United States, (The Richmond), 9 Cranch, 102.

However this may be, the decision of that question is as much within the province of the State court, as a question of common law, or of the law of nations, of which that court is bound to take notice, as it is of the courts of the United States. And though we might or might not differ with the Illinois court on that subject, it is one in which we have no right to review their decision.

It must be remembered that this view of the subject does not leave the prisoner or the government of Peru without remedy for his unauthorized seizure within its territory. Even this treaty with that country provides for the extradition of persons charged with kidnapping, and on demand from Peru, Julian, the party who is guilty of it, could be surrendered and tried in its courts for this violation of its laws. The party himself would probably not be without redress, for he could sue Julian in an action of trespass and false imprisonment, and the facts set out in the plea would without doubt sustain the action. Whether he could recover a sum sufficient to justify the action would probably depend upon moral aspects of the case, which we cannot here consider.

We must, therefore, hold that, so far as any question in which this court can revise the judgment of the Supreme Court of the State of Illinois is presented to us, the judgment must be

Affirmed.[55]

MERIJILDO DOMINGUEZ v. THE STATE

United States. Court of Criminal Appeals of Texas. 1921.

90 *Texas Criminal Reports* 92.

Appeal from the District Court of Val Verde. Tried before the Honorable Joseph Jones.

Appeal from a conviction of murder; penalty, ninety-nine years in the penitentiary.

The opinion states the case.

[The names of counsel and part of the opinion are omitted.]

MORROW, PRESIDING JUDGE.—Upon an indictment for murder, the appellant is condemned to confinement in the penitentiary for a period for ninety-nine years.

In a preliminary plea he urged the want of jurisdiction over his person. It appeared from the evidence and admission introduced in support of the plea that he was a native, a citizen and resident of the Republic of Mexico; that he had been forcibly arrested therein and brought to the State of Texas by a detachment of the military forces of the Government of the United States, by whom he was delivered, without his consent, to the civil authorities of the State of Texas.

A captain, who was in command of the company of soldiers of the United States who arrested the appellant, testified that by virtue of instructions from the War Department of the United States, his command, within a certain limit of time and space, was authorized to go into the territory of the United States of Mexico in pursuit of bandits; that upon such mission he took his command, on the second day of April,

[55] See Ex parte Ponzi, 290 S. W. (Tex.) 170.

into Mexico and, within the limits of the time and distance, captured appellant. The authority under which he was acting was denominated following a "hot trail," which term comprehended the pursuits of bandits across the border. It developed sometime after his capture that the appellant was not one of the bandits pursued, though he was believed to be such at the time he was apprehended. Because he was not one of those who made the "hot trail," which was followed, the appellant, some days after his seizure and while he was in the State of Texas, where he had been brought by the soldiers mentioned, their custody of him was abandoned and immediately thereupon, by pre-arrangement, he was taken charge of by Texas Rangers and held under the charge which culminated in the conviction involved in this appeal.

Appellant insists that not being one of those whom the United States soldiers were privileged to arrest while in the United States of Mexico; that he was immune from prosecution until such time as he had been given the privilege of returning to his native country. In support of this view he refers to the principle that a fugitive from justice, who has taken refuge in a foreign country and by that country surrendered upon the requisition of the United States Government in virtue of a treaty of extradition, cannot lawfully be tried for an offense against the United States committed before he was extradited and differing from that to answer which he was surrendered by the country of refuge. United States v. Rauscher, 119 U. S. Rep., 407, 30 U. S. (L. ed.) 425; Johnson v. Browne, 205 U. S. Rep., 309, 51 U. S. (L. ed.) 816; Commonwealth v. Hawes, 13 Bush (Ky.) 697, 26 Am. Rep., 242; State v. Vanderpool, 39 Ohio St. 273, 48 Am. Rep. 431; Blandford v. State, 10 Texas Crim. App. 640.

Against appellant's contention, the State advances the view that the appellant's apprehension was not under authority of the United States Government nor with the consent of that of Mexico, but that he was, in fact, abducted or kidnapped and brought forcibly from his native country into the United States contrary to his wishes; that in so doing his abductors acted under no warrant or right from any government but were trespassers, and in punishing him for the offense committed in the State of Texas no violence is done to any treaty obligation or right. . . .

[In an omitted part of the opinion the court reviewed United States v. Rauscher, 119 U. S. 407, *supra*, 738; and Ker v. Illinois, 119 U. S. 436, *supra*, 751.]

The cases of Rauscher and Ker were decided by the Supreme Court of the United States about the same time, and we interpret them to hold that when a foreign country surrenders a fugitive from justice under an extradition treaty, he can be tried in the demanding country alone for the offense named in the extradition proceedings, but when the fugitive

is kidnapped or abducted in a foreign country and brought into one of the United States and there tried for an offense against its laws, the judgment of conviction will not be overturned by the Supreme Court of the United States because he was kidnapped or abducted, but that the decision of the state court upon the effect of such acquisition of custody of his person will control. The primary inquiry then is into which of the classes, if either, the proof brings the appellant's arrest. The extradition treaty does not sanction or purport to sanction the entry of the soldiers of the United States of America to make an arrest in the Republic of Mexico.

The captain who conducted the expedition into Mexico and apprehended the appellant said:

"I was acting under instructions issued by the War Department; we had a certain limit that we could go into Mexico for a certain length of time in pursuit of bandits, and I was within those limits at the time of Merijildo Dominguez' detention."

We have no more specific information touching the source and the scope of the authority upon which the soldiers acted. Their entry of Mexico for the purpose of apprehending offenders would have been a violation of Mexican territory contrary to the law of nations in the absence of consent of the Mexican Government. Ruling Case Law, Volume 15, page 132, Section 45. For the purpose of this decision it must be assumed that the instructions which proceeded from the War Department of the United States were in accord with the permission extended by the Mexican Government. The exact nature or classification of the privilege exercised by the War Department in sending its soldiers into Mexico for the purpose named is not certain, though it is doubtless referable to the so-called "comity of nations." Cyc. of Law & Proc. Vol. 22, page 1732. The United States and Mexico were at peace, and the office the soldiers performed appears to have been analogous to that which pertains to the exercise by police officers of authority to make arrests without warrant. The police officers of the State of Texas having no authority as such beyond the bounds of the State, the privilege of pursuing offenders into Mexico was extended to and exercised by the military officers of the United States Government and the soldiers under their command.

On the occasion in question, as we understand the record, having pursued and overtaken a band of raiders in a certain village of Mexico, they found appellant among them, and acting upon the authority to arrest the raiders, they seized the appellant, believing him to be one of the raiders. In making the arrest apparently, they were acting for the Government, not as individuals. What was done, was in virtue of the office. See Mechem on Public Officers, Sec. 284. Having no reference to their civil liability by reason of the mistake of fact, if it was such, as

to the identity of the appellant, if it was made in good faith on adequate ground, no criminal responsibility ought to follow from it. In other words, if the apprehension of appellant was due solely to an honest mistake of fact as to his identity, the act was not criminal kidnaping or abduction. Appellant having been seized by virtue of the authority of the United States Government with the consent of the Mexican Government, the United States Government acquired no greater right than would have existed if appellant had been one of those in whose pursuit the Mexican territory was entered. If the principles applicable to treaty obligations control the privilege of entering the Mexican territory and seizing its citizens under the agreement in question, appellant, if he had been one of those who made the so-called "hot trail," would have been entitled to his release when he had answered the charge against him upon which his arrest was made. In other words, if he had been one of the raiders pursued, he could have been tried for the offense committed on the occasion of the raid which was followed, but could not have been then held and tried for an offense previously committed within the State of Texas. This would have been true even though he had not been a citizen of Mexico. He having sought an asylum in Mexico could be removed to the United States only in accord with the treaty of extradition. He being a citizen of Mexico, the United States of America had no absolute right to demand his return. By the express provisions of the treaty, the surrender of a citizen of Mexico is made discretionary with the Mexican executive. We are aware of no precedent by which to determine whether the agreement involved in the instant case would fall under the same principle that would control a written treaty. The same moral obligation that would restrain the United States Government from transgressing the implied limitations upon it under its treaty with Mexico, would necessarily prevail with reference to the agreement resting upon the "comity of nations," and if the legal obligation is the same, the appellant cannot be held for the offense which we are now considering without the opportunity to return to his country in order that it may there determine whether he shall be surrendered for trial under the treaty of extradition. . . .

The treaty between the United States and Mexico, to which we have referred, contains the following:

"The Government of the United States of America and the Government of the United States of Mexico mutually agree to deliver up persons who, having been charged with or convicted of any of the crimes and offenses specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territory of the other."

"Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this convention, but the executive

authority of each shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so." (Proclaimed April 24, 1899)."

This treaty, like others, is a part of the supreme law of the land, binding upon courts and available to persons having rights secured or recognized thereby and may be set up as a defense to a criminal prosecution established in disregard thereof. Foster v. Neilson, 2 Peters, 253; Rose's Notes on U. S. Rep. Vol. 2, 716; also Blandford v. State, 10 Texas Crim. App., 640, from which we quote:

"If the Federal Constitution, or a treaty, inhibits the doing of a certain thing, no legislative or executive action is required to authorize the courts to decline to override these limitations or restrictions, 'for the palpable and all-sufficient reason, that to do so would be not only to violate the public faith but to transgress the supreme law of the land.'

In view of these principles of law, we hold then that it is the duty of the courts of the State to take cognizance of, construe, and give effect to the treaties of the Federal government made with other nations; and that under a proper construction of the treaty with Mexico, the defendant could not be legally called upon to answer any other crime save that for which he was extradited."

Appellant, a citizen of Mexico, not having been kidnapped or abducted, had the right to resist trial for the offense charged in the indictment until such time as he should voluntarily subject himself to the jurisdiction of the United States, or until the consent of the Mexican Government to his trial should be obtained.

By his plea in abatement, the appellant sought to avail himself of this privilege by bringing to the attention of the trial court the facts upon which he relied, seeking to have their truth determined and invoking the judgment of the court thereon. His plea, in our judgment, should have been considered, and, if found true, the prosecution abated.

The reversal of the judgment and remanding of the case is ordered.

Reversed and remanded.

The Case of Savarkar

France and Great Britain. Tribunal of the Permanent Court of Arbitration at The Hague. 1911.

Protocoles des Séances et Sentence du Tribunal d'Arbitrage, page 54.

[This case arose as the result of the escape of Savarkar, a Hindoo, who was being transported from England to India for trial on a charge of abetment of murder, and who at Marseilles on July 8, 1910, escaped to the shore from the Morea, a British merchant vessel, which was carrying him. While being pursued by Indian policemen from the vessel, he was

captured by a French police officer, who returned him to the Morea, which sailed with the fugitive on board on the following day. Subsequently, France demanded the restitution of the fugitive on the ground that his delivery to the British officers on board the vessel was contrary to the rules of international law, and, upon Great Britain's refusal to comply, the questions of law and fact involved were, by a *compromis* signed October 25, 1910, submitted to the arbitration of a tribunal composed of the following members of the Permanent Court of Arbitration: Auguste M. F. Beernaert of Belgium, Louis Renault of France, Gregors Gram of Norway, A. F. de Savornin Lohman of Holland and the Earl of Desart of England. The sessions began February 14, 1911, and ended February 17, 1911, the decision being rendered February 24, 1911.]

[The above statement of the case is taken from the syllabus in Scott, The Hague Court Reports, 275. Part of the award is omitted.]

Whereas, by an agreement dated the 25th October 1910, the Government of the French Republic and the Government of His Britannic Majesty agreed to submit to Arbitration the questions of fact and law raised by the arrest and restoration to the mail-steamer "Morea" at Marseilles, on the 8th July 1910, of the British Indian Savarkar, who had escaped from that vessel where he was in custody; and the demand made by the Government of the French Republic for the restitution of Savarkar,

the Arbitral Tribunal has been called upon to decide the following question:

Should Vinayak Damodar Savarkar, in conformity with the rules of international law, be restored or not be restored by His Britannic Majesty's Government to the Government of the French Republic? . . .

Whereas, with regard to the facts which gave rise to the difference of opinion between the two Governments, it is established that, by a letter, dated the 29th June 1910, the Commissioner of the Metropolitan Police in London informed the "*Directeur de la Sûreté générale*" at Paris, that the British-Indian Vinayak Damodar Savarkar was about to be sent to India, in order to be prosecuted for abetment of murder, etc., and that he would be on board the vessel "Morea" touching at Marseilles on the 7th or 8th July.

Whereas, in consequence of the receipt of this letter, the Ministry of the Interior informed the Prefect of the "Bouches-du-Rhône," by a telegram dated the 4th July 1910, that the British Police were sending Savarkar to India on board the steamship "Morea." This telegram states that some "*révolutionnaires hindous*" then on the Continent, might take advantage of this to further the escape of this foreigner, and the Prefect was requested to take the measures necessary to guard against any attempt of that kind.

Whereas the "*Directeur de la Sûreté générale*" replied by a letter dated the 9th July 1910 to the letter of the Commissioner of the Metropo-

litan Police, stating that he had given the necessary instructions for the purpose of guarding against the occurrence of any incident during the presence at Marseilles of the said Vinayak Damodar Savarkar, on board the steamship "Morea."

Whereas, on the 7th July, the "Morea" arrived at Marseilles. The following morning, between 6 and 7 o'clock, Savarkar, having succeeded in effecting his escape, swam ashore and began to run; he was arrested by a brigadier of the French maritime gendarmerie and taken back to the vessel. Three persons, who had come ashore from the vessel, assisted the brigadier in taking the fugitive back. On the 9th July, the "Morea" left Marseilles with Savarkar on board.

Whereas, from the statements made by the French brigadier to the Police at Marseilles, it appears:

that he saw the fugitive, who was almost naked, get out of a porthole of the steamer, throw himself into the sea and swim to the quay;

that at the same moment some persons from the ship, who were shouting and gesticulating, rushed over the bridge leading to the shore, in order to pursue him;

that a number of people on the quay commenced to shout "*Arrêtez-le*";

that the brigadier at once went in pursuit of the fugitive and, coming up to him after running about five hundred metres, arrested him.

Whereas the brigadier declares that he was altogether unaware of the identity of the person with whom he was dealing, that he only thought that the man who was escaping was one of the crew, who had possibly committed an offence on board the vessel.

Whereas, with regard to the assistance afforded him by one of the crew and two Indian policemen, it appears from the explanations given on this point, that these men came up after the arrest of Savarkar, and that their intervention was only auxiliary to the action of the brigadier. The brigadier had seized Savarkar by one arm for the purpose of taking him back to the ship, and the prisoner went peaceably with him. The brigadier, assisted by the above mentioned persons, did not relax his hold, till he reached the half deck of the vessel.

The brigadier said that he did not know English.

From what has been stated, it would appear that the incident did not occupy more than a few minutes.

Whereas it is alleged that the brigadier who effected the arrest was not ignorant of the presence of Savarkar on board the vessel, and that his orders, like those of all the French Police and Gendarmes, were to prevent any Hindoo from coming on board who had not got a ticket.

Whereas these circumstances show that the persons on board in charge of Savarkar might well have believed that they could count on the assistance of the French Police.

Whereas it is established that a "*Commissaire*" of the French Police came on board the vessel shortly after her arrival at the port, and, in accordance with the orders of the Prefect, placed himself at the disposal of the Commander in respect of the watch to be kept;

that, in consequence, this "*Commissaire*" was put into communication with the British Police Officer who, with other Police Officers, was in charge of the prisoner;

that the Prefect of Marseilles, as appears from a telegram dated the 13th July 1910 addressed to the Minister of the Interior, stated that he had acted in this matter in accordance with instructions given by the "*Sûreté générale*" to make the necessary arrangements to prevent the escape of Savarkar.

Whereas, having regard to what has been stated, it is manifest that the case is not one of recourse to fraud or force in order to obtain possession of a person who had taken refuge in foreign territory, and that there was not, in the circumstances of the arrest and delivery of Savarkar to the British Authorities and of his removal to India, anything in the nature of a violation of the sovereignty of France, and that all those who took part in the matter certainly acted in good faith and had no thought of doing anything unlawful.

Whereas, in the circumstances cited above, the conduct of the brigadier not having been disclaimed by his chiefs before the morning of the 9th July, that is to say before the "Morea" left Marseilles, the British Police might naturally have believed that the brigadier had acted in accordance with his instructions, or that his conduct had been approved.

Whereas, while admitting that an irregularity was committed by the arrest of Savarkar, and by his being handed over to the British Police, there is no rule of International Law imposing, in circumstances such as those which have been set out above, any obligation on the Power which has in its custody a prisoner, to restore him because of a mistake committed by the foreign agent who delivered him up to that Power.

FOR THESE REASONS:

The Arbitral Tribunal decides that the Government of His Britannic Majesty is not required to restore the said Vinayak Damodar Savarkar to the Government of the French Republic.

Done at The Hague, at the Permanent Court of Arbitration, February 24th, 1911.[56]

[56] See MOORE, Extradition, I, 281.

SECTION 4. POLITICAL OFFENSES

Convention between Great Britain and the United States

Article 2. Washington, July 12, 1889.

26 *United States Statutes at Large* 1508, 1509.

Art. 2. A fugitive criminal shall not be surrendered, if the offence in respect of which his surrender is demanded be one of a political character, or if he proves that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.

No person surrendered by either of the High Contracting Parties to the other shall be triable or tried, or be punished for any political crime or offence, or for any act connected therewith, committed previously to his extradition.

If any question shall arise as to whether a case comes within the provisions of this Article, the decision of the authorities of the government in whose jurisdiction the fugitive shall be at the time shall be final.[57]

[57] "Various definitions have been given of what constitutes a political offence. Such definitions, however, are of little practical value, since the question whether a particular act comes within that category is pre-eminently circumstantial." Moore, Extradition, I, 308.

"There are three senses which might naturally be given to the expression standing alone. The first and most obvious sense is an offence consisting in an attack upon the political order of things established in the country where it is committed. High treason, riots for political purposes, crimes like the offences defined by the Treason-Felony Act of 1848, seditious libels and conspiracies, are instances of offences of this class. It is, however, difficult to interpret the expression in this sense, because none of the crimes referred to are extradition crimes. As therefore they are not within the rule, it seems difficult to suppose that the exception was intended to apply to them.

"The second sense in which the expression 'political offence' can be used is any offence committed in order to obtain any political object. The exception thus interpreted would cover all crimes committed under the orders of any secret political society, such for instance as assassination, arson, robbery, or forgery. It is monstrous to suppose that this interpretation can be the true one. To take an illustration which can hardly give offence in the present day, it would have protected the wretch Fieschi, whose offence consisted in shooting down many persons in the streets of Paris in an attempt to murder Louis Philippe.

"The third meaning which may be given to the words, and which I take to be the true one, is somewhat more complicated than either of those I have described. An act often falls under several different definitions. For instance, if a civil war were to take place, it would be high treason by levying war against the queen. Every case in which a man was shot in action would be murder; whenever a house was burnt for military purposes, arson would be committed; to take cattle, &c., by requisition would be robbery. According to the common use of language, however, all such acts would be political offences, because they would be incidents in carrying on a civil war. I think, therefore, that the expression in the Extradition Act ought (unless some better interpretation of it can be suggested) to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes if those crimes were incidental to and formed a part of political disturbances." Stephen, History, II, 70.

In re Castioni

Great Britain. High Court of Justice; Queen's Bench Division. 1890.

Law Reports [1891] 1 *Queen's Bench Division* 149.

Application for *habeas corpus*.

[Part of the statement of the case, part of the arguments of counsel, and part of the opinion are omitted.]

The prisoner Castioni had been arrested in England on the requisition of the Swiss Government, and brought before the magistrate at the police court at Bow Street, and by him committed to prison for the purpose of extradition, on a charge of wilful murder alleged to have been committed in Switzerland.[58] . . .

The prisoner was charged with the murder of Luigi Rossi, by shooting him with a revolver on September 11, 1890, in the town of Bellinzona, in the canton of Ticino in Switzerland. The deceased, Rossi, was a member of the State Council of the canton of Ticino, and was about twenty-six years of age. The prisoner, Castioni, was a citizen of the same canton; he had resided for seventeen years in England, and arrived at Bellinzona on September 10, 1890. For some time previous to this date much dissatisfaction had been felt and expressed by a large number of the inhabitants of Ticino at the mode in which the political party then in power were conducting the government of the canton. A request was presented to the Government for a revision of the constitution of the canton, under art. 15 of the constitution, which provides that "The constitution of the canton may be revised wholly or partially . . . (b) at the request of 7000 citizens presented with the legal formalities. In this case the Council shall within one month submit to the people the question whether or not they wish to revise the constitution," and a law of May 9, 1877, prescribes the course to be adopted for the execution of letter (b) of art. 15. The Government having declined to take a popular vote on the question of the revision of the constitution, on September 11, 1890, a number of the citizens of Bellinzona, among whom

[58] The Extradition Treaty between Great Britain and Switzerland, Nov. 26, 1880, art. 11, provided: "A fugitive criminal shall not be surrendered, if the offence in respect of which his surrender is demanded is one of a political character, or if he prove that the requisition for his surrender has, in fact, been made with a view to try and punish him for an offence of a political character." Piggott, Extradition, App. 237, 243. The British Extradition Act of 1870, §3, provided: "The following restrictions shall be observed with respect to the surrender of fugitive criminals: (1.) A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate or the court before whom he is brought on *Habeas corpus*, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try to punish him for an offence of a political character." 33 & 34 Vict. c. 52.

was Castioni, seized the arsenal of the town, from which they took rifles and ammunition, disarmed the gendarmes, arrested, and bound or handcuffed, several persons connected with the Government, and forced them to march in front of the armed crowd to the municipal palace. Admission to the palace was demanded in the name of the people, and was refused by Rossi and another member of the Government, who were in the palace. The crowd then broke open the outer gate of the palace, and rushed in, pushing before them the Government officials whom they had arrested and bound; Castioni, who was armed with a revolver, was among the first to enter. A second door, which was locked, was broken open, and at this time, or immediately after, Rossi, who was in the passage, was shot through the body with a revolver, and died very soon afterwards. Some other shots were fired, but no one else was injured. Two witnesses, who were present when the shot was fired, and were called before the magistrate at Bow Street, identified Castioni as the person who fired the shot. One of the witnesses called for the prisoner was an advocate named Bruni, who had taken a leading part in the attack on the municipal palace. In cross-examination he said: "The death of Rossi was a misfortune, and not necessary for the rising." There was no evidence that Castioni had any previous knowledge of Rossi. The crowd then occupied the palace, disarmed the gendarmes who were there, and imprisoned several members of the Government. A provisional government was appointed, of which Bruni was a member, and assumed the government of the canton, which it retained until dispossessed by the armed intervention of the Federal Government of the Republic.

The magistrate was of opinion that the identification of Castioni was sufficient, and held upon the evidence that the bar to extradition specified in s. 3 of the Extradition Act, 1870 did not exist, and committed Castioni to prison.

Sir Charles Russell, Q. C. (J. P. Grain and Eldridge, with him), for the prisoner. Looking at all the facts now before the Court, it is clear that the offence with which the prisoner is charged is an offence of a political character within the meaning of s. 3 of the statute (33 & 34 Vict. c. 52) and article 11 of the treaty. On the evidence two conclusions are irresistible—first, that there was a political rising; and secondly, that the shot which caused the death of Councillor Rossi was fired at a moment when the tumult occasioned by that rising was at its height; and further, assuming for the purpose of argument that the shot was fired by Castioni, the evidence shews conclusively that he was taking an active part in the rising. . . .

The expression "of a political character" is, no doubt, vague, and probably intentionally so. It seems as if the legislature had purposely abstained from attempting to give an exhaustive definition, leaving it

to the Court to decide in each case as it arose whether the exception applied. This view is supported by the extract from Lord Stanley's speech in the House of Commons, of August 3, 1866, cited in Clarke on Extradition, 3rd edition, Appendix, pp. cclix., cclx., to which it may be admissible to refer for the purpose of illustration; and on the same occasion Mr. J. S. Mill suggested the following definition: "Any offence committed in the course of or furthering of civil war, insurrection, or political commotion." If this definition is correct, it certainly includes the present case. . . .

The Attorney-General (Sir Richard Webster, Q. C.) (R. S. Wright with him), for the Crown, and the Solicitor-General (Sir Edward Clarke, Q. C.), and Robert Woodfall, for the Federal Government of the Republic of Switzerland, by arrangement, shewed cause in the first instance.

The magistrate has rightly found that the offence was not of a political character, and his finding ought not to be overruled. The definition suggested by Mr. Mill is incorrect. The effect of adopting it would be to introduce a dangerous doctrine; for it would give immunity from extradition to persons who, without any political object in view, joined in a rising for the sole purpose of gratifying personal malice, or for the sake of plunder. The definition in Mr. Justice Stephen's History of the Criminal Law is more accurate, and would not include the present case. . . .

Denman, J. . . . There has been no legal decision as yet upon the meaning of the words contained in the Act of 1870, upon the true meaning of which this case mainly depends. . . . I do not think it is necessary or desirable that we should attempt to put into language in the shape of an exhaustive definition exactly the whole state of things, or every state of things which might bring a particular case within the description of an offence of a political character. I wish, however, to express an opinion as to one matter upon which I entertain a very strong opinion. That is, that if the description given by Mr. John Stuart Mill were to be construed in the sense that it really means any act which takes place in the course of a political rising without reference to the object and intention of it, and other circumstances connected with it, I should say that it was a wrong definition and one which could not be legally applied to the words used in the Act of Parliament. Sir Charles Russell suggested that "in the course of" was to be read with the words following, "or in furtherance of," and that "in furtherance of" is equivalent to "in the course of." I cannot quite think that this was the intention of the speaker, or is the natural meaning of the expression; but I entirely concur with the observation of the Solicitor-General that in the other sense of the words, if they are not to be construed as merely equivalent expressions, it would be a wrong definition. I think that in order to

bring the case within the words of the Act and to exclude extradition for such an act as murder, which is one of the extradition offences, it must at least be shewn that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter, a political rising, or a dispute between two parties in the State as to which is to have the government in its hands, before it can be brought within the meaning of the words used in the Act. . . .

It seems to me that it is a question of mixed law and fact—mainly indeed of fact—as to whether the facts are such as to bring the case within the restriction of s. 3, and to shew that it was an offence of a political character. I do not think it is disputed, or that now it can be looked upon as in controversy, that there was at this time existing in Ticino a state of things which would certainly shew that there was more than a mere small rising of a few people against the law of the State. I think it is clearly made out by the facts of this case that there was something of a very serious character going on—amounting, I should go so far as to say, in that small community, to a state of war. There was an armed body of men who had seized arms from the arsenal of the State; they were rushing into the municipal council chamber in which the Government of the State used to assemble; they demanded admission; admission was refused; some firing took place; the outer gate was broken down; and I think it also appears perfectly plain from the evidence in the case that Castioni was a person who had been taking part in that movement at a much earlier stage. He was an active party in the movement; he had taken part in the binding of one member of the Government. Some time before he arrived with his pistol in his hand at the seat of government, he had gone with multitudes of men, armed with arms from the arsenal, in order to attack the seat of government, and I think it must be taken that it is quite clear that from the very first he was an active party, one of the rebellious party who was acting and in the attack against the Government. Now, that being so, it resolves itself into a small point, depending on the evidence which was taken before the magistrate, and anything that we can collect from the evidence that we have before us and from the whole circumstances of the case.

. . . I have carefully followed the discussion as to the facts of the case, and if it were necessary I could go through them all one by one, and point out, I think, that, looking at the way in which that evidence was given, and at the evidence itself, there is nothing in my judgment to displace the view which I take of the case, that at the moment at which Castioni fired the shot the reasonable presumption is, not that it is a matter of absolute certainty (we cannot be absolutely certain about anything as to men's motives), but the reasonable assumption

is that he, at the moment knowing nothing about Rossi, having no spite or ill-will against Rossi, as far as we know, fired that shot—that he fired it thinking it would advance, and that it was an act which was in furtherance of, and done intending it to be in furtherance of, the very object which the rising had taken place in order to promote, and to get rid of the Government, who, he might, until he had absolutely got into the place, have supposed were resisting the entrance of the people to that place. That, I think, is the fair and reasonable presumption to draw from the facts of the case. I do not know that it is necessary to give any opinion as to the exact moment when the shot was fired; there is some conflict about it. There is evidence that there was great confusion; there is evidence of shots fired after the shot which Castioni fired; and all I can say is, that looking at it as a question of fact, I have come to the conclusion that at the time at which that shot was fired he acted in the furtherance of the unlawful rising to which at that time he was a party, and an active party—a person who had been doing active work from a very much earlier period, and in which he was still actively engaged. That being so, I think the writ ought to issue, and that we should be acting contrary to the spirit of this enactment, and to the fair meaning of it, if we were to allow him to be detained in custody longer.

Hawkins, J. I am of the same opinion. . . .

Now, I entirely dissent, and I think all reasonable persons would dissent, from the proposition that any act done in the course of a political rising, or in the course of any insurrection, is necessarily of a political character. Everybody would agree, I think, with this—that it is not everything done during the period during which a political rising exists that could be said to be of a political character. A man might be joining in an insurrection, joining in a rising, joining in that which in itself is a pure political matter, but notwithstanding that he were engaged in a political rising, if he were deliberately, for a matter of private revenge or for the purpose of doing injury to another, to shoot an unoffending man, because he happened himself to be one of an insurgent crowd and had a revolver in his hand, no reasonable man would question that he was guilty of the crime of murder, because that offence so committed by him could not be said to have any relation at all to a political crime, namely, a crime which in law ought to be punished with the punishment awarded for such a crime.

Now, what is the meaning of crime of a political character? I have thought over this matter very much indeed, and I have thought whether any definition can be given of the political character of the crime—I mean to say, in language which is satisfactory. I have found none at all, and I can imagine for myself none so satisfactory, and to my mind so complete, as that which I find in a work which I have now before me, and

the language of which for the purpose of my present judgment I entirely adopt, and that is the expression of my brother Stephen in his History of the Criminal Law of England in vol. ii., pp. 70, 71. I will not do more than refer to the interpretations, other than those with which he agrees, which have been given upon this expression, "political character"; but I adopt his definition absolutely. "The third meaning which may be given to the words, and which I take to be the true meaning, is somewhat more complicated than either of those I have described. An act often falls under several different definitions. For instance, if a civil war were to take place, it would be high treason by levying war against the Queen. Every case in which a man was shot in action would be murder. Whenever a house was burnt for military purposes arson would be committed. To take cattle, &c., by requisition would be robbery. According to the common use of language, however, all such acts would be political offences, because they would be incidents in carrying on a civil war. I think, therefore, that the expression in the Extradition Act ought (unless some better interpretation of it can be suggested) to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances. I do not wish to enter into details beforehand on a subject which might at any moment come under judicial consideration." The question has come under judicial consideration, and having had the opportunity before this case arose of carefully reading and considering the views of my learned brother, having heard all that can be said upon the subject, I adopt his language as the definition that I think is the most perfect to be found or capable of being given as to what is the meaning of the phrase which is made use of in the Extradition Act.

Now, was this act done by Castioni of a political character? . . . I find no evidence which satisfies me that his object in firing at Rossi was to take that poor man's life, or to pay off any old grudge which he had against him, or to revenge himself for anything in the least degree which Rossi or any one of the community had ever personally done to him. When it is said that he took aim at Rossi, there is not a particle of evidence that Rossi was even known to him by name. I cannot help thinking that everybody knows there are many acts of a political character done without reason, done against all reason; but at the same time one cannot look too hardly and weigh in golden scales the acts of men hot in their political excitement. We know that in heat and in heated blood men often do things which are against and contrary to reason; but none the less an act of this description may be done for the purpose of furthering and in furtherance of a political rising, even though it is an act which may be deplored and lamented, as even cruel and against all reason, by those who can calmly reflect upon it after the battle is over.

For the reasons I have expressed, I am of opinion that this rule ought to be made absolute, and that the prisoner ought to be discharged.

[The concurring opinion of Stephen, J., is omitted.]

Rule absolute.[59]

Ornelas v. Ruiz

United States. Supreme Court. 1896.

161 *United States Reports* 502.

On complaints made by Plutarco Ornelas, consul of the Republic of Mexico, charging Juan Duque, Inez Ruiz, and Jesus Guerra with the commission of murder, arson, robbery, and kidnapping, at the village of San Ygnacio, in the State of Tamaulipas, Republic of Mexico, on December 10, 1892; that they were fugitives from justice of the State of Tamaulipas and the Republic of Mexico, and had fled into the jurisdiction of the United States for the purpose of seeking an asylum; and that the alleged crimes were enumerated and embraced in the treaty of extradition then in force between the United States and the Republic of Mexico, warrants were issued by L. F. Price, commissioner of the Circuit Court of the United States for the Western District of Texas, duly authorized, for their apprehension, on which they were arrested and brought before the commissioner to answer the premises and to be dealt with according to law and the provisions of the treaty. The cases were heard, and the commissioner found that the evidence was sufficient in law to justify their commitment on such charges, and that they should be placed in custody to await the order of the President of the United States in the premises.

Thereupon Ruiz, Guerra and Duque applied to the District Court of the United States for the Western District of Texas for writs of *habeas corpus*, alleging that they were unlawfully restrained of their liberty by the United States marshal for that district, and praying that they be released.

The writs were issued, and the marshal made his return, showing that he held petitioners by virtue of warrants issued by the United States commissioner on the application of the Mexican government for

[59] A Royal Commission was appointed in Great Britain in 1877 to consider the working and effect of the existing law and treaties with respect to extradition. Clarke says: "The Commission advised that the suggestion of a political motive should not be recognized as a ground on which a magistrate or a judge should refuse a demand for the surrender of a person accused of what, in the absence of such motive, would be an ordinary crime, unless the act to which a political character was sought to be ascribed occurred during a time of civil war or open insurrection but they considered that a discretionary power in favour of the prisoner should be reserved for the Government to refuse to deliver up a person so accused." Law of Extradition, 3d ed., 222.

their extradition on the aforesaid charges. With the writs of *habeas corpus* were issued writs of *certiorari* directing the commissioner to send up the original papers and a transcript of the testimony on which the prisoners were committed. This was done, and on consideration of the cases the District Court held on the evidence that the offences with which petitioners were charged were purely political offences, for the commission of which petitioners were not extraditable, and entered a final order discharging petitioners from the custody of the marshal on giving bond for their appearance to answer the judgment on appeal. From this final order, the consul of the Republic of Mexico prayed an appeal to this court. . . .

[Part of the statement of the case, the names of counsel, and part of the opinion are omitted.]

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court. . . .

The legislative provisions on the subject of extradition are to be found in sections 5270 to 5280, constituting Title LXVI of the Revised Statutes. Section 5270 provides: "Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any Justice of the Supreme Court, Circuit Judge, District Judge, commissioner authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, district, or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

In the extradition case of In re Stupp, 12 Blatchford, 501, Mr. Justice Blatchford, then District Judge, carefully considered the provisions of the Revised Statutes in respect of the issue of writs of *habeas corpus* and *certiorari* by the courts and judges of the United States, Rev. Stat. §§751 to 761, and the acts of Congress from which those sections were brought forward, and pointed out that the general language used is as applicable to a case where the party is in custody under process issued on a final

judgment of a court of the United States on a conviction on an indictment as it is to a case where a party is in custody under any other process; that it could not be successfully contended that these provisions have the effect to authorize a court of the United States, which has no direct power given to it to review the final judgment of another court of the United States in a given case, to review such judgment on the merits under the indirect authority of a writ of *habeas corpus;* and that, therefore, as the statute in respect of extradition gives no right of review to be exercised by any court or judicial officer, but the magistrate is to certify his findings on the testimony to the Secretary of State, that the case may be reviewed by the Executive Department of the government, the court issuing the writ may "inquire and adjudge whether the commissioner acquired jurisdiction of the matter, by conforming to the requirements of the treaty and the statute; whether he exceeded his jurisdiction; and whether he had any legal or competent evidence of facts before him, on which to exercise a judgment as to the criminality of the accused. But such court is not to inquire whether the legal evidence of facts before the commissioner was sufficient or insufficient to warrant his conclusion."

By repeated decisions of this court it is settled that a writ of *habeas corpus* cannot perform the office of a writ of error, and that, in extradition proceedings, if the committing magistrate has jurisdiction of the subject-matter and of the accused, and the offence charged is within the terms of the treaty of extradition, and the magistrate, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision cannot be reviewed on *habeas corpus.* In re Oteiza y Cortez, Petitioner, 136 U. S. 330; Benson v. McMahon, 127 U. S. 457; Fong Yue Ting v. United States, 149 U. S. 698, 714.[60]

As the English extradition act of 1870, 33 & 34 Vict. c. 52 . . . contemplates an independent examination on *habeas corpus* in every case, if applied for, as in effect part of the proceedings, it has been held that the courts have power to go into the whole matter under the writ so provided for. In re Castioni, L. R. 1 Q. B. 1891, 149; In re Arton, 1896, 1 Q. B. 108. But the legislation of Congress in respect of extradition is widely different, and the scope of inquiry on the writ of *habeas corpus* is necessarily much narrower.

Whether an extraditable crime has been committed is a question of mixed law and fact, but chiefly of fact, and the judgment of the magistrate rendered in good faith on legal evidence that the accused is guilty of the act charged, and that it constitutes an extraditable crime, cannot be

[60] See also Bryant v. United States, 167 U. S. 104; McNamara v. Henkel, 226 U. S. 520.

reviewed on the weight of evidence, and is final for the purposes of the preliminary examination unless palpably erroneous in law.

It must be assumed on this record that the commissioner was duly authorized; that petitioners were not citizens of the United States but were citizens of Mexico; that the acts charged were committed in Mexico, and were considered crimes under both governments; that no objection requiring consideration exists in the mode of procedure; and that the commissioner had jurisdiction of the person, and of the subject-matter, if, on the evidence, the offences charged were within the terms of the treaty.

The release of petitioners was ordered on the sole ground that, as appears from the portion of the opinion of the learned District Judge contained in the record, this raid was part of "a political movement, having for its purpose the overthrow of the existing government in Mexico, and that the offences committed by the petitioners and their associates in their vain and visionary attempt to accomplish their purpose were purely political offences within the meaning of the sixth article of the treaty of extradition." The evidence before the commissioner, from which this conclusion was deduced, tended to show that on December 10, 1892, a band of armed men to the number of one hundred and thirty or forty, under the leadership of one Francisco Benevides, passed over the Rio Grande from Texas into Mexico, and attacked about forty Mexican soldiers stationed at the village of San Ygnacio; killing and wounding some of them, and capturing others, who were afterwards released; burning their barracks and taking away their horses and equipments; that private citizens were also violently assaulted; horses belonging to them taken; houses burned; small sums of money extorted from women; clothes, provisions, and goods appropriated; and three citizens kidnapped and carried over the river to the Texas side, finally escaping; that these men were bandits, without uniforms or flag, but with a red band on their hats; and that Garza was not there and had nothing to do with the expedition. The band remained on the Mexican side of the river about six hours and recrossed at the village ford. Petitioners were members of the band, and citizens of Mexico, as appeared from the complaints and testimony, though one of them at least had resided a large part of the time, for many years, in Texas. Evidence on behalf of petitioners was adduced indicating that there had been a revolutionary movement on that border under one Garza in 1891; that indictments had been found against the participants for violation of the neutrality laws; and that the aim, object and purpose of Benevides' men was the same as Garza's, "to cross over the river and fight against the government."

In the course of his opinion the District Judge referred to the views of the State Department as to the transaction at San Ygnacio. We

presume this reference is to the note of Mr. Secretary Gresham to the Minister of Mexico, May 13, 1893, in respect of the extradition of Benevides. The facts were reviewed therein by the Secretary, and it was held that the acts for which his extradition was asked were "not of such a purely political character as to exclude them from the operation of the treaty." The Secretary concluded his resumé with these words: "The idea that these acts were perpetrated with *bona fide* political or revolutionary designs is negatived by the fact that immediately after this occurrence, though no superior armed force of the Mexican government was in the vicinity to hinder their advance into the country, the bandits withdrew with their booty across the river into Texas." But extradition was not granted because it appeared that Benevides was a citizen of the United States.

The District Judge entertained different views from those of the Secretary, and arrived at a different result from that reached by the commissioner on the evidence on which the latter proceeded, and so was induced to substitute his judgment for that of the commissioner, in whom was reposed the authority of decision, unless jurisdiction were lacking.

Can it be said that the commissioner had no choice on the evidence but to hold, in view of the character of the foray, the mode of attack, the persons killed or captured, and the kind of property taken or destroyed, that this was a movement in aid of a political revolt, an insurrection or a civil war, and that acts which contained all the characteristics of crimes under the ordinary law were exempt from extradition because of the political intentions of those who committed them? In our opinion this inquiry must be answered in the negative.

The contention that the right of the executive authority to determine when offences charged are or are not purely political is exclusive is not involved in any degree; nor are we concerned with the question of the actual criminality of petitioners if the commissioner had probable cause for his action. It is enough if it appear that there was legal evidence on which the commissioner might properly conclude that the accused had committed offences within the treaty as charged, and so be justified in exercising his power to commit them to await the action of the Executive Department. The rule as to probable cause was thus laid down by Mr. Chief Justice Marshall, sitting as a committing magistrate, in Burr's case: "On an application of this kind I certainly should not require that proof which would be necessary to convict the persons to be committed, on a trial in chief; nor should I even require that which should absolutely convince my own mind of the guilt of the accused; but I ought to require, and I should require, that probable cause be shown; and I understand probable cause to be a case made out by proof furnishing good reason to believe that the crime alleged has been committed by

the person charged with having committed it." 1 Burr's Trial, 11; Benson v. McMahon, 127 U. S. 457, 462; In re Farez, 7 Blatchford, 345; In re Ezeta, 62 Fed. Rep. 972, 981.

We are of opinion that it cannot be held that there was substantially no evidence calling for the judgment of the commissioner as to whether he would, or would not, certify and commit under the statute, and that, therefore, as matter of law, he had no jurisdiction over the subject-matter; and, this being so, his action was not open to review on *habeas corpus*.

The final order of the District Court is therefore reversed and the case remanded for further proceedings in conformity to law. [61]

TREATY BETWEEN BELGIUM AND THE UNITED STATES

Article 4. Washington, October 26, 1901.

32 *United States Statutes at Large* 1894, 1897.

Art. 4. The provisions of this convention shall not be applicable to persons guilty of any political crime or offence or of one connected with such a crime or offence. A person who has been surrendered on account of one of the common crimes or offences mentioned in Article II shall consequently in no case be prosecuted and punished in the State to which his extradition has been granted on account of a political crime or offence committed by him previously to his extradition or on account of an act connected with such a political crime or offence, unless he has been at liberty to leave the country for one month after having been tried and, in case of condemnation, for one month after having suffered his punishment or having been pardoned.

An attempt against the life of the head of a foreign government or against that of any member of his family when such attempt comprises the act either of murder or assassination, or of poisoning, shall not be considered a political offence or an act connected with such an offence.

MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION

Volume I, page 309, section 208. 1891.

The first provision of this sort was inserted in a treaty between Belgium and France, in 1856, in consequence of an attempt made to destroy by an infernal machine a train on a railway in France, on which the Emperor was travelling. The machine was discovered before the approach of the train. Two Frenchmen, who were suspected of complicity in the affair, were pursued and took refuge in Belgium, from which

[61] See In re Ezeta, 62 Fed. 972.

country the French government demanded their extradition. One of them, Célestin Jacquin, was caught and arrested, with a view to his surrender. The grand jury of the tribunal of first instance at Brussels found that the act with which he was charged was political and ordered his release. From this decision an appeal was taken to the Court of Cassation, which, on March 12, 1855, quashed the judgment of the lower tribunal, holding that the act was not exclusively of a political character, but belonged to a class of offences which were against the natural and immutable laws of the human conscience, and as such punished by all nations. The court of Liége, March 29, 1855, rendered a similar decision. The government then called for the opinion of the chamber of indictments at Brussels, which advised that Jacquin ought not to be surrendered. The case produced great excitement, and the French government finally desisted from its demand. On September 22, 1856, an additional convention was concluded between the two countries, which contained a provision like that in the treaty between the United States and Belgium, that the attempt against the person of a foreign sovereign or that of a member of his family, whenever such attempt should constitute murder, or assassination, or poisoning, should not be reputed as a political offence nor as an act connected therewith.

In re Meunier

Great Britain. High Court of Justice; Queen's Bench Division. 1894.

Law Reports [1894] 2 *Queen's Bench Division* 415.

Application for a writ of *habeas corpus* to bring up and discharge a prisoner named Meunier, who had been committed by Sir John Bridge, the Chief Magistrate at Bow Street, for surrender to the French Government under the Extradition Acts, 1870 and 1873 (33 & 34 Vict. c. 52; 36 & 37 Vict. c. 60).

The prisoner was charged with wilfully causing two explosions in France, one at the Café Véry in Paris, which caused the death of two persons, and the other at certain barracks. It was proved by the witnesses whose depositions were taken in France, as well as by a statement voluntarily made by the prisoner himself to the inspector of police who arrested him in London, that the prisoner was an anarchist.

The application was made in vacation by summons at chambers, which Kennedy, J., referred to the Court.

The grounds of the application were four: (1.) that there was no evidence that the prisoner Meunier, who was brought up and committed at Bow Street, was the same person as Meunier, who was charged with the offences committed in France, and was referred to in the depositions taken in France; (2.) that the evidence relied on to connect the prisoner

with the offences charged was the evidence of an accomplice, and was not corroborated; (3.) that two separate and distinct offences were included in one committal; (4.) that the explosion at the barracks was an offence of a political character, within the meaning of the Extradition Act, 1870 (33 & 34 Vict. c. 52) s. 3, sub-s. 1, and therefore the prisoner was not liable to be surrendered in respect of that offence.

[The arguments of counsel and part of the opinion of Cave, J., dealing with the questions of identity, corroboration, and committal, are omitted.]

CAVE, J. I am of opinion that this application for a writ of *habeas corpus* must be refused. . . .

The last point taken is, that, so far as regards the outrage at the barracks, the offence charged is one of a political character, and therefore the accused is not liable to be surrendered under the Extradition Acts; for it is said that the outrage was an attack on Government property, and was an attempt to destroy the quarters occupied by the troops of the French Government. It appears to me that, in order to constitute an offence of a political character, there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other, and that, if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not. In the present case there are not two parties in the State, each seeking to impose the Government of their own choice on the other; for the party with whom the accused is identified by the evidence, and by his own voluntary statement, namely, the party of anarchy, is the enemy of all Governments. Their efforts are directed primarily against the general body of citizens. They may, secondarily and incidentally, commit offences against some particular Government; but anarchist offences are mainly directed against private citizens. I agree, as to this question also, with the view taken by Sir John Bridge; and I am of opinion that the crime charged was not a political offence within the meaning of the Extradition Act.

For these reasons I am of opinion that the contention on behalf of the prisoner fails on all grounds, and that the application for a writ of *habeas corpus* must be refused.

COLLINS, J. I am of the same opinion, and on the same grounds.

Application refused.[62]

[62] See LAMMASCH, Le Droit d'Extradition Appliqué aux Délits Politiques; MOORE, Extradition, I, 303; OPPENHEIM, 4th ed., I, §§333–337; ROLIN, "Les infractions politiques," 15 Rev. de Dr. Int. 417, 16 *ibid.* 147, 254.

On extradition, in general, see BAR, 707; BERNARD, Traité Théorique et Pratique de l'Extradition, 2d ed.; BILLOT, Traité de l'Extradition; CLARKE, Law of Extradition, 4th ed.; FAUCHILLE, I, Pt. I, 987; HYDE, I, §§310–341; MOORE, Extradition; OPPENHEIM, 4th ed., I, §§327–332; PIGGOT, Extradition; TRAVERS, IV, 288; WHARTON, Conflict of Laws, 3d ed., II, §§835–857b.

CHAPTER VIII

PROTECTION OF THE INTERESTS OF FOREIGN STATES IN THE LAW OF NATIONS

SECTION 1. SECURITY OF FOREIGN STATES

JUDGE HUBER, IN THE ARBITRATION WITH RESPECT TO THE ISLAND OF PALMAS

Netherlands and the United States. Tribunal of the Permanent Court of International Arbitration (Judge Huber, Sole Arbitrator). 1928.

22 *American Journal of International Law* 867, 876.

Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a state. This right has as corollary a duty: the obligation to protect within the territory the rights of other states, in particular their right to integrity and inviolability in peace and in war, together with the rights which each state may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the state cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, *i.e.*, to excluding the activities of other states; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.

TWEE GEBROEDERS, ALBERTS MASTER

Great Britain. High Court of Admiralty. 1800.

3 *C. Robinson's Reports* 162.

This was a case respecting four Dutch ships, taken in the Western Eems, in or near the Groningen Wat, by boats, sent from the L'Espiegle, then lying in the Eastern Eems. The material point of the case turned on the question of territory. The Prussian consul claiming restitution, (by the direction of the Chargé d'affaires of Prussia), on a suggestion, that it was a capture made within the protection of the Prussian territory.

[Part of the opinion is omitted.]

SIR W. SCOTT— . . . Upon the question so proposed, the first fact to be determined is, the character of the place where the capturing ship

lay; whether she was actually stationed within those portions of land and water, or of something between water and land, which are considered to be within the limits of the Prussian territory? On this point, I am inclined to think, on an inspection of the charts, and on hearing what has been urged, that she was lying within the limits, to which neutral immunity is usually conceded.—She was lying in the Eastern branch of the Eems, within what may I think be considered as a distance of three miles, at most, from East Friesland: an exact measurement cannot easily be obtained; but in a case of this nature, in which the Court would not willingly act with an unfavourable minuteness towards a neutral state, it will be disposed to calculate the distance very liberally; and more especially, as the spot in question is a sand covered with water only on the flow of the tide, but immediately connected with the land of East Friesland, and when dry, may be considered as making part of it. I am of opinion, that the ship was lying within those limits, in which all direct hostile operations are by the law of nations forbidden to be exercised. That fact being assumed I have only to inquire, whether the ship being so stationed, the capture which took place, was made under such circumstances, as oblige us to consider it as an act of violence, committed within the protection of a neutral territory.

It is said that the ship was, in all respects, observant of the peace of the neutral territory; that nothing was done by her, which could affect the right of territory, or from which any inconvenience could arise to the country, within whose limits she was lying; inasmuch as the hostile force which she employed, was applied to the captured vessel lying out of the territory. But that is a doctrine that goes a great deal too far; I am of opinion, that no use, of a neutral territory, for the purposes of war, is to be permitted; I do not say remote uses, such as procuring provisions and refreshments, and acts of that nature, which the law of nations universally tolerates; but that, no proximate acts of war are in any manner to be allowed to originate on neutral grounds; and I cannot but think, that such an act as this, that a ship should station herself on neutral territory, and send out her boats on hostile enterprises, is an act of hostility much too immediate to be permitted: for, suppose that even a direct hostile use should be required, to bring it within the prohibition of the law of nations; nobody will say, that the very act of sending out boats to effect a capture, is not itself an act directly hostile—not complete indeed, but inchoate, and clothed with all the characters of hostility. If this could be defended, it might as well be said, that a ship lying in a neutral station might fire shot on a vessel lying out of the neutral territory; the injury in that case would not be consummated, nor received on neutral ground; but no one would say, that such an act would not be an hostile act, immediately commenced within the neutral territory: And what does it signify to the nature of the act, considered

for the present purpose, whether I send out a cannon-shot which shall compel the submission of a vessel lying at two miles distance, or whether I send out a boat armed and manned to effect the very same thing at the same distance? It is in both cases the direct act of the vessel lying in neutral ground; the act of hostility actually begins, in the latter case, with the launching and manning and arming the boat, that is sent out on such an errand of force.

If it were necessary therefore to prove, that a direct and immediate act, of hostility had been committed; I should be disposed to hold that it was sufficiently made out by the facts of this case.—But direct hostility appears not to be necessary; for whatever has an immediate connection with it is forbidden: you cannot, without leave, carry prisoners or booty into a neutral territory, there to be detained, because such an act is an immediate continuation of hostility.[1] In the same manner, an act of hostility is not to take its commencement, on neutral ground: It is not sufficient to say it is not completed there—you are not to take any measure there, that shall lead to immediate violence; you are not to avail yourself of a station, on neutral territory, making as it were a vantage ground of the neutral Country, a Country which is to carry itself with perfect equality between both belligerents, giving neither the one or the other any advantage.[2] . . . Every government is perfectly justified in interposing to discourage the commencement of such a practice; for the inconvenience to which the neutral territory will be exposed is obvious; if the respect due to it is violated by one party, it will soon provoke a similar treatment from the other also; till, instead of neutral ground, it will soon become the theatre of war. On these grounds, I am of opinion, that this capture cannot be maintained, and I direct these vessels to be restored.[3]

[1] See The Appam, *infra*, 781.

[2] Neutral territory is inviolable and may not be used as a base of operations by either belligerent. See Hague Convention V, 1907, Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 36 U. S. Stat. L. 2310, and Hague Convention XIII, 1907, Concerning the Rights and Duties of Neutral Powers in Naval War, 36 *ibid.* 2415. In addition to declaring the general principle, these conventions impose specific prohibitions upon belligerent states and specific obligations upon neutral states.

On the inviolability of neutral ships innocently employed, see the Trent Affair, COBBETT, Cases, 4th ed., II, 596; MOORE, Dig. Int. L., VII, 768. On forfeiture of inviolability by neutral ships, see The Orozembo, 6 C. Rob. 430 (unneutral service); The Atalanta, 6 C. Rob. 440 (*ditto*); The Frederick Molke, 1 C. Rob. 86 (breach of blockade); The Franciska, Spinks P. C. 111, 10 Moo. P. C. 37 (*ditto*); The Jonge Margaretha, 1 C. Rob. 189 (contraband trade); The Peterhoff, 5 Wall. 28 (*ditto*); COLOMBOS, Law of Prize, 208, 226, 172; GARNER, Prize Law, 608, 621, 510; VERZIJL, Le Droit des Prises, 951, 921, 730.

[3] Captures made in violation of neutral territorial waters will be restored by British or American prize courts upon demand of the neutral state. See The Anna, 5 C. Rob. 373, *supra*, 334; The Valeria [1921] 1 A. C. 477; The Pellworm [1922] 1 A. C.

The Steamship Appam

United States. Supreme Court. 1917.

243 *United States Reports* 124.

[In January, 1916, during war between Great Britain and Germany, the British merchant steamship Appam was captured on the high seas by the German cruiser Moewe, placed under control of a small prize crew commanded by Lieutenant Berg, and taken into Hampton Roads in the United States. The owner and master of The Appam filed libels in the District Court of the United States to recover possession of vessel and cargo. There were decrees for libellants and the claimants appealed.]

[The above statement of the case is substituted for the detailed statement in the opinion. The arguments of counsel and part of the opinion are omitted.]

Mr. Justice Day delivered the opinion of the court. . . .

At the time of the capture, the Appam was approximately distant 1,590 miles from Emden, the nearest German port; from the nearest available port, namely, Punchello, in the Madeiras, 130 miles; from Liverpool, 1,450 miles; and from Hampton Roads, 3,051 miles. The Appam was found to be in first class order, sea-worthy, with plenty of provisions, both when captured and at the time of her arrival in Hampton Roads.

The order or commission delivered to Lieutenant Berg by the commander of the Moewe is as follows:

"Information for the American Authorities. The bearer of this, Lieutenant of the Naval Reserve Berg, is appointed by me to the command of the captured English steamer 'Appam,' and has orders to bring this ship into the nearest American harbor, and there to lay up. Kommando S. M. H. Moewe. Count Zu Dohna, Cruiser Captain and Commander. (Imperial Navy Stamp:) Kommando S. M. H. Moewe."

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292. As against an individual enemy claimant such a capture is regarded as valid. See The Twee Gebroeders, 3 C. Rob. 162, 162 n.; The Purissima Conception, 6 C. Rob. 45; The Eliza Ann, 1 Dods. 244; The Bangor [1916] P. 181; The Düsseldorf [1920] A. C. 1034, 1037; The Anne, 3 Wh. 435; The Santissima Trinidad, 7 Wh. 283, 349; The Lilla, 2 Sprague 177; The Florida, 101 U. S. 37, 42. Likewise such a capture is regarded as valid as against an individual neutral claimant. The Bangor, *supra;* The Sir William Peel, 5 Wall. 517; The Adela, 6 Wall. 266. Nor is this rule deemed to have been modified by Hague Convention XIII, 1907, Concerning the Rights and Duties of Neutral Powers in Naval War, arts. 1, 2, and 3, 36 U. S. Stat. L. 2415, 2427; The Bangor, *supra.*

The prize tribunals of France, Germany, and Italy, on the other hand, apparently consider a capture made in violation of neutral territorial waters as "absolutely illegal irrespective of whether the neutral power in whose waters the capture was made, intervenes or not." Garner, Prize Law, 227, 227–30. See also Colombos, Law of Prize, 117–20.

Upon arrival in Hampton Roads, Lieutenant Berg reported his arrival to the Collector, and filed a copy of his instructions to bring the Appam into the nearest American port and there to lay up.

On February 2d, His Excellency, the German Ambassador, informed the State Department of the intention, under alleged treaty rights, to stay in an American port until further notice, and requested that the crew of the Appam be detained in the United States for the remainder of the war.

The prisoners brought in by the Appam were released by order of the American Government.

On February 16th, and sixteen days after the arrival of the Appam in Hampton Roads, the owner of the Appam filed the libel in case No. 650, to which answer was filed on March 3d. On March 7th, by leave of court, an amended libel was filed, by which the libellant sought to recover the Appam upon the claim that holding and detaining the vessel in American waters was in violation of the law of nations and the laws of the United States and of the neutrality of the United States. The answer of the respondents to the amended libel alleged that the Appam was brought in as a prize by a prize master, in reliance upon the Treaty of 1799 between the United States and Prussia; that by the general principles of international law the prize master was entitled to bring his ship into the neutral port under these circumstances, and that the length of stay was not a matter for judicial determination; and that proceedings had been instituted in a proper prize court of competent jurisdiction in Germany for the condemnaton of the Appam as a prize of war,[4] and averred that the American court had no jurisdiction. . . .

From the facts which we have stated, we think the decisive questions resolve themselves into three: First, was the use of an American port, under the circumstances shown, a breach of this Nation's neutrality under the principles of international law? Second, was such use of an American port justified by the existing treaties between the German

[4] The Appam was condemned by the German prize court. 11 Am. Jour. Int. L. 872. The jurisdiction of a belligerent prize court to condemn prize lying in a neutral port, though frequently criticized in principle, has been admitted by British and American courts in a number of cases. See The Herstelder, 1 C. Rob. 114, 119 n.; The Henrick and Maria, 4 C. Rob. 43; The Comet, 5 C. Rob. 285; The Purissima Conception, 6 C. Rob. 45; The Polka, Spinks P. C. 57; Hudson v. Guestier, 4 Cr. 293, 6 Cr. 281; Cheriot v. Foussat, 3 Bin. (Pa.) 220; The Arabella and Madeira, 2 Gall. 368; The Santissima Trinidad, 7 Wh. 283, 354–5. "An attentive review of all the cases decided in the Courts of England and the North American United States leads to the conclusion that the condemnation of a Capture, by a regular Prize Court, sitting in the country of the Belligerent, of a prize lying at the time of the sentence in a neutral port, is irregular, but clearly valid." PHILLIMORE, 3d ed., III, 594. *Cf.* WHEATON, Dana's 8th ed., 486 n. And *cf.* the cases of The Elbing and other vessels, in the Belgian prize court, B. Y. B. Int. L. (1921–22) 183, 190; COLOMBOS, Law of Prize, 41–3; GARNER, Prize Law, 83–6; 1 Rev. de Dr. Int., 3 sér., 228; B. Y. B. Int. L. (1921–22) 180.

Government and our own? Third, was there jurisdiction and right to condemn the Appam and her cargo in a court of admiralty of the United States?

It is familiar international law that the usual course after the capture of the Appam would have been to take her into a German port, where a prize court of that Nation might have adjudicated her status, and, if it so determined, condemned the vessel as a prize of war. Instead of that, the vessel was neither taken to a German port, nor to the nearest port accessible of a neutral power, but was ordered to, and did, proceed over a distance of more than three thousand miles, with a view to laying up the captured ship in an American port.

It was not the purpose to bring the vessel here within the privileges universally recognized in international law, *i. e.*, for necessary fuel or provisions, or because of stress of weather or necessity of repairs, and to leave as soon as the cause of such entry was satisfied or removed. The purpose for which the Appam was brought to Hampton Roads, and the character of the ship, are emphasized in the order which we have quoted to take her to an American port and there lay her up and in a note from His Excellency, The German Ambassador, to the Secretary of State, in which the right was claimed to keep the vessel in an American port until further notice, (Diplomatic Correspondence with Belligerent Governments Relating to Neutral Rights and Duties, Department of State, European War No. 3, p. 331,) and a further communication from the German Ambassador forwarding a memorandum of a telegram from the German Government concerning the Appam (*Idem*, p. 333), in which it was stated:

"Appam is not an auxiliary cruiser but a prize. Therefore she must be dealt with according to Article 19 of Prusso-American treaty of 1799. Article 21 of Hague Convention concerning neutrality at sea is not applicable, as this convention was not ratified by England and is therefore not binding in present war according to Article 28. The above-mentioned Article 19 authorizes a prize ship to remain in American ports as long as she pleases. Neither the ship nor the prize crew can therefore be interned nor can there be question of turning the prize over to English."

In view of these facts, and this attitude of the Imperial Government of Germany, it is manifest that the Appam was not brought here in any other character than as a prize, captured at sea by a cruiser of the German navy, and that the right to keep her here, as shown in the attitude of the German Government and in the answer to the libel, was rested principally upon the Prussian-American Treaty of 1799.

The principles of international law recognized by this Government, leaving the treaty aside, will not permit the ports of the United States to be thus used by belligerents. If such use were permitted, it would

constitute of the ports of a neutral country harbors of safety into which prizes, captured by one of the belligerents, might be safely brought and indefinitely kept.

From the beginning of its history this country has been careful to maintain a neutral position between warring governments, and not to allow the use of its ports in violation of the obligations of neutrality; nor to permit such use beyond the necessities arising from the perils of the seas or the necessities of such vessels as to sea-worthiness, provisions and supplies. Such usage has the sanction of international law, Dana's Note to Wheaton on International Law, 1866, 8th American Edition, §391, and accords with our own practice. Moore's Digest of International Law, vol. 7, 936, 937, 938.

A policy of neutrality between warring nations has been maintained from 1793 to this time. In that year President Washington firmly denied the use of our ports to the French Minister for the fitting out of privateers to destroy English commerce. This attitude led to the enactment of the Neutrality Act of 1794, afterwards embodied in the Act of 1818, enacting a code of neutrality, which among other things inhibited the fitting out and arming of vessels; the augmenting or increasing of the force of armed vessels; or the setting on foot in our territory of military expeditions; and empowering the President to order foreign vessels of war to depart from our ports and compelling them so to do when required by the law of nations. Moore on International Arbitrations, vol. 4, 3967 *et seq.*

This policy of the American Government was emphasized in its attitude at the Hague Conference of 1907. Article 21 of the Hague Treaty provides:

"A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

"It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral Power must order it to leave at once; should it fail to obey, the neutral Power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew."

Article 22 provides:

"A neutral Power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21."

To these articles, adherence was given by Belgium, France, Austria-Hungary, Germany, the United States, and a number of other nations. They were not ratified by the British Government. This Government refused to adhere to Article 23, which provides:

"A neutral Power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be seques-

trated pending the decision of a Prize Court. It may have the prize taken to another of its ports.

"If the prize is convoyed by a war-ship, the prize crew may go on board the convoying ship.

"If the prize is not under convoy, the prize crew are left at liberty."

And in the proclamation of the convention the President recited the resolution of the Senate adhering to it, subject to the "reservation and exclusion of its Article 23 and with the understanding that the last clause of Article 3 of the said Convention implies the duty of a neutral power to make the demand therein mentioned for the return of a ship captured within the neutral jurisdiction and no longer within that jurisdiction." 36 Stat., Pt. II, p. 2438.

While this treaty may not be of binding obligation, owing to lack of ratification,[5] it is very persuasive as showing the attitude of the American Government when the question is one of international law; from which it appears clearly that prizes could only be brought into our ports upon general principles recognized in international law, on account of unseaworthiness, stress of weather, or want of fuel or provisions, and we refused to recognize the principle that prizes might enter our ports and roadsteads, whether under convoy or not, to be sequestrated pending the decision of a prize court. From the history of the conference it appears that the reason for the attitude of the American delegates in refusing to accept Article 23 was that thereby a neutral might be involved in participation in the war to the extent of giving asylum to a prize which the belligerent might not be able to conduct to a home port. See Scott on Peace Conferences, 1899–1907, vol. II, p. 237 *et seq.*

Much stress is laid upon the failure of this Government to proclaim that its ports were not open to the reception of captured prizes, and it is argued that having failed to interdict the entrance of prizes into our ports permission to thus enter must be assumed. But whatever privilege might arise from this circumstance it would not warrant the attempted use of one of our ports as a place in which to store prizes indefinitely, and certainly not where no means of taking them out are shown except by the augmentation of her crew, which would be a clear violation of established rules of neutrality. . . .

[In an omitted part of the opinion the court considered art. 19 of the Treaty of 1799 between Prussia and the United States and held that it did not authorize the laying up of German prizes in United States ports.]

[5] The Hague Convention XIII, 1907, art. 28, provided: "The provisions of the present Convention do not apply except to the Contracting Powers, and then only if all the belligerents are parties to the Convention." 36 U. S. Stat. L. 2415, 2433. Not all of the belligerents were parties to the convention.

. . . We cannot avoid the conclusion that in thus making use of an American port there was a clear breach of the neutral rights of this Government, as recognized under principles of international law governing the obligations of neutrals, and that such use of one of our ports was in no wise sanctioned by the Treaty of 1799.

It remains to inquire whether there was jurisdiction and authority in an admiralty court of the United States, under these circumstances, to order restoration to an individual owner of the vessel and cargo.

The earliest authority upon this subject in the decisions of this court is found in the case of Glass v. The Sloop Betsey, 3 Dall. 6, decided in 1794, wherein it appeared that the commander of the French privateer, The Citizen Genet, captured as a prize on the high seas the sloop Betsey and sent the vessel into Baltimore, where the owners of the sloop and cargo filed a libel in the District Court of Maryland, claiming restitution because the vessel belonged to subjects of the King of Sweden, a neutral power, and the cargo was owned jointly by Swedes and Americans. The District Court denied jurisdiction, the Circuit Court affirmed the decree, and an appeal was prosecuted to this court. The unanimous opinion was announced by Mr. Chief Justice Jay, holding that the District Courts of the United States possessed the powers of courts of admiralty, whether sitting as an instance or as a prize court, and sustained the jurisdiction of the District Court of Maryland, and held that that court was competent to inquire into and decide whether restitution should be made to the complainants conformably to the laws of nations and the treaties and laws of the United States.

The question came again before this court in the case of The Santissima Trinidad, decided in 1822, reported in 7 Wheat. 283. In that case it was held that an illegal capture would be invested with the character of a tort, and that the original owners were entitled to restitution when the property was brought within our jurisdiction. The opinion was delivered by Mr. Justice Story, and, after a full discussion of the matter, the court held that such an illegal capture, if brought into the jurisdiction of the courts of the United States, was subject to condemnation and restitution to the owners, and the learned justice said:

"If, indeed, the question were entirely new, it would deserve very grave consideration, whether a claim founded on a violation of our neutral jurisdiction, could be asserted by private persons, or in any other manner than a direct intervention of the government itself. In the case of a capture made within a neutral territorial jurisdiction, it is well settled, that as between the captors and the captured, the question can never be litigated. It can arise only upon a claim of the neutral sovereign, asserted in his own courts, or the courts of the power having cognizance of the capture itself for the purposes of prize.[6] And by analogy

[6] See note 3, *supra*, 780.

to this course of proceeding, the interposition of our own government might seem fit to have been required, before cognizance of the wrong could be taken by our courts. But the practice from the beginning, in this class of causes, a period of nearly thirty years, has been uniformly the other way; and it is now too late to disturb it. If any inconvenience should grow out of it, from reasons of state policy or executive discretion, it is competent for Congress to apply at its pleasure the proper remedy." (p. 349.)

" . . . Whatever may be the exemption of the public ship herself, and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our courts, for the purpose of examination and inquiry, and if a proper case be made out, for restitution to those whose possession has been divested by a violation of our neutrality; and if the goods are landed from the public ship, in our ports, by the express permission of our own government, that does not vary the case, since it involves no pledge, that if illegally captured, they shall be exempted from the ordinary operation of our laws." (p. 354.)

In the subsequent cases in this court this doctrine has not been departed from. L'Invincible, 1 Wheat. 238, 258; The Estrella, 4 Wheat. 298, 308–311; La Amistad de Rues, 5 Wheat. 385, 390.[7]

It is insisted that these cases involve illegal captures at sea, or violations of neutral obligation, not arising because of the use of a port by sending in a captured vessel and keeping her there in violation of our rights as a neutral. But we are at a loss to see any difference in principle between such cases and breaches of neutrality of the character here involved in undertaking to make of an American port a depository of

[7] "A neutral nation, which knows its duty, will not interfere between belligerents, so as to obstruct them in the exercise of their undoubted right to judge, through the medium of their own Courts, of the validity of every capture made under their respective commissions, and to decide on every question of prize law, which may arise in the progress of such discussion. But it is no departure from this obligation, if, in a case in which a captured vessel be brought, or voluntarily comes, *infra præsidia*, the neutral nation extends its examination so far as to ascertain whether a trespass has been committed on its own neutrality by the vessel which has made the capture. So long as a nation does not interfere in the war, but professes an exact impartiality toward both parties, it is its duty, as well as right, and its safety, good faith, and honour demand of it, to be vigilant in preventing its neutrality from being abused, for the purposes of hostility against either of them. This may be done, not only by guarding, in the first instance, as far as it can, against all warlike preparations and equipments in its own waters, but, also, by restoring to the original owner such property as has been wrested from him, by vessels which have been thus illegally fitted out." LIVINGSTON, J., in The Estrella, 4 Wh. 298, 308. See also Glass v. Sloop Betsey, 3 Dall. 6; Talbot v. Janson, 3 Dall. 133; Moodie v. The Betsey, 3 Dall. 288 n.; The Brig Alerta v. Blas Moran, 9 Cr. 359; L'Invincible, 1 Wh. 238; The Divina Pastora, 4 Wh. 52; La Amistad de Rues, 5 Wh. 385; The Santissima Trinidad, 7 Wh. 283.

captured vessels with a view to keeping them there indefinitely. Nor can we consent to the insistence of counsel for appellant that the Prize Court of the German Empire has exclusive jurisdiction to determine the fate of the Appam as lawful prize. The vessel was in an American port and under our practice within the jurisdiction and possession of the District Court which had assumed to determine the alleged violation of neutral rights, with power to dispose of the vessel accordingly. The foreign tribunal under such circumstances could not oust the jurisdiction of the local court and thereby defeat its judgment. The Santissima Trinidad, *supra*, p. 355.

Were the rule otherwise than this court has frequently declared it to be, our ports might be filled in case of a general war such as is now in progress between the European countries, with captured prizes of one or the other of the belligerents, in utter violation of the principles of neutral obligation which have controlled this country from the beginning.

The violation of American neutrality is the basis of jurisdiction, and the admiralty courts may order restitution for a violation of such neutrality. In each case the jurisdiction and order rests upon the authority of the courts of the United States to make restitution to private owners for violations of neutrality where offending vessels are within our jurisdiction, thus vindicating our rights and obligations as a neutral people.

It follows that the decree in each case must be

Affirmed.[8]

[8] See SCOTT, "Case of The Appam," 10 Am. Jour. Int. L. 809; BURCHARD, "Case of the 'Appam,' and the Law of Nations," 11 *ibid.* 270; COUDERT, "The Appam Case," 11 *ibid.* 302.

"The modern practice of neutrals prohibits the use of their ports by the prizes of a belligerent, except in cases of necessity; and they may remain in the ports only for the meeting of the exigency. The necessity must be one arising from perils of the seas, or need of repairs for seaworthiness, or provisions and supplies. Increase of armament is prohibited. The neutral will protect the prize against pursuit from the same port for twenty-four hours, and against capture within his waters; but, beyond that, the general peril of war, arising from the power or vigilance of the other belligerent, does not constitute a necessity which the neutral recognizes as justifying a remaining in his port." WHEATON, Dana's 8th ed., 486 n. On repair of damages incurred in action, see ATTORNEY-GENERAL WIRT, "Neutrality," 2 Op. Atty. Gen. 86. On the general subject of belligerent warships and their prizes in neutral ports, see Hague Convention XIII, 1907, Concerning the Rights and Duties of Neutral Powers in Naval War, 36 U. S. Stat. L. 2415; HIGGINS, Hague Peace Conferences, 445, 457.

A fortiori a belligerent may not establish prize courts in neutral territory. British and American courts have refused to recognize the judgments of tribunals thus established. See The Flad Oyen, 1 C. Rob. 135; Havelock v. Rockwood, 8 T. R. 268; Donaldson v. Thompson, 1 Campb. 429; Wheelwright v. Depeyster, 1 Johns. (N. Y.) 471. The Hague Convention XIII, 1907, *supra*, art. 4, provides: "A Prize Court cannot be set up by a belligerent on neutral territory or on a vessel in neutral waters."

Ex parte Chavasse, In re Grazebrook

Great Britain. Court of Appeal in Bankruptcy. 1865.

34 *Law Journal Reports, Bankruptcy, New Series,* 17.

This was an appeal from an order of Mr. Commissioner Perry, of the Liverpool District Court of Bankruptcy, dismissing with costs a petition by which the petitioners sought to obtain a share of the proceeds of certain cotton, the result of a successful running of the blockade of the ports of the Confederate States of North America.

The circumstances were as follows: Grazebrook, the bankrupt, a merchant and commission-agent at Liverpool, arranged with Chavasse, a sword-manufacturer of Birmingham, for the purchase on their joint account of large quantities of arms and ammunition, to be consigned to Power, then carrying on business as a merchant in the Confederate States, to be sold by him for the joint benefit of Chavasse and Grazebrook. The goods were shipped about the 20th of April 1862. The ship was wrecked off Wilmington in North Carolina, and a considerable portion of her cargo was totally lost; such portions, however, as were saved from the wreck were cleared and sold. About 2,000*l.*, part of the money realized by the sale, was remitted to Grazebrook, and the residue was invested in cotton. Grazebrook was adjudicated bankrupt on the 17th of June 1863; and on the 19th of February 1864 Chavasse executed a statutory deed of assignment for the benefit of creditors. No part of the money produced by the sale, or of the cotton in which part of the money was invested, was ever paid or remitted to Chavasse, and the trustees of his deed of assignment presented their petition to have the same apportioned. The petition was dismissed with costs by the Commissioner, on the ground of the illegality of the contract. Hence the present appeal.

[The statement of the case is condensed and the arguments of counsel are omitted.]

The Lord Chancellor [Westbury]. In the view of international law, the commerce of nations is perfectly free and unrestricted. The subjects of each nation have a right to interchange the products of labour with the inhabitants of every other country. If hostilities occur between two nations, and they become belligerents, neither belligerent has a right to impose, or to require a neutral government to impose, any restrictions on the commerce of its subjects. The belligerent power certainly acquires certain rights which are given to it by international law. One of these is the right to arrest and capture, when found on the sea, the high road of nations, any munitions of war which are destined and in the act of being transported in a neutral ship to its enemy. This right, which the laws of war give to a belligerent for his protection, does

not involve as a consequence that the act of the neutral subject in so transporting munitions of war to a belligerent country is either a personal offence against the belligerent captor, or an act which gives him any ground of complaint either against the neutral trader personally or against the government of which he is a subject. The title of the belligerent is limited entirely to the right of seizing and condemning as lawful prize the contraband articles. He has no right to inflict any punishment on the neutral trader, or to make his act a ground of representation or complaint against the neutral state of which he is a subject. In fact, the act of the neutral trader in transporting munitions of war to the belligerent country is quite lawful, and the act of the other belligerent in seizing and appropriating the contraband articles is equally lawful. Their conflicting rights are co-existent, and the right of the one party does not render the act of the other party wrongful or illegal. There is, however, much incorrectness of expression in some writers on the subject, who, in consequence of this right of the belligerent to seize *in transitu* munitions of war while being conveyed by a neutral to his enemy, speak of this act of transport by the neutral as unlawful and prohibited commerce. But this commerce, which was perfectly lawful for the neutral with either belligerent country before the war, is not made by the war unlawful or capable of being prohibited by both or either of the belligerents; and all that international law does is to subject the neutral merchant who transports the contraband of war to the risk of having his ship and cargo captured and condemned by the belligerent power for whose enemy the contraband is destined. That the act of the neutral merchant is in itself innocent is plain from the circumstance that the belligerent captor cannot visit it with any penal consequences beyond his judicial condemnation of the ship and cargo, nor can he make it the subject of complaint. This is well explained by Vattel in the following passage. Speaking as a belligerent power, he says: "*Quand j'ai notifié aux nations neutres ma déclaration de guerre à tel ou tel peuple, si elles veulent s'exposer à lui porter des choses qui servent à la guerre, elles n'auront pas sujet de se plaindre au cas que leurs marchandises tombent dans mes mains, de même que je ne leur déclare pas la guerre pour avoir tenté de les porter. Elles souffrent, il est vrai, d'une guerre à laquelle elles n'ont point de part, mais c'est par accident. Je ne m'oppose point à leur droit—j'use seulement du mien, et si nos droits se croisent et se nuisent réciproquement, c'est par l'effet d'une nécessité inévitable. Ce conflit arrive tous les jours dans la guerre.*" [Liv. III, chap. vii, §111.] Vattel must here be considered as speaking of the acts of the subjects of a neutral power, and not of the neutral government itself, for the supplying of warlike stores to a belligerent by a neutral state would clearly be a breach of neutrality. The same doctrine as to the freedom of the commerce of the neutral subject is more explicitly stated by Mr. Chancel-

lor Kent, in the first volume of his Commentaries, p. 142, and was most distinctly affirmed in a celebrated decision—The Santissima Trinidad—of the Supreme Court of the United States. The language of Chancellor Kent is clear and comprehensive: "It is a general understanding, grounded on true principles, that the powers at war may seize and confiscate all contraband goods, without any complaint on the part of the neutral merchant, and without any imputation of a breach of neutrality in the neutral sovereign himself. It was contended on the part of the French nation in 1796, that neutral Governments were bound to restrain their subjects from selling or exporting articles contraband of war to the belligerent powers. But it was successfully shewn on the part of the United States that neutrals may lawfully sell at home to a belligerent purchaser, or carry themselves to the belligerent powers, contraband articles, subject to the right of seizure *in transitu*. This right has since been explicitly declared by the judicial authorities of this country. The right of the neutral to transport, and of the hostile power to seize, are conflicting rights, and neither party can charge the other with a criminal act." The material passage of the judgment in the case of the Santissima Trinidad which affirms this, as given in 7 Wheaton's Rep. 340, is the following: "There is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels as well as munitions of war to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation." I take this passage to be a very correct representation of the present state of the law of England also. For if a British ship-builder builds a vessel of war in an English port, and arms or equips her for war *bonâ fide* on his own account, as an article of merchandise, and not under or by virtue of any agreement, understanding or concert with a belligerent power, he may lawfully, if acting *bonâ fide*, send the ship, so armed and equipped, for sale as merchandise in a belligerent country, and will not in so doing violate the provisions or incur the penalties of the Foreign Enlistment Act. It is true that, under the provisions of the act of the 16 & 17 Vict. c. 107, Her Majesty has power by proclamation or Order in Council to prohibit the exportation of certain goods, including arms, ammunition, gunpowder, naval and military stores, but no Order in Council or proclamation was made in the terms or under the special authority of this statute. Great reliance, however, was placed by the counsel for the respondents on the Queen's Proclamation of the 13th of May 1861. Although it was admitted that it could not be treated as made under the authority of the last-mentioned statute, I need not observe that it is the object of a proclamation to make known the existing law, and that it can neither make nor unmake law. But in truth the proclamation of 1861 is directed, and very properly, to two objects: first, to declare that

the provisions of the Foreign Enlistment Act would be strictly enforced; and, secondly, not to prohibit the exportation of warlike stores, but to warn the subjects of the realm that if any subject carried contraband of war to either belligerent he would incur the penal consequences of the law of nations, and would receive no protection or relief from these consequences (that is, from capture and condemnation) at the hands of Her Majesty. The proclamation has no effect whatever on the legality of this adventure. I am of opinion, therefore, that this adventure between the bankrupt and the petitioner was a lawful contract, and that the ordinary rights of property result from it. Consequently, I am of opinion that the goods in which the proceeds of the adventure were invested belong to the petitioner and the bankrupt, according to their several interests in that adventure and their contributions to the same, and I shall remit the case to the Commissioner with this declaration: Reverse the order of the Commissioner: declare that there was a valid partnership between the bankrupt and the petitioner in the adventure described in the petition, and that the accounts of the partnership ought to be taken, the partnership property sold or otherwise disposed of, the proceeds applied in payment of the debts of the partnership, and the surplus divided according to the interests of the petitioner and the bankrupt respectively.[9]

[9] See also Richardson v. Maine Fire and Marine Insurance Co., 6 Mass. 102; The Helen, L. R. 1 Ad. & Ec. 1.

"It may be said, that the law of nations is part of the municipal law of the land, and that by that law, . . . contraband trade is prohibited to neutrals, and, consequently, unlawful. This reasoning is not destitute of force, but the fact is, that the law of nations does not declare the trade to be unlawful. It only authorizes the seizure of the contraband articles by the belligerent powers; and this it does from necessity. A neutral nation has nothing to do with the war, and is under no moral obligation to abandon or abridge its trade; and yet, at the same time, from the law of necessity, as Vattel observes, the powers at war have a right to seize and confiscate the contraband goods, and this they may do from the principle of self-defence. The right of the hostile power to seize, this same very moral and correct writer continues to observe, does not destroy the right of the neutral to transport. They are rights which may, at times, reciprocally clash and injure each other. But this collision is the effect of inevitable necessity, and the neutral has no just cause to complain. A trade by a neutral, in articles contraband of war, is, therefore, a lawful trade, though a trade, from necessity, subject to inconvenience and loss." KENT, J., in Seton, Maitland & Co. v. Low, 1 Johns. (N. Y.) 1, 5. See also Pond v. Smith, 4 Conn. 297; Pearson v. Parson, 108 Fed. 461; Northern Pacific Railway Co. v. American Trading Co., 195 U. S. 439; Pearson v. Allis-Chalmers Co., 11 Am. Jour. Int. L. 883; DUER, Marine Insurance, I, 748–62; KERR, "Principles and Rules of Neutrality," 2 Jurid. Soc. Papers 629, 634; Hague Convention V, 1907, Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, arts. 7, 8, and 9, 36 U. S. Stat. L. 2310, 2323; Hague Convention XIII, 1907, Concerning the Rights and Duties of Neutral Powers in Naval War, arts. 6 and 7, 36 U. S. Stat. L. 2415, 2428.

The United States proclamation of neutrality, Aug. 4, 1914, warned "all citizens of the United States, and all persons residing or being within its territory or juris-

United States, An Act to Codify, Revise, and Amend the Penal Laws of the United States

Chapter II, Offenses Against Neutrality,[10] Sections 9, 10, 11, 12, 13, and 18. 1909.

35 *United States Statutes at Large* 1088, 1089, 1091.

Sec. 9. Every citizen of the United States who, within the territory or jurisdiction thereof, accepts and exercises a commission to serve a foreign prince, state, colony, district, or people, in war, by land or by sea, against any prince, state, colony, district, or people, with whom the United States are at peace, shall be fined not more than two thousand dollars and imprisoned not more than three years.[11]

Sec. 10. Whoever, within the territory or jurisdiction of the United States, enlists, or enters himself, or hires or retains another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people, as a soldier, or as a marine or seaman, on board of any vessel of war, letter of marque, or

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diction that, while the free and full expression of sympathies in public and private is not restricted by the laws of the United States, military forces in aid of a belligerent can not lawfully be originated or organized within its jurisdiction; and that, while all persons may lawfully and without restriction by reason of the aforesaid state of war manufacture and sell within the United States arms and munitions of war, and other articles ordinarily known as 'contraband of war', yet they cannot carry such articles upon the high seas for the use or service of a belligerent, nor can they transport soldiers and officers of a belligerent or attempt to break any blockade which may be lawfully established and maintained during the said wars without incurring the risk of hostile capture and the penalties denounced by the law of nations in that behalf." 38 U. S. Stat. L. 1999, 2001. The identical warning was incorporated in other neutrality proclamations issued by the United States during the world war.

[10] The earliest neutrality legislation enacted in the United States was the Act of 1794, c. 50, 1 U. S. Stat. L. 381. See The Three Friends, 166 U. S. 1, 52, *supra*, 139, 140. Hall says (8th ed., 707): "The policy of the United States in 1793 constitutes an epoch in the development of the usages of neutrality. There can be no doubt that it was intended and believed to give effect to the obligations then incumbent upon neutrals. But it represented by far the most advanced existing opinions as to what those obligations were; and in some points it even went further than authoritative international custom has up to the present time advanced. In the main however it is identical with the standard of conduct which is now adopted by the community of nations." Later United States neutrality legislation included the Act of 1797, c. 1, 1 U. S. Stat. L. 520; Act of 1817, c. 58, 3 *ibid.* 370; Act of 1818, c. 88, 3 *ibid.* 447; Act of 1838, c. 31, 5 *ibid.* 212; U. S. Rev. Stat., §§5281–5291. See Fenwick, Neutrality Laws of the United States, ch. 2.

[11] See McLean, J., charging the grand jury, 2 McL. 1, 2.

privateer, shall be fined not more than one thousand dollars and imprisoned not more than three years.[12]

Sec. 11. Whoever, within the territory or jurisdiction of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out, or arming of any vessel, with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, or whoever issues or delivers a commission within the territory or jurisdiction of the United States for any vessel, to the intent that she may be so employed, shall be fined not more than ten thousand dollars and imprisoned not more than three years. And every such vessel, her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores which may have been procured for the building and equipment thereof, shall be forfeited; one half to the use of the informer and the other half to the use of the United States.[13]

Sec. 12. Whoever, within the territory or jurisdiction of the United States, increases or augments, or procures to be increased or augmented, or knowingly is concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel which, at the time of her arrival within the United States, was a ship of war, or cruiser, or armed vessel, in the service of any foreign prince or state, or of any colony, district, or people, or belonging to the subjects or citizens of any such prince or state, colony, district, or people, the same being at war with any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, by adding to the number of the guns of such vessel, or by changing those on board of her for guns of a larger caliber, or by adding thereto any equipment solely applicable to war, shall be fined not more than one thousand dollars and imprisoned not more than one year.[14]

[12] See United States v. Hertz, 26 Fed. Cas. 293; United States v. Blair-Murdock Co., 228 Fed. 77; Attorney-General Cushing, "Foreign Enlistments in the United States," 7 Op. Atty. Gen. 367.

[13] See United States v. Guinet, 2 Dall. 321; United States v. Quincy, 6 Pet. 445; The Three Friends, 166 U. S. 1, *supra*, 139. "But there is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit; and which only exposes the persons engaged in it to the penalty of confiscation." Story, J., in The Santissima Trinidad, 7 Wh. 283, 340. See also United States v. The Meteor, 26 Fed. Cas. 1241; Wheaton, Dana's 8th ed., 563 n.

[14] "It has never been held by this Court, that an augmentation of force or illegal outfit affected any captures made after the original cruize was terminated. By

Sec. 13. Whoever, within the territory or jurisdiction of the United States, begins, or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, shall be fined not more than three thousand dollars and imprisoned not more than three years.[15]

[Sections 14 to 17 inclusive provide for the enforcement of neutrality.]

Sec. 18. The provisions of this chapter shall not be construed to extend to any subject or citizen of any foreign prince, state, colony, district, or people who is transiently within the United States and enlists or enters himself on board of any vessel of war, letter of marque, or privateer, which at the time of its arrival within the United States was fitted and equipped as such, or hires or retains another subject or citizen of the same foreign prince, state, colony, district, or people who is transiently within the United States to enlist or enter himself to serve such foreign prince, state, colony, district, or people on board such vessel of war, letter of marque, or privateer, if the United States shall then be at peace with such foreign prince, state, colony, district, or people. Nor shall they be construed to prevent the prosecution or punishment of treason, or of any piracy defined by the laws of the United States.[16]

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analogy to other cases of violations of public law the offence may well be deemed to be deposited at the termination of the voyage, and not to affect future transactions. But as to captures made during the same cruize, the doctrine of this Court has long established that such illegal augmentation is a violation of the law of nations, as well as of our own municipal laws, and as a violation of our neutrality, by analogy to other cases, it infects the captures subsequently made with the character of torts, and justifies and requires a restitution to the parties who have been injured by such misconduct." STORY, J., in The Santissima Trinidad, 7 Wh. 283, 348. See note 7, *supra*, 787.

[15] See Wiborg v. United States, 163 U. S. 632; United States v. O'Brien, 75 Fed. 900; United States v. Nunez, 82 Fed. 599; United States v. Murphy, 84 Fed. 609; CURTIS, "Law of Hostile Military Expeditions as Applied by the United States," 8 Am. Jour. Int. L. 1, 224. This section was amended by Act of 1917, c. 30, Tit. V, §8, to read as follows: "Whoever, within the territory or jurisdiction of the United States or of any of its possessions, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or who takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined not more than $3,000 or imprisoned not more than three years, or both." 40 U. S. Stat. L. 217, 223.

[16] See Act of 1917, c. 30, Tit. V, 40 U. S. Stat. L. 217, 221; 18 U. S. Code Ann. §§21–39; FENWICK, Neutrality Laws of the United States. *Cf.* Great Britain, Foreign Enlistment Act, 1870, 33 & 34 Vict. c. 90; Treaties of Washington Act, 1922, 12 & 13 Geo. V. c. 21; WHEELER, Foreign Enlistment Act.

The Alabama Claims

Great Britain and the United States. Special Tribunal of Arbitration. 1872.

Cobbet, Cases and Opinions on International Law, 3d ed., Volume II, pages 320–339; 17 *United States Statutes at Large* 863; *Papers Relating to the Treaty of Washington, Volumes I–IV, Geneva Arbitration.*

[The following statement of the case of The Alabama is taken from Cobbett, Cases, 3d ed., II, 332. The facts with respect to other vessels are omitted.]

The "Alabama" and her Tender.—This vessel was built at Liverpool and launched in May, 1862. She was known as No. 290, but was evidently intended as a vessel of war. On the 23rd June the United States Minister advised the British Government that the vessel was about to leave with the view of entering the service of the Confederacy; but it was not until the 16th July that the law officers of the Crown advised that there was sufficient evidence to warrant her detention; nor was her detention actually directed until the 31st July. Meanwhile, on the 29th, the vessel herself had sailed, though unarmed, from Liverpool. She proceeded to the Azores, where she was equipped as a vessel of war; her armament, together with a number of recruits, having been brought out to her by two vessels that had also cleared from British ports. She was then commissioned as a Confederate warship, and thereafter committed a variety of depredations on American commerce, besides destroying the United States warship "Hatteras." From time to time she put into British ports and was allowed to take coal and to effect repairs; a request for her seizure, as having been fitted out in violation of British neutrality, being refused on the ground that she was protected by her commission as a public armed vessel of a recognized belligerent. On the 19th June, 1864, she was sunk, after an encounter which took place off Cherbourg, by the United States warship "Kearsage."

[The claims arising out of the depredations of The Alabama and other vessels were referred to a specially constituted Tribunal of Arbitration by the Treaty of Washington concluded May 8, 1871, between Great Britain and the United States, 17 U. S. Stat. L. 863, in part as follows.]

Art. 1. Whereas differences have arisen between the government of the United States and the government of her Britannic Majesty, and still exist, growing out of the acts committed by the several vessels which have given rise to the claims generically known as the "Alabama claims:"

And whereas her Britannic Majesty has authorized her high commissioners and plenipotentiaries to express, in a friendly spirit, the regret

felt by her Majesty's government for the escape, under whatever circumstances, of the Alabama and other vessels from British ports, and for the depredations committed by those vessels:

Now, in order to remove and adjust all complaints and claims on the part of the United States, and to provide for the speedy settlement of such claims, which are not admitted by her Britannic Majesty's government, the high contracting parties agree that all the said claims, growing out of acts committed by the aforesaid vessels, and generically known as the "Alabama claims," shall be referred to a tribunal of arbitration to be composed of five arbitrators, to be appointed in the following manner, that is to say: One shall be named by the President of the United States; one shall be named by her Britannic Majesty; his Majesty the King of Italy shall be requested to name one; the President of the Swiss Confederation shall be requested to name one; and his Majesty the Emperor of Brazil shall be requested to name one. . . .

Art. 2. The arbitrators shall meet at Geneva, in Switzerland, at the earliest convenient day after they shall have been named, and shall proceed impartially and carefully to examine and decide all questions that shall be laid before them on the part of the governments of the United States and her Britannic Majesty respectively. All questions considered by the tribunal, including the final award, shall be decided by a majority of all the arbitrators. . . .

Art. 6. In deciding the matters submitted to the arbitrators, they shall be governed by the following three rules, which are agreed upon by the high contracting parties as rules to be taken as applicable to the case, and by such principles of international law not inconsistent therewith as the arbitrators shall determine to have been applicable to the case.

Rules. A neutral government is bound—

First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

Thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

Her Britannic Majesty has commanded her high commissioners and plenipotentiaries to declare that her Majesty's government cannot

assent to the foregoing rules as a statement of principles of international law which were in force at the time when the claims mentioned in Article I. arose, but that her Majesty's government, in order to evince its desire of strengthening the friendly relations between the two countries and of making satisfactory provision for the future, agrees that in deciding the questions between the two countries arising out of those claims, the arbitrators should assume that her Majesty's government had undertaken to act upon the principles set forth in these rules.

And the high contracting parties agree to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime powers, and to invite them to accede to them.

Art. 7. . . . The said tribunal shall first determine as to each vessel separately whether Great Britain has, by any act or omission, failed to fulfil any of the duties set forth in the foregoing three rules, or recognized by the principles of international law not inconsistent with such rules, and shall certify such fact as to each of the said vessels. In case the tribunal find that Great Britain has failed to fulfil any duty or duties as aforesaid, it may, if it think proper, proceed to award a sum in gross to be paid by Great Britain to the United States for all the claims referred to it; and in such case the gross sum so awarded shall be paid in coin by the government of Great Britain to the government of the United States, at Washington, within twelve months after the date of the award. . . .

[The Tribunal of Arbitration delivered its award September 14, 1872. The following text is taken from Papers Relating to the Treaty of Washington, IV, 49. Parts of the award dealing with organization and procedure and with claims based upon the depredations of other vessels than The Alabama are omitted.]

The tribunal having . . . fully taken into their consideration the treaty, and also the cases, counter-cases, documents, evidence, and arguments, and likewise all other communications made to them by the two parties during the progress of their sittings, and having impartially and carefully examined the same,

Has arrived at the decision embodied in the present award:

Whereas, having regard to the VIth and VIIth articles of the said treaty, the arbitrators are bound under the terms of the said VIth article, "in deciding the matters submitted to them, to be governed by the three rules therein specified and by such principles of international law, not inconsistent therewith, as the arbitrators shall determine to have been applicable to the case;"

And whereas the "due diligence" referred to in the first and third of the said rules ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfil the obligations of neutrality on their part;

And whereas the circumstances out of which the facts constituting the subject-matter of the present controversy arose were of a nature to call for the exercise on the part of Her Britannic Majesty's government of all possible solicitude for the observance of the rights and the duties involved in the proclamation of neutrality issued by Her Majesty on the 13th day of May, 1861;

And whereas the effects of a violation of neutrality committed by means of the construction, equipment, and armament of a vessel are not done away with by any commission which the government of the belligerent power, benefited by the violation of neutrality, may afterwards have granted to that vessel; and the ultimate step, by which the offense is completed, cannot be admissible as a ground for the absolution of the offender, nor can the consummation of his fraud become the means of establishing his innocence;

And whereas the privilege of exterritoriality accorded to vessels of war has been admitted into the law of nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between different nations, and therefore can never be appealed to for the protection of acts done in violation of neutrality;

And whereas the absence of a previous notice cannot be regarded as a failure in any consideration required by the law of nations, in those cases in which a vessel carries with it its own condemnation;

And whereas, in order to impart to any supplies of coal a character inconsistent with the second rule, prohibiting the use of neutral ports or waters, as a base of naval operations for a belligerent, it is necessary that the said supplies should be connected with special circumstances of time, of persons, or of place, which may combine to give them such character;

And whereas, with respect to the vessel called the Alabama, it clearly results from all the facts relative to the construction of the ship at first designated by the number "290" in the port of Liverpool, and its equipment and armament in the vicinity of Terceira through the agency of the vessels called the "Agrippina" and the "Bahama," dispatched from Great Britain to that end, that the British government failed to use due diligence in the performance of its neutral obligations; and especially that it omitted, notwithstanding the warnings and official representations made by the diplomatic agents of the United States during the construction of the said number "290," to take in due time any effective measures of prevention, and that those orders which it did give at last, for the detention of the vessel, were issued so late that their execution was not practicable;

And whereas, after the escape of that vessel, the measures taken for its pursuit and arrest were so imperfect as to lead to no result, and therefore cannot be considered sufficient to release Great Britain from the responsibility already incurred;

And whereas, in despite of the violations of the neutrality of Great Britain committed by the "290," this same vessel, later known as the confederate cruiser Alabama, was on several occasions freely admitted into the ports of colonies of Great Britain, instead of being proceeded against as it ought to have been in any and every port within British jurisdiction in which it might have been found;

And whereas the government of Her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed:

Four of the arbitrators, for the reasons above assigned, and the fifth for reasons separately assigned by him,

Are of opinion—

That Great Britain has in this case failed, by omission, to fulfill the duties prescribed in the first and the third of the rules established by the VIth article of the treaty of Washington. . . .

The tribunal, making use of the authority conferred upon it by Article VII of the said treaty, by a majority of four voices to one, awards to the United States a sum of $15,500,000 in gold, as the indemnity to be paid by Great Britain to the United States, for the satisfaction of all the claims referred to the consideration of the tribunal, conformably to the provisions contained in Article VII of the aforesaid treaty.[17]

United States, An Act to Punish Acts of Interference with the Foreign Relations, the Neutrality, and the Foreign Commerce of the United States, etc.

Title V, Enforcement of Neutrality, Sections 3 and 6. 1917.

40 *United States Statutes at Large* 217, 222.

Sec. 3. During a war in which the United States is a neutral nation, it shall be unlawful to send out of the jurisdiction of the United States any vessel built, armed, or equipped as a vessel of war, or converted from a private vessel into a vessel of war, with any intent or under any agreement or contract, written or oral, that such vessel shall be delivered to a belligerent nation, or to an agent, officer, or citizen of such nation,

[17] See Kerr, "Principles and Rules of Neutrality," 2 Jurid. Soc. Papers 629; Moore, Int. Arb., I, 495. The Hague Convention XIII, 1907, Concerning the Rights and Duties of Neutral Powers in Naval War, art. 8, provides: "A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a Power with which that Government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise, or engage in hostile operations, which had been adapted entirely or partly within the said jurisdiction for use in war." 36 U. S. Stat. L. 2415, 2428. See also 9 Am. Jour. Int. L. 177.

or with reasonable cause to believe that the said vessel shall or will be employed in the service of any such belligerent nation after its departure from the jurisdiction of the United States.

Sec. 6. Whoever, in violation of any of the provisions of this title, shall take, or attempt or conspire to take, or authorize the taking of any such vessel, out of port or from the jurisdiction of the United States, shall be fined not more than $10,000 or imprisoned not more than five years, or both; and, in addition, such vessel, her tackle, apparel, furniture, equipment, and her cargo shall be forfeited to the United States.

Loans by Subjects of Neutral States to Belligerents

Great Britain. Opinion of the Law Officers of the Crown, Christopher Robinson, King's Advocate, R. Gifford, Attorney-General, and J. S. Copley, Solicitor-General. 1823.

Phillimore, Commentaries upon International Law, Third Edition, Volume III, Appendix X, page 928.

We have been honoured with your commands signified in Mr. Planta's letter of the 12th inst., stating that you were desirous that we should report our opinion upon the following questions:

1. Whether subscriptions for the use of one of two belligerent States by individual subjects of a nation professing and maintaining a strict neutrality between them be contrary to the law of nations, and constitute such an offence as the other belligerent would have a right to consider as an act of hostility on the part of the neutral Government?

2. If such individual voluntary subscriptions in favour of one belligerent would give such just cause of offence to the other, whether loans for the same purpose would give the like cause of offence?

3. And if not, where is the line to be drawn between a loan at an easy or mere nominal rate of interest, or a loan with a previous understanding that interest would never be exacted, and a gratuitous voluntary subscription?

In obedience to your commands we beg leave to report that we have taken the same into our consideration, and we are of opinion that subscriptions of the nature above alluded to, for the use and avowedly for the support of one of two belligerent States against the other, entered into by individual subjects of a Government professing and maintaining neutrality, are inconsistent with that neutrality and contrary to the law of nations; but we conceive that the other belligerent would not have a right to consider such subscriptions as constituting an act of hostility on the part of the Government, although they might afford just ground of complaint if carried to any considerable extent.

With respect to loans, if entered into merely with commercial views, we think, according to the opinions of writers on the law of nations and the practice which has prevailed, they would not be an infringement of neutrality; but if, under colour of a loan, a gratuitous contribution was afforded without interest, or with mere nominal interest, we think such a transaction would fall within the opinion given in answer to the first question.[18]

JOHN KENNETT, EZEKIEL S. HAINES, EDEN B. REEDER, GEORGE GRAHAM, JR., JOHN MCCARTY, JOSHUA YORKE, AND ROBERT B. BOWLER, APPELLANTS, v. THOMAS J. CHAMBERS

United States. Supreme Court. 1852.

14 *Howard's Reports* 38.

[The statement of the case, the arguments of counsel, and part of the opinion are omitted. The facts are stated sufficiently in the opinion.]

MR. CHIEF JUSTICE TANEY delivered the opinion of the court.

This is an appeal from the decree of the District Court of the United States for the District of Texas.

The appellants filed a bill in that court against the appellee, to obtain the specific execution of an agreement which is set out in full in the bill; and which they allege was executed at the city of Cincinnati, in the State of Ohio, on or about the 16th of September, 1836. . . .

The contract, after stating that it was entered into on the day and year above mentioned, between General T. Jefferson Chambers, of the Texan army, of the first part, and Morgan Neville and six others, who are named in the agreement, of the city of Cincinnati, of the second part, proceeds to recite the motives and inducements of the parties in the following words:—

"That the said party of the second part, being desirous of assisting the said General T. Jefferson Chambers, who is now engaged in raising, arming, and equipping volunteers for Texas, and who is in want of means therefor; and, being extremely desirous to advance the cause of freedom and the independence of Texas, have agreed to purchase of the said T. Jefferson Chambers, of his private estate, the lands hereinafter described."

And after this recital follows the agreement of Chambers, to sell and convey to them the land described in the agreement, situated in Texas, for the sum of twelve thousand five hundred dollars, which he

[18] See "Report on the Means of Proceeding Legally against Individuals and Corporations engaged in Subscriptions to Belligerent Powers," PHILLIMORE, 3d ed., III, 929.

acknowledged that he had received in their notes, payable in equal instalments of four, six, and twelve months, and he covenanted that he had a good title to this land, and would convey it with general warranty.

. . .

After setting out the contract at large, the bill avers, that the notes given, as aforesaid, were all paid; and sets forth the manner in which the complainants, who were not parties to the original contract, had acquired their interest as assignees; and charges that, notwithstanding the full payment of the money, Chambers, under different pretexts, refuses to convey the land, according to the terms of his agreement.

. . .

To this bill the respondent (Chambers) demurred, and the principal question which arises on the demurrer is, whether the contract was a legal and valid one, and such as can be enforced by either party in a court of the United States. It appears on the face of it, and by the averments of the appellants in their bill, that it was made in Cincinnati, with a general in the Texan army, who was then engaged in raising, arming, and equipping volunteers for Texas, to carry on hostilities with Mexico; and that one of the inducements of the appellants, in entering into this contract and advancing the money, was to assist him in accomplishing these objects.

The District Court decided that the contract was illegal and void, and sustained the demurrer and dismissed the bill; and we think that the decision was right.

The validity of this contract depends upon the relation in which this country then stood to Mexico and Texas; and the duties which these relations imposed upon the government and citizens of the United States.

Texas had declared itself independent a few months previous to this agreement. But it had not been acknowledged by the United States; and the constituted authorities charged with our foreign relations, regarded the treaties we had made with Mexico as still in full force, and obligatory upon both nations. By the treaty of limits, Texas had been admitted by our government to be a part of the Mexican territory; and by the first article of the treaty of amity, commerce, and navigation, it was declared, "that there should be a firm, inviolable, and universal peace, and a true and sincere friendship between the United States of America and the United Mexican States, in all the extent of their possessions and territories, and between their people and citizens respectively, without distinction of persons or place." These treaties, while they remained in force, were, by the Constitution of the United States, the supreme law, and binding not only upon the government, but upon every citizen. No contract could lawfully be made in violation of their provisions.

Undoubtedly, when Texas had achieved her independence, no previous treaty could bind this country to regard it as a part of the Mexican territory. But it belonged to the government, and not to individual citizens, to decide when that event had taken place. And that decision, according to the laws of nations, depended upon the question whether she had or had not a civil government in successful operation, capable of performing the duties and fulfilling the obligations of an independent power. It depended upon the state of the fact, and not upon the right which was in contest between the parties. And the President, in his message to the Senate, of December 22, 1836, in relation to the conflict between Mexico and Texas, which was still pending, says: "All questions relative to the government of foreign nations, whether of the old or the new world, have been treated by the United States as questions of fact only, and our predecessors have cautiously abstained from deciding upon them until the clearest evidence was in their possession, to enable them not only to decide correctly, but to shield their decision from every unworthy imputation." Senate Journal of 1836, 37, p. 54.

Acting upon these principles, the independence of Texas was not acknowledged by the Government of the United States until the beginning of March, 1837. Up to that time, it was regarded as a part of the territory of Mexico. The treaty which admitted it to be so, was held to be still in force and binding on both parties, and every effort made by the government to fulfil its neutral obligations, and prevent our citizens from taking part in the conflict. This is evident, from an official communication from the President to the Governor of Tennessee, in reply to an inquiry in relation to a requisition for militia, made by General Gaines. The despatch is dated in August, 1836; and the President uses the following language: "The obligations of our treaty with Mexico, as well as the general principles which govern our intercourse with foreign powers, require us to maintain a strict neutrality in the contest which now agitates a part of that republic. So long as Mexico fulfils her duties to us, as they are defined by the treaty, and violates none of the rights which are secured by it to our citizens, any act on the part of the Government of the United States, which would tend to foster a spirit of resistance to her government and laws, whatever may be their character or form, when administered within her own limits and jurisdiction, would be unauthorized and highly improper." Ex. Doc. 1836, 1837, Vol. 1, Doc. 2, p. 58.

And on the very day on which the agreement of which we are speaking, was made, (September 16, 1836,) Mr. Forsyth, the Secretary of State, in a note to the Mexican Minister, assured him that the government had taken measures to secure the execution of the laws for preserving the neutrality of the United States, and that the public officers were vigilant in the discharge of that duty. Ex. Doc. Vol. 1, Doc. 2, page 63–64. . . .

We have given these extracts from the public documents not only to show that, in the judgment of our government, Texas had not established its independence when this contract was made, but to show also how anxiously the constituted authorities were endeavoring to maintain untarnished the honor of the country, and to place it above the suspicion of taking any part in the conflict.

This being the attitude in which the government stood, and this its open and avowed policy, upon what grounds can the parties to such a contract as this, come into a court of justice of the United States and ask for its specific execution? It was made in direct opposition to the policy of the government, to which it was the duty of every citizen to conform. And, while they saw it exerting all its power to fulfil in good faith its neutral obligations, they made themselves parties to the war, by furnishing means to a general of the Texan army, for the avowed purpose of aiding and assisting him in his military operations.

It might indeed fairly be inferred, from the language of the contract and the statements in the appellants' bill, that the volunteers were to be raised, armed, and equipped within the limits of the United States. The language of the contract is: "That the said party of the second part, (that is the complainants,) being desirous of assisting the said General T. Jefferson Chambers, who is now engaged in raising, arming, and equipping volunteers for Texas, and is in want of means therefor." And as General Chambers was then in the United States, and was, as the contract states, actually engaged at that time in raising, arming, and equipping volunteers, and was in want of means to accomplish his object, the inference would seem to be almost irresistible that these preparations were making at or near the place where the agreement was made, and that the money was advanced to enable him to raise and equip a military force in the United States. . . .

If this be the correct interpretation of the agreement, the contract is not only void, but the parties who advanced the money were liable to be punished in a criminal prosecution, for a violation of the neutrality laws of the United States. And certainly, with such strong indications of a criminal intent, and without any averment in the bill from which their innocence can be inferred, a court of chancery would never lend its aid to carry the agreement into specific execution, but would leave the parties to seek their remedy at law. And this ground would of itself be sufficient to justify the decree of the District Court dismissing the bill.

But the decision stands on broader and firmer ground, and this agreement cannot be sustained either at law or in equity. The question is not whether the parties to this contract violated the neutrality laws of the United States or subjected themselves to a criminal prosecution; but whether such a contract, made at that time, within the United

States, for the purposes stated in the contract and the bill of complaint, was a legal and valid contract, and such as to entitle either party to the aid of the courts of justice of the United States to enforce its execution.

The intercourse of this country with foreign nations, and its policy in regard to them, are placed by the Constitution of the United States in the hands of the government, and its decisions upon these subjects are obligatory upon every citizen of the Union. He is bound to be at war with the nation against which the war-making power has declared war, and equally bound to commit no act of hostility against a nation with which the government is in amity and friendship. This principle is universally acknowledged by the laws of nations. It lies at the foundation of all government, as there could be no social order or peaceful relations between the citizens of different countries without it. It is, however, more emphatically true in relation to citizens of the United States. For as the sovereignty resides in the people, every citizen is a portion of it, and is himself personally bound by the laws which the representatives of the sovereignty may pass, or the treaties into which they may enter, within the scope of their delegated authority. And when that authority has plighted its faith to another nation that there shall be peace and friendship between the citizens of the two countries, every citizen of the United States is equally and personally pledged. The compact is made by the department of the government upon which he himself has agreed to confer the power. It is his own personal compact as a portion of the sovereignty in whose behalf it is made. And he can do no act, nor enter into any agreement to promote or encourage revolt or hostilities against the territories of a country with which our government is pledged by treaty to be at peace, without a breach of his duty as a citizen, and the breach of the faith pledged to the foreign nation. And if he does so he cannot claim the aid of a court of justice to enforce it. The appellants say, in their contract, that they were induced to advance the money by the desire to promote the cause of freedom. But our own freedom cannot be preserved without obedience to our own laws, nor social order preserved if the judicial branch of the government countenanced and sustained contracts made in violation of the duties which the law imposes, or in contravention of the known and established policy of the political department, acting within the limits of its constitutional power. . . .

[In an omitted part of the opinion the court referred to Rose v. Himely, 4 Cr. 241, *supra*, 502, and Gelston v. Hoyt, 3 Wh. 246.]

It was upon this ground that the Court of Common Pleas in England, in the case of De Wutz v. Hendricks, 9 Moore's C. B. Reports, 586, decided that it was contrary to the law of nations for persons residing in England to enter into engagements to raise money by way of loan

for the purpose of supporting subjects of a foreign state in arms against a government in friendship with England, and that no right of action attached upon any such contract. And this decision is quoted with approbation by Chancellor Kent, in 1 Kent's Com. 116.

Nor can the subsequent acknowledgment of the independence of Texas, and her admission into the Union as a sovereign State, affect the question. The agreement being illegal and absolutely void at the time it was made, it can derive no force or validity from events which afterwards happened. . . .

We therefore hold this contract to be illegal and void, and affirm the decree of the District Court.[19]

Mr. Justice Daniel and Mr. Justice Grier dissented.

United States, Joint Resolution to Prohibit the Exportation of Arms or Munitions of War from the United States to Certain Countries, and for Other Purposes

Sections 1 and 2. 1922.

42 *United States Statutes at Large* 361.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever the President finds that in any American country, or in any country in which the United States exercises extraterritorial jurisdiction, conditions of domestic violence exist, which are or may be promoted by the use of arms or munitions of war procured from the United States, and makes proclamation thereof, it shall be unlawful to export, except under such limitations and exceptions as the President prescribes, any arms or munitions of war from any place in the United States to such country until otherwise ordered by the President or by Congress.

Sec. 2. Whoever exports any arms or munitions of war in violation of section 1 shall, on conviction, be punished by fine not exceeding $10,000, or by imprisonment not exceeding two years, or both.[20]

[19] See Jones v. Garcia del Rio, Turn. & Russ. 297, 299; De Wütz v. Hendricks, 9 Moo. 586, 2 Bing. 314; Yrisarri v. Clement, 2 Car. & Payne, 223, 228; Thompson v. Powles, 2 Sim. 194, *supra*, 154; Tompson v. Barclay, C. P. Coop. 501; Habershon v. Vardon, 4 De G. & Sm. 467; Emperor of Austria v. Day, 3 De G. F. & J. 217, 244; Gladstone, in 215 Hansard, 3d series, 633, 896; Kent, Commentaries, 2d ed., I, 116; Cobbett, Cases, 3d ed., II, 366.

[20] See Joint Resolution of 1898, 30 U. S. Stat. L. 739; Joint Resolution of 1912, 37 U. S. Stat. L. 630. See also United States v. Lucas, 6 F. (2d) 327.

Lord Lyndhurst, Debate on Foreign Refugees

Great Britain. House of Lords. 1853.

Hansard's Parliamentary Debates, Third Series, Volume CXXIV, page 1046.

It is a matter of public notoriety that great irritation prevails in the capital of the Austrian dominions, and throughout the whole of that country, against the people and Government of England. So far has it been carried, that I understand the Austrian Government have just considered it right to appoint a police force to protect the residence and person of our Ambassador from insult and attack. Though, from recent circumstances, that irritation has been greatly increased—I allude to those painful and deplorable events which have lately occurred—yet this irritation owes its origin, no doubt, to the asylum we have afforded to foreign refugees, and to the manner in which they have been permitted to abuse the protection afforded them by this country. Their conduct in this respect, as everybody sees, has been most scandalous; and the impression I believe prevails abroad that there are no means in this country adequate for the purpose of punishing them. If that were really the case, it would be incumbent on the Government of this country to consider whether it would not be proper to introduce some law for that purpose; but I do not think so ill of the common law of this country as to suppose that it would leave offences of this description without providing the means of adequate punishment; and I feel it to be my duty to state my opinion on that subject, which I do with great deference, in the presence of noble and learned Lords, who will correct me if I am erroneous in what I state. I will first take the case of British subjects. If a number of British subjects were to combine and conspire together to excite revolt among the inhabitants of a friendly State—of a State united in alliance with us—and these persons, in pursuance of that conspiracy, were to issue manifestoes and proclamations for the purpose of carrying that object into effect; above all, if they were to subscribe money for the purpose of purchasing arms to give effect to that intended enterprise, I conceive, and I state with confidence, that such persons would be guilty of a misdemeanor, and liable to suffer punishment by the laws of this country, inasmuch as their conduct would tend to embroil the two countries together, to lead to remonstrances by the one with the other, and ultimately, it might be, to war. . . . Now with respect to foreigners. Foreigners residing in this country, as long as they reside here under the protection of this country, are considered in the light of British subjects, or rather subjects of Her Majesty, and are punishable by the criminal law precisely in the same manner, to the same extent, and under the same conditions, as natural-born subjects of Her Majesty.

In cases of this kind, persons coming here as refugees from a foreign State, in consequence of political acts which they have committed, are bound by every principle of gratitude to conduct themselves with propriety. This circumstance tends greatly to aggravate their offence, and no one can doubt that they are liable to severe punishment. I will put the case in another shape. The offence of endeavouring to excite revolt among the subjects of a neighbouring State is an offence against the law of nations. No writer on the law of nations states otherwise. But the law of nations, according to the decision of our greatest Judges, is part of the law of England. I need therefore say no more with reference to the nature of the offence imputed to those individuals—I need say no more than that they are subject to be punished by the laws of this country for offences of this description committed by them. . . . There is one point more to which, with all submission, I would call the attention of noble Lords opposite. It is not sufficient for the Government to say to a foreign State—"Our courts are open to you; obtain evidence of a crime having been committed, bring that evidence into a court of justice, and justice will be done you." I say that is not a sufficient course for the Government to take. In my opinion, in cases of this kind, where foreign States are concerned, and where the offence is committed not only against the foreign State, but against our own, it is the duty of the Government of this country to take the initiative, to institute a prosecution in their own name, and more especially so as they have means of obtaining evidence of the transaction which cannot possibly be obtained by the foreign State.[21]

[21] Referring to Lord Lyndhurst's proposition that conspiracy to excite revolt among the inhabitants of a friendly state is an offence against the law of nations, and hence against the law of England, Lord Brougham ventured to say, "that there was no lawyer in Westminster Hall who entertained the shadow of a doubt on his proposition—that the law of this country, as it at present stood, was amply sufficient to visit with severe punishment, not only all conspiracies such as his noble and learned Friend had described, but lesser attempts against the majesties or constitutions of foreign nations; he meant even libels against the persons of those Sovereigns or authorities, which, by the law of this country, were offences against the Sovereign of this country and against the municipal law of England. Conspiracy might be tried and prosecuted here, although the place to which the conspiracy bore reference was a foreign country, if the offence was committed in England." 124 Hansard, 3d series, 1046, 1052. Lord Truro and Lord Chancellor Cranworth also concurred in Lord Lyndhurst's proposition. 124 *ibid.* 1055, 1059. "Lord Lyndhurst has laid it down in debate, with the concurrence of other law lords, that a conspiracy in the United Kingdom, either by native subjects or aliens, to do any act, either here or abroad, which tends to embroil the Government of her Majesty with that of any foreign country, is a misdemeanour. This doctrine may be correct; but it has never been the foundation of any indictment; it has never been declared by any judicial decision, and it is not to be found in any text-book of criminal law. Whether this principle would ever be laid down as law by a judge to a jury, and whether a conviction could be obtained upon it, is at present only matter of conjecture." Lewis,

SECTION 2. OTHER INTERESTS OF FOREIGN STATES (NOT INCLUDING NATIONALS)[22]

RESPUBLICA v. DE LONGCHAMPS

United States. Court of Oyer and Terminer at Philadelphia Pennsylvania. 1784.

1 *Dallas' Reports* 111.

Charles Julian De Longchamps, commonly called the Chevalier De Longchamps, was indicted, that "he on the 17th of May, 1784, in the dwelling-house of his Excellency the French Minister Plenipotentiary, in the presence of Francis Barbe Marbois, unlawfully and insolently did threaten and menace bodily harm and violence to the person of the said Francis Barbe Marbois, he being Consul General of France to the United States, Consul for the State of Pennsylvania, Secretary of the French Legation &c. resident in the house aforesaid, and under the protection of the law of nations and this Commonwealth." And that "afterwards, to wit on the 19th of May in the public street &c. he the said Charles Julian de Longchamps unlawfully, premeditatedly and violently, in and upon the person of the said Francis Barbe Marbois under the protection of the laws of nations, and in the peace of this Commonwealth, then and there being, an assault did make, and him the said Francis Barbe Marbois unlawfully and violently did strike and otherwise &c. in violation of the laws of nations, against the peace and dignity of the United States and of the Commonwealth of Pennsylvania."—To these charges the defendant pleaded not guilty.

The evidence, in support of the first Count, was, that on the 17th of May, De Longchamps went to the house of the Minister of France, and after some conversation with Monsieur Marbois, was heard to exclaim in a loud and menacing tone, "*Je vous deshonnerera, Poliçon, Coquin*", addressing himself to that gentleman. That the noise being heard by the Minister, he repaired to the room from which it issued, and that in his presence the defendant repeated the insult offered to Monsieur Marbois in nearly the same terms.

Foreign Jurisdiction and the Extradition of Criminals, 73. *Cf.* LAUTERPACHT, "Revolutionary Activities by Private Persons against Foreign States," 22 Am. Jour. Int. L. 105.

See Reg. v. Bernard, 8 St. Tr., N. S., 887; Reg. v. Tchorzewski, 8 *ibid.* 1091; LEWIS, *op. cit.*, 58–78; STEPHEN, "The Point of Law Involved in the Case of Reg. v. Bernard," 2 Jurid. Soc. Papers 67. And see Great Britain, Offences against the Person Act, 1861, 24 & 25 Vict. c. 100, §4; Queen v. Most, 7 Q. B. D. 244. *Cf.* ch. 7, §1, n. 6, *supra*, 655. *Cf.* also STARKIE, Treatise on the Law of Slander and Libel, 3d ed., 657, *infra*, 822.

[22] On the protection of nationals of foreign states, see §§3 and 4, *infra*, 823, 861.

In support of the second Count, it appeared, that De Longchamps and Monsieur Marbois, having met in Market Street, near the Coffee House, entered into a long conversation, in the course of which, the latter said that he would complain to the civil authority, and the former replied, "you are a Blackguard." The witnesses generally deposed that De Longchamps struck the cane of Monsieur Marbois before that gentleman used any violent gestures, or even appeared incensed; but that as soon as the stroke was given, Monsieur Marbois employed his stick with great severity, till the spectators interfered and separated the parties. One of the witnesses, indeed, said, that previously to engaging with their canes, he observed the two gentlemen, at the same instant, lay their hands on each others shoulders, in a manner so gentle, that he, who had heard it was customary among the French to part with mutual salutations, imagined a ceremony of that kind was about to take place, and was surprized to see De Longchamps step back, and strike the cane of Monsieur Marbois.

On the part of the defendant, evidence was produced of his having served with honour in the French armies, and his commission of Sub-Brigadier in the dragoons of Noailles, was read. It appeared that the occasion of his calling on Monsieur Marbois, was to obtain authentications of these, and some other papers relative to his family, his rank in France, and his military promotions, in order to refute several publications, which had been made in the news-papers, injurious to his character and pretensions. The refusal of Monsieur Marbois to grant the authentications required, was the ground of De Longchamps' resentment, and the immediate cause of his menaces at the Minister's house. . . .

The Jury, at first, found the defendant guilty of the Assault only; but, the Court desiring them to re-consider the matter, they returned with a verdict against him on both Counts. . . .

[Part of the statement of the case, the arguments of counsel, and part of the judgment are omitted.]

M'Kean, Chief Justice.—Charles-Julian De Longchamps:—You have been indicted for unlawfully and violently threatening and menacing bodily harm and violence to the person of the honorable Francis-Barbe De Marbois, Secretary to the Legation from France, and Consul General of France to the United States of America, in the mansion-house of the Minister Plenipotentiary of France; and for an Assault and Battery committed upon the said Secretary and Consul, in a public street in the City of Philadelphia. To this Indictment you have pleaded, that you were not guilty, and for trial put yourself upon the country;—an unbiased Jury, upon a fair trial, and clear evidence, have found you guilty. . . .

The first crime in the indictment is an infraction of the law of Nations. This law, in its full extent, is part of the law of this State, and is to be

collected from the practice of different Nations, and the authority of writers.

The person of a public minister is sacred and inviolable. Whoever offers any violence to him, not only affronts the Sovereign he represents, but also hurts the common safety and well-being of nations;—he is guilty of a crime against the whole world.

All the reasons, which establish the independency and inviolability of the person of a Minister, apply likewise to secure the immunities of his house: It is to be defended from all outrage; it is under a peculiar protection of the laws; to invade it's freedom is a crime against the State and all other nations.

The *Comites* of a Minister, or those of his train, partake also of his inviolability. The independency of a Minister extends to all his household; these are so connected with him, that they enjoy his privileges and follow his fate. The Secretary to the Embassy has his commission from the Sovereign himself; he is the most distinguished character in the suite of a public Minister, and is in some instances considered as a kind of public Minister himself. Is it not then an extraordinary insult to use threats of bodily harm to his person in the domicil of the Minister Plenipotentiary? If this is tolerated, his freedom of conduct is taken away, the business of his Sovereign cannot be transacted, and his dignity and grandeur will be tarnished.

You then have been guilty of an atrocious violation of the law of nations; you have grossly insulted gentlemen, the peculiar objects of this law (gentlemen of amiable characters, and highly esteemed by the government of this State) in a most wanton and unprovoked manner: And it is now the interest as well as duty of the government, to animadvert upon your conduct with a becoming severity,—such a severity as may tend to reform yourself, to deter others from the commission of the like crime, preserve the honor of the State, and maintain peace with our great and good Ally, and the whole world.

A wrong opinion has been entertained concerning the conduct of Lord Chief Justice Holt and the Court of the King's-Bench in England, in the noted case of the Russian Ambassador. They detained the offenders, after conviction, in prison, from term to term, until the Czar Peter was satisfied, without ever proceeding to judgment; and from this it has been inferred, that the Court doubted, whether they could inflict any punishment for an infraction of the law of nations. But this was not the reason. The Court never doubted, that the law of nations formed a part of the law of England, and that a violation of this general law could be punished by them; but no punishment less than death would have been thought by the Czar an adequate reparation for the arrest of his Ambassador; This punishment they could not inflict, and such a sentence as they could have given, He might have thought a

fresh insult. Another expedient was therefore fallen upon. However, the Princes of the world, at this day, are more enlightened, and do not require impracticable nor unreasonable reparations for injuries of this kind.

The second offence charged in the indictment, namely the Assault and Battery, needs no observations.

Upon the whole the Court, after a most attentive consideration of every circumstance in this case, do award, and direct me to pronounce the following sentence:—

That you pay a fine of one hundred French Crowns to the Commonwealth; that you be imprisoned until the 4th. day of July 1786, which will make a little more than two years imprisonment in the whole; that you then give good security to keep the peace, and be of good behaviour to all public Ministers, Secretaries to Embassies, and Consuls, as well as to all the liege people of Pennsylvania, for the space of seven years, by entering into a recognizance, yourself in a thousand pounds, and two securities in five hundred pounds each: that you pay the costs of this prosecution, and remain committed until this sentence be complied with.[23]

United States, Revised Statutes

Second Edition, Title XLVII, Foreign Relations, Sections 4062–4065. 1878.

Sec. 4062. Every person who violates any safe conduct or passport duly obtained and issued under authority of the United States; or who assaults, strikes, wounds, imprisons, or in any other manner offers violence to the person of a public minister, in violation of the law of nations, shall be imprisoned for not more than three years, and fined, at the discretion of the court.

Sec. 4063. Whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any public minister of any foreign prince or state, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached, such writ or process shall be deemed void.

Sec. 4064. Whenever any writ or process is sued out in violation of the preceding section, every person by whom the same is obtained

[23] See United States, Act of 1790, c. 9, §§25–28, 1 U. S. Stat. L. 112, 117; United States v. Liddle, 2 Wash. C. C. 205; United States v. Hand, 2 Wash. C. C. 435; United States v. Ortega, 4 Wash. C. C. 531.

See also King v. D'Eon, 1 W. Bla. 510; Holt, Law of Libel, 1st Am. from 2d London ed., 90 n.

or prosecuted, whether as party or as attorney or solicitor, and every officer concerned in executing it, shall be deemed a violator of the laws of nations, and a disturber of the public repose, and shall be imprisoned for not more than three years, and fined at the discretion of the court.

Sec. 4065. The two preceding sections shall not apply to any case where the person against whom the process is issued is a citizen or inhabitant of the United States, in the service of a public minister, and the process is founded upon a debt contracted before he entered upon such service; nor shall the preceding section apply to any case where the person against whom the process is issued is a domestic servant of a public minister, unless the name of the servant has, before the issuing thereof, been registered in the Department of State, and transmitted by the Secretary of State to the marshal of the District of Columbia, who shall upon receipt thereof post the same in some public place in his office.[24]

United States, An Act to Punish Acts of Interference with the Foreign Relations, the Neutrality, and the Foreign Commerce of the United States, etc.

Title VIII, Disturbance of Foreign Relations, Section 2. 1917.

40 *United States Statutes at Large* 217, 226.

Sec. 2. Whoever within the jurisdiction of the United States shall falsely assume or pretend to be a diplomatic or consular, or other official of a foreign government duly accredited as such to the Government of

[24] See 22 U. S. Code Ann. §§251–255. *Cf.* Great Britain, Act of 1708, 7 Anne c. 12, *supra*, 562. See also Eagleton, "Responsibility of the State for the Protection of Foreign Officials," 19 Am. Jour. Int. L. 293; Moore, Dig. Int. L., IV, 622; Oppenheim, 4th ed., I, §386. *Cf.* the Tellini incident, in Eagleton, *op. cit.*, 303.

On the protection of consuls of foreign states, see the Breslau incident, 27 Rev. Gén. de Dr. Int. Pub. 361; the Imbrie incident, 18 Am. Jour. Int. L. 768; the Mallén Case, Mex. U. S. Gen. Cl. Com'n., 254. See also Borchard, Diplomatic Protection, 216; Eagleton, *op. cit.*, 307; Hyde, I, §466; Moore, Dig. Int. L., V, 40.

In his message to Congress of 1851, referring to an attack upon the Spanish consulate by rioters in New Orleans, President Fillmore said: "Ministers and consuls of foreign nations are the means and agents of communication between us and those nations, and it is of the utmost importance that while residing in the country they should feel a perfect security so long as they faithfully discharge their respective duties and are guilty of no violation of our laws. This is the admitted law of nations. . . . And what is due to our own public functionaries residing in foreign nations is exactly the measure of what is due to the functionaries of other Governments residing here. As in war the bearers of flags of truce are sacred, or else wars would be interminable, so in peace ambassadors, public ministers and consuls, charged with friendly national intercourse, are objects of especial respect and protection, each according to the rights belonging to his rank and station." Richardson, Messages and Papers of the Presidents, V, 118.

the United States with intent to defraud such foreign government or any person, and shall take upon himself to act as such, or in such pretended character shall demand or obtain, or attempt to obtain from any person or from said foreign government, or from any officer thereof, any money, paper, document, or other thing of value, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

The Emperor of Austria v. Day and Kossuth

Great Britain. High Court of Chancery. 1861.

2 *Giffard's Reports* 628.

On the 28th of February, 1861, Sir H. Cairns, with Mr. Cotton, moved *ex parte*, on behalf of the Emperor, for an injunction that the defendants, Messrs. Day, until and at the hearing might be restrained from printing, or lithographing, or manufacturing any documents purporting to be the notes of the Hungarian state or nation, or notes with the royal arms of Hungary printed thereon; and in the mean time, and until the hearing of this cause, might be restrained by the like order and injunction from delivering to the defendant Louis Kossuth, or parting with or permitting Messrs. Day to part with or deliver to any person the plates prepared by Messrs. Day aforesaid, or any of them, or the documents printed or lithographed thereupon, or any of the documents in their possession purporting to be a note of the Hungarian state or nation, or any notes in their possession with the royal arms of Hungary printed thereon. . . .

[Part of the statement of the case is omitted.]

The bill prayed (besides the injunction) that Messrs. Day might be decreed to deliver to the plaintiff, to be destroyed, the plates and any documents printed or lithographed therefrom, and any other documents purporting to be notes of the Hungarian state or nation, or notes with the royal arms of Hungary printed thereon. . . .

Mr. Collier, with Mr. Giffard, Mr. C. T. Simpson, and Mr. J. Westlake, now moved, on behalf of the defendant, to dissolve the injunction. . . .

[The arguments of counsel and part of the opinion are omitted.]

The Vice-Chancellor.—The plaintiff sues in his sovereign character, as King of Hungary. He asks the assistance of the Court to prevent an injury, of a public kind, to what he asserts to be his legal rights. These rights he claims as the acknowledged possessor of the sovereign power in a foreign state at peace with this kingdom.

It appears that the defendants have manufactured and prepared in this country a vast quantity of printed paper, purporting to represent public paper money of Hungary, such as could be lawfully issued by

the sovereign power. What they have thus prepared is intended to be circulated at some future time as the public paper money of Hungary. This paper has been thus made and prepared, not only without the license of the plaintiff, but as in exercise of some contemplated power hostile to that of the plaintiff, and intended to supersede it.

What the Court has now to decide is the question, whether the defendants can, by the law of England, be allowed to continue in possession, or to be protected in the possession, of this large quantity of printed paper, manufactured and held by them for such a purpose; or whether, on the other hand, the plaintiff is entitled to have the right of which he claims to be in possession, protected against the invasion of the defendants, and to have delivered up to him what has been thus prepared, and made ready to be used, for a purpose hostile to his existing right.

For the defendants, it has been argued, that this Court has no jurisdiction in such a case; that what is complained of is a public wrong, not cognizable by the law of England, because it relates merely to the public and political affairs of a foreign nation. The defendant's counsel have admitted that a foreign sovereign may have relief in this court, when he sues in his public character to recover public property within the jurisdiction of this Court. But they insist that, what is in question in this cause is not any right of property, but a mere public and political right, which, by the constitution of Hungary, is not absolute in the Sovereign, but subject to the control and direction of the Diet of that kingdom. Such a right, they say, is beyond the jurisdiction of this Court.

If the question related merely to an affair of state, it would be a question, not of law, but for mere political discussion. But the regulation of the coin and currency of every State is a great prerogative right of the sovereign power. It is not a mere municipal right, or a mere question of municipal law. Money is the medium of commerce between all civilized nations; therefore, the prerogative of each sovereign state as to money is but a great public right recognised and protected by the law of nations. A public right, recognised by the law of nations, is a legal right; because the law of nations is part of the common law of England.

These propositions are supported by unquestionable authority. In the modern version of Blackstone's Commentaries [4 Steph. Com. 282], it is laid down (and it has so always been held in our courts) that the law of nations, wherever any question arises, which is properly the object of its jurisdiction, is adopted in its full extent by the common law of England, and held to be part of the law of the land. Acts of Parliament, which have been from time to time made to enforce this universal law, or to facilitate the execution of its decisions, are not considered as introductive of any new rule, but merely declaratory of the old funda-

mental constitution of the kingdom, without which it must cease to be part of the civilized world.

To apply these acknowledged principles of the law of nations and law of England to the present case, it appears that the British Parliament, by the Act 11 Geo. 4 & 1 Wm. 4, c. 66, has enacted, that the forgery or counterfeiting the paper money of any foreign sovereign or state is a felony punishable by the law of England. This statute is a legislative recognition of the general right of the sovereign authority in foreign states to the assistance of the laws of this country, to protect their rights as to the regulation of their paper money as well as their coin, and to punish, by the law of England, offences against that power.

The friendly relations between civilized countries require, for their safety, the protection by municipal law of an existing sovereign right of this kind recognised by the law of nations. It appears from the evidence of the defendant Kossuth himself, that the present plaintiff is in possession of the supreme power in Hungary, and that the property now in question, which this defendant has caused to be manufactured in order, at some future time, to issue it as the public paper money of the State of Hungary, is not intended to be immediately used for that purpose, because of the existing power of the plaintiff. But it also appears, that the paper so manufactured is now in the possession and power of both the defendants, ready to be used, when the defendant Kossuth shall think fit, for a purpose adverse to the existing right of the plaintiff.

The manufactured paper in question, therefore, is property which has been made for no other purpose, and can be used for no other purpose, except one hostile to the sovereign rights of the plaintiff. It is not property of a kind which, like warlike weapons or other property, may be lawfully used for other purposes. And if the avowed and single purpose, for which this property is now in the hands of the defendants, be a purpose hostile to the plaintiff's rights, if this Court were to refuse its interference, the refusal would amount to a decision that it has no jurisdiction to protect the legal right of the plaintiff—a legal right recognised by the law of nations, and, therefore, by the law of England.

. . .

Then, it is said, that the defendant Kossuth contemplates the overthrow of the existing right of the plaintiff, and that when it is overthrown, and the power transferred to himself or to some other body, which shall sanction the use of this paper as the current money of the kingdom of Hungary, he will then be entitled to use it; and therefore, that this Court ought not now to interfere.

To this argument the answer is, that this Court, like other public tribunals, can deal only with existing laws and existing governments. Obedience to existing laws and to existing governments, by which alone

the laws can be enforced, are purposes essential to the distribution of justice, and to the maintenance of civil society. Therefore, if by the existing laws the plaintiff has the right which he asserts, and if the defendants have made and have now in their possession the property in question, which has been made and now is in their hands for no other purpose than one hostile to the legal rights of the plaintiff, the legal right of the plaintiff ought to be protected by the interference of this Court. This right of the plaintiff is clear on principle, unless the Court is to abandon its protective jurisdiction. It is clear, also, upon authority. In the case of Farina v. Silverlock [1 K. & J. 509], an injunction was granted against a printer, who had made and printed papers which he had in his possession, merely because they might be used, and were ready to be used, in such a manner as to violate the legal right of the plaintiff, although they were not in fact actually used for that purpose.

Foreign States at peace with this country have always been held entitled to the assistance of the law of England to vindicate and protect their rights, and to punish offenders against those acknowledged public privileges recognised by the law of nations. Even the sovereign power, under a revolutionary government recognised for the time by the Crown of England as an existing government, has had its rights protected, and offenders against those rights punished by prosecution in the courts of England. The prosecution and conviction of M. Peltier, for a libel on the First Consul of France, proceeded on this principle. In earlier times, Lord George Gordon was tried and convicted for a libel on the Queen of France.[25]

These rights of foreign powers may be for a time suppressed, and the law may be silent during the flagrance of rebellion and revolution, when rights, both public and private, are overturned and destroyed during the crimes and calamities of civil war.

But where, as in the present case, the existing rights of the plaintiff, as Sovereign of Hungary, are recognised by the Crown of England, the relief which he seeks in this cause, is for the protection of a legal right of universal public importance against the acts of the defendants.

That protection can only be effectually afforded by the relief prayed for in this suit; and there must be a decree against the defendants, according to the prayer of the bill.[26]

[25] See STARKIE, Treatise on the Law of Slander and Libel, *infra*, 822.

[26] See also United States, Act of 1884, c. 52, 23 U. S. Stat. L. 22; United States v. Arjona, 120 U. S. 479.

"The law of nations requires every national government to use 'due diligence' to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof; and because of this the obligation of one nation to punish those who within its own jurisdiction counterfeit the money of another nation has long been recognized." WAITE, C. J., in United States v. Arjona, 120 U. S. 479, 484.

United States, An Act to Codify, Revise, and Amend the Penal Laws of the United States

Chapter VII, Offenses against the Currency, Coinage, etc., Sections 156–159. 1909.

35 *United States Statutes at Large* 1088, 1117, 1118.

Sec. 156. Whoever, within the United States or any place subject to the jurisdiction thereof, with intent to defraud, shall falsely make, alter, forge, or counterfeit any bond, certificate, obligation, or other security in imitation of, or purporting to be an imitation of, any bond, certificate, obligation, or other security of any foreign government, issued or put forth under the authority of such foreign government, or any treasury note, bill, or promise to pay issued by such foreign government, and intended to circulate as money, either by law, order, or decree of such foreign government; or whoever shall cause or procure to be so falsely made, altered, forged, or counterfeited, or shall knowingly aid or assist in making, altering, forging, or counterfeiting, any such bond, certificate, obligation, or other security, or any such treasury note, bill, or promise to pay, intended as aforesaid to circulate as money, shall be fined not more than five thousand dollars and imprisoned not more than five years.

Sec. 157. Whoever, within the United States or any place subject to the jurisdiction thereof, knowingly and with intent to defraud, shall utter, pass, or put off, in payment or negotiation, any false, forged, or counterfeited bond, certificate, obligation, security, treasury note, bill, or promise to pay, mentioned in the section last preceding, whether the same was made, altered, forged, or counterfeited within the United States or not, shall be fined not more than three thousand dollars and imprisoned not more than three years.

Sec. 158. Whoever, within the United States or any place subject to the jurisdiction thereof, with intent to defraud, shall falsely make, alter, forge, or counterfeit, or cause or procure to be so falsely made, altered, forged, or counterfeited, or shall knowingly aid and assist in the false making, altering, forging, or counterfeiting of any bank note or bill issued by a bank or corporation of any foreign country, and intended by the law or usage of such foreign country to circulate as money, such bank or corporation being authorized by the laws of such country, shall be fined not more than two thousand dollars and imprisoned not more than two years.

Sec. 159. Whoever, within the United States or any place subject to the jurisdiction thereof, shall utter, pass, put off, or tender in payment, with intent to defraud, any such false, forged, altered, or counterfeited

bank note or bill, as mentioned in the preceding section, knowing the same to be so false, forged, altered, and counterfeited, whether the same was made, forged, altered, or counterfeited within the United States or not, shall be fined not more than one thousand dollars and imprisoned not more than one year.[27]

UNITED STATES, AN ACT TO CODIFY, REVISE, AND AMEND THE PENAL LAWS OF THE UNITED STATES

Chapter VIII, Offenses against the Postal Service, Sections 218, 220, and 229. 1909.

35 *United States Statutes at Large* 1088, 1131, 1132, 1134.

Sec. 218. Whoever, with intent to defraud, shall falsely make, forge, counterfeit, engrave, or print, or cause or procure to be falsely made, forged, counterfeited, engraved, or printed, or shall willingly aid or assist in falsely making, forging, counterfeiting, engraving, or printing, any order in imitation of or purporting to be a money order issued by the Post-Office Department, or by any postmaster or agent thereof; or whoever shall forge or counterfeit the signature of any postmaster, assistant postmaster, chief clerk, or clerk, upon or to any money order, or postal note, or blank therefor provided or issued by or under the direction of the Post-Office Department of the United States, or of any foreign country, and payable in the United States . . . shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.

Sec. 220. Whoever shall forge, or counterfeit, or knowingly utter or use any forged or counterfeited postage stamp of any foreign government, shall be fined not more than five hundred dollars, or imprisoned not more than five years, or both.

Sec. 229. Every foreign mail shall, while being transported across the territory of the United States under authority of law, be taken and deemed to be a mail of the United States so far as to make any violation thereof, or depredation thereon, or offense in respect thereto, or any part thereof, an offense of the same grade, and punishable in the same manner and to the same extent as though the mail was a mail of the United States; and in any indictment or information for any such offense, the mail, or any part thereof, may be alleged to be, and on the trial of any such indictment or information it shall be deemed and held to be, a mail or part of a mail of the United States.

[27] See also §§160–163, 165, 167, 170–173; 18 U. S. Code Ann. §§270–277, 279, 281, 284–288; Texas Penal Code, 1925, arts. 981–983.

United States, Revised Statutes

Second Edition, Title XLVII, Foreign Relations, Sections 4071–4073. 1878.

Sec. 4071. The testimony of any witness residing within the United States, to be used in any suit for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest, may be obtained, to be used in such suit. If a commission or letters rogatory to take such testimony, together with specific written interrogatories, accompanying the same, and addressed to such witness, shall have been issued from the court in which such suit is pending, on producing the same before the district judge of any district where the witness resides or shall be found, and on due proof being made to such judge that the testimony of any witness is material to the party desiring the same, such judge shall issue a summons to such witness requiring him to appear before the officer or commissioner named in such commission or letters rogatory, to testify in such suit. . . .

Sec. 4072. No witness shall be required, on such examination or any other under letters rogatory, to make any disclosure or discovery which shall tend to criminate him either under the laws of the State or Territory within which such examination is had, or any other, or any foreign state.

Sec. 4073. If any person shall refuse or neglect to appear at the time and place mentioned in the summons issued, in accordance with section forty hundred and seventy-one, or if upon his appearance he shall refuse to testify, he shall be liable to the same penalties as would be incurred for a like offense on the trial of a suit in the district court of the United States.

United States, An Act to Punish Acts of Interference with the Foreign Relations, the Neutrality, and the Foreign Commerce of the United States, etc.

Title VIII, Disturbance of Foreign Relations, Section 5. 1917.

40 *United States Statutes at Large* 217, 226.

Sec. 5. If two or more persons within the jurisdiction of the United States conspire to injure or destroy specific property situated within a foreign country and belonging to a foreign Government or to any political subdivision thereof with which the United States is at peace, or any railroad, canal, bridge, or other public utility so situated, and if one or more of such persons commits an act within the jurisdiction of the United States to effect the object of the conspiracy, each of the parties

to the conspiracy shall be fined not more than $5,000, or imprisoned not more than three years, or both. Any indictment or information under this section shall describe the specific property which it was the object of the conspiracy to injure or destroy.[28]

STARKIE, TREATISE ON THE LAW OF SLANDER AND LIBEL

Third Edition, pages 657–659. 1869.

Every publication is intrinsically illegal which tends to produce any public inconvenience or calamity. Under this division those rank highly, in respect of the magnitude of their results, which tend to disturb the amicable relations which subsist between this and other nations, by malicious reflections upon those who are possessed of high rank and influence in foreign states. As the natural tendency of these is to involve the government in a foreign war, their authors have, in several instances, been punished as offenders at common law. Thus, in the case [East T. 4 Geo. III. 1764: K. B. MSS. Dig. L. L. 88] of The King v. D'Eon, an information was filed against the defendant by the Attorney-General [Sir Fletcher Norton], for publishing a libel upon the Count de Guerchy, who was at that time residing in this kingdom, in the capacity of ambassador from the Court of France. The information charged the defendant with an intention to defame the character and abilities of the Count de Guerchy; to render him ridiculous and contemptible; to arraign his conduct and behaviour in his character of ambassador; and to cause it to be believed that he had, after his arrival in this kingdom, been guilty of unjust, unwarrantable, and oppressive proceedings towards the defendant and his friends; and to insinuate, that he was not fit or qualified to execute the office and functions of ambassador; and the defendant was convicted. Lord George Gordon was found guilty upon an information, for having published some severe reflections upon the Queen of France, in which she was represented as the leader of a faction; and Mr. Justice Ashhurst, in passing sentence, observed, that unless the authors of such publications were punished, their libels would be supposed to have been made with the connivance of the state [Hil. T. 28 Geo. III. The defendant was sentenced to pay a fine of £500, to be imprisoned in Newgate for the space of two years, and afterwards to give security for his good behaviour for the space of fourteen years.]. The defendant, John Vint [40 Geo. III 1801], was found guilty upon an information charging him with having published the following libel: "The Emperor of Russia is rendering himself obnoxious to his subjects, by various acts of tyranny, and ridiculous in the eyes of Europe, by his inconsistency; he

[28] See also United States, Act of 1917, c. 30, Tit. III, §1, 40 U. S. Stat. L. 217, 221 (protection of vessels of foreign states); Act of 1918, c. 138, 40 U. S. Stat. L. 821 (protection of uniforms, decorations, or regalia of foreign states).

has lately passed an edict to prohibit the exportation of deals and other naval stores. In consequence of this ill-judged law, a hundred sail of vessels are likely to return to this country without their freight;" with intent to traduce the Emperor of Russia, and to interrupt and disturb the friendship subsisting between that country and Great Britain. Jean Peltier [K. B. 43 Geo. III] was found guilty upon an information, charging him with having published a malicious libel, with intent to vilify Napoleon Bonaparte, the Chief Consul of the French Republic, and to excite and provoke the citizens of the said republic to deprive the said Napoleon Bonaparte of his consular dignity, and to kill and destroy him, and to interrupt the friendship and peace subsisting between our lord the king and his subjects and the said Napoleon Bonaparte and the French Republic. . . . Upon the trial, Lord Ellenborough, C. J., referred to the cases of Lord George Gordon and Vint, and said, "I lay it down as law, that any publication which tends to disgrace, revile, and defame persons of considerable situations of power and dignity in foreign countries, may be taken to be and treated as a libel; and particularly where it has a tendency to interrupt the amity and peace between the two countries."[29]

SECTION 3. NATIONALS OF FOREIGN STATES

BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD

Page 36, section 19. 1915.

The alien in law occupies a position between two extremes—the one a barbaric exclusion of all aliens, the other, a complete equality of nationals and aliens. The first extreme, complete exclusion, is no longer compatible with the existence of the state as a member of the society of nations. Continental writers base the custom of international intercourse on the so-called right of each state to enter into commercial intercourse with the other states of the international community. Anglo-American writers, on the other hand, find no such right to exist apart from treaty. A few continental publicists admit that the duty of the state to enter into commercial relations is not absolute, and agree that a state may impose prohibitive customs tariffs or prevent export by a burdensome tax, *e. g.*, the prohibitive tax on occasion assessed on the

[29] See King v. Gordon, 22 How. St. Tr. 175; King v. Vint, 27 How. St. Tr. 627; King v. Peltier, 28 How. St. Tr. 529; HOLT, Law of Libel, ch. 4; LEWIS, Foreign Jurisdiction and the Extradition of Criminals, 65; PHILLIMORE, 3d ed., II, 47; RUSSELL, Crimes, 9th Am. ed., I, 350; 22 Am. Jour. Int. L. 840.

The Criminal Code of Canada provides: "Every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful justification, publishes any libel tending to degrade, revile or expose to hatred and contempt in the estimation of the people of any foreign state, any prince or person exercising sovereign authority over such state." 1 Can. Rev. Stat., 1927, c. 36, §135.

export of Brazilian coffee. As a practical matter, it is within the sovereign power of a state to isolate itself (as was done within the last century by China, Japan, Paraguay and Argentine), though this isolation may be inconsistent with membership in the family of nations. Practically all of the civilized states have now within definite limits granted a right of residence and travel to unobjectionable foreigners and accorded them a wide range of incidental rights. The universality of the right of sojourn granted to foreigners affords some justification for the continental theory that there is a right of international intercourse which these treaties merely confirm, define and regulate. On the other hand, the recognized inherent power of a state to exclude foreigners, which, however, is now exercised only against certain classes of undesirable aliens, lends direct support to the Anglo-American view that apart from treaty and concession there is no right of international intercourse—notwithstanding the fact that without such intercourse international existence would be impossible. At the present day the right of admission and sojourn on the part of unobjectionable aliens is almost universally recognized. Qualifications of the right, which are to be found in the possibilities of exclusion, expulsion and the fixing of conditions of sojourn by the state, must in practice be based upon reasonable grounds.[30]

Pisani v. Lawson

Great Britain. Court of Common Pleas. 1839.

6 *Bingham's New Cases* 90.

[This was an action brought by an interpreter in the employ of the British ambassador at Constantinople to recover damages for an alleged libel published in England. The defendant pleaded that the plaintiff was a non-resident alien. The plaintiff demurred and there was joinder in the demurrer.]

[The above statement is substituted for the statement of the case in the report. The arguments of counsel are omitted.]

Tindal C. J. I am of opinion that the present action is maintainable, although brought by an alien not residing within the Queen's dominions. With respect to real actions, it has always been held that no alien can sustain one, because he is disqualified by the law to hold land. But this

[30] "Publicists have disagreed as to the governing principles and governments as to the expedient policy. Those writers who base their conclusions upon the assumption that there is a fundamental right of international intercourse between states, maintain that no state can absolutely forbid entrance to aliens, although it may exclude those whose presence is a menace to the welfare of the state. On the other hand, taking the sovereignty of the state and its right of self-preservation as the point of departure, other publicists, by far the more numerous, agree that there is an inherent right of the state to exclude aliens at its pleasure." Borchard, *op. cit.*, 45.

is a personal action, for an injury done within this realm; and so long ago as the 19th of Henry 8., I read in a case reported in Dyer, page 2., that an alien living in France having brought a writ of debt, and the Defendant having demanded judgment if he was bound to answer, the Plaintiff being out of the King's dominions, this Court held that the plea furnished no answer to the action. Now, that case in the generality of its terms comprehends the present. Then, there is Tirlot v. Morris, the case in Bulstrode, relied on for the Defendant, where an alien brought an action for scandalous words, namely, for saying of him that he was a bankrupt: it was answered, that the Plaintiff was an alien born, he being a stranger merchant, and residing out of the kingdom: Mr. Justice Williams thought the action would not lie; but the other three Judges of the Court held that it did; and that an alien friend might well maintain all actions personal, such as assault and battery, &c. So that the Court did not take the distinction now supposed between an action for defamation, and an action in respect of goods, or brought by the Plaintiff in the character of a merchant. It would present our laws in a very unfavourable light to strangers, if they were to be told that they can obtain no redress for an injury inflicted on them in this country, whereas if they come here, but for an instant, they owe such obedience to those laws as to become liable for any wrong done by themselves.

Bosanquet J. I am of the same opinion. It is said by this plea, that the Plaintiff is under a personal disability; that he is an alien, and has never been in this country, and that therefore he can maintain no action here, protection and allegiance being reciprocal. Now it is clear, from the cases cited, that this proposition is not universally true; because it has been decided in one case, that an alien may maintain an action for slander, although not living in the King's dominions; and, in another (read by the Chief Justice), that a native of France—whether he was a merchant or not, does not appear,—might maintain an action of debt, though he resided in France. It is admitted, that if he had come to this country he would be entitled to protection. Now, if merely coming here for one hour an alien would be entitled to maintain such an action, it would be strange indeed if the present Plaintiff could not maintain it: for what does the declaration state? That the Plaintiff was in the confidential employ of Lord Ponsonby and the British government, at the time; and that the libel is published of him in that character. If the Courts in this country will not protect a party in this situation, I know no case in which any person not a natural born subject of this realm can expect protection.

Coltman J. I consider that it would be disgraceful to the laws of this country if the Plaintiff could not maintain this action. As it stands on the record at present, the Plaintiff is libelled by a person in this country; and it is said that, because he is an alien, he can maintain no

action for it. The burthen is case upon the Defendant, to shew why he is exempted from the ordinary rule. But no authority has been cited, nor any reason offered, except that the Plaintiff is an alien. That is not sufficient, for it would apply equally in the case of the alien merchant, which shews that no such ground of defence is valid; and this is not the time when I should feel disposed to narrow the free intercourse which ought to exist between friendly nations.

MAULE J. I concur with the rest of the Court. It is not true that an action does not lie, except for one in the queen's ligeance; actions of trover have constantly been brought by foreigners. No authority has been cited to shew that such an action cannot be sustained; but even if, in general, an alien could not sue, there is good reason why the present Plaintiff should be entitled to do so, filling the office which he does in the employment of the British government.

Judgment for the Plaintiff.[31]

BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD

Page 41, section 23. 1915.

There is more uncertainty as to the extent of the obligation to recognize the legal capacity of foreign corporations. Two systems have been in vogue, the one restrictive, which gives a foreign corporation few if any rights and scarcely even recognizes its civil personality, the other liberal, which grants a foreign corporation, within certain specified limitations, the same rights as a natural person, its civil personality being fully recognized.

The restrictive system, supported vigorously by Laurent [*Droit civil international*, IV, 119 *et seq.*] and his school, is founded upon the Roman "fiction" theory of the nature of juridical personality. The corporation is considered as having an existence only in the territory which has given it legal birth, and recognition of its personality abroad is deemed to require an express act of the local sovereign power, a decree, a statute or a treaty. The fallacies of this system, which with the necessities of modern international commercial relations is rapidly being discarded, consist in over-emphasis of the fiction theory of the corporation, and a failure to distinguish between civil and functional capacity.

A corporation, certainly a commercial corporation, is composed of human beings and has a real personality, which is a reality in every state. Its civil capacity, consisting of its right to sue and be sued, to

[31] See also Taylor v. Carpenter, 3 Story 458; Stramburg v. Heckman, 44 N. C. 250. "According to the common law, which is followed in most of the codes of civil procedure, a foreigner has a full right to seek the courts of a country for the purpose of bringing any action which is in other respects within the competence of the court." BEALE, "Jurisdiction of Courts over Foreigners," 26 Harv. L. Rev. 193, 196.

enter into contracts and own property, is essential to its existence, and may be recognized quite apart from any permission to transact business or fulfill its functions. With these facts in mind, the liberal system founds its doctrine upon an assimilation between foreign corporations and natural persons. The corporation's civil capacity and status are governed by its personal law and only its functional capacity is under the control and regulation of the territorial state. This control is limited to those relations of the corporation which concern the citizens of the state, its public policy, or the interests of third parties. Thus, all questions of internal management are matters of personal law and are free from interference by the territorial state. The functional capacity of a corporation is limited by its charter and the law of the state where it transacts business.

At the present day, practically all states recognize the civil capacity of foreign corporations as they do that of natural persons. With the growth of commerce, local limitations on functional capacity are gradually being removed, either by statute or treaty, those that still exist being dictated by interests of public policy. Foreign corporations, like aliens generally, are subject to local regulations of registration and other provisions of penal and police laws.[32]

[32] "The question whether a foreign corporation may sue on the same terms as a foreign individual is discussed at length by von Bar. The prevailing doctrine of the Continent appears to allow foreign juridical persons to stand on the same basis as natural persons. There is, however, considerable authority the other way, on the ground that the public policy of a state is interested in determining how far artificial persons may be given standing." BEALE, "Jurisdiction of Courts over Foreigners," 26 Harv. L. Rev. 193, 197. See BAR, 2d ed., 227; DICEY, 4th ed., 520; HENDERSON, Position of Foreign Corporations in American Constitutional Law; LOEB, Legal Status of American Corporations in France; MOORE, Dig. Int. L., IV, 19; PENNANT, "International Status of Modern Companies," 28 L. Mag. & Rev., 5th series, 161; PILLET, Des Personnes Morales en Droit International Privé; YOUNG, Foreign Companies and Other Corporations; YOUNG, "Status of Foreign Corporations and the Legislature," 23 L. Quart. Rev. 151, 290.

The recent commercial treaty between Germany and the United States, Dec. 8, 1923, art. 12, deals with the subject as follows: "Limited liability and other corporations and associations, whether or not for pecuniary profit, which have been or may hereafter be organized in accordance with and under the laws, National, State or Provincial, of either High Contracting Party and maintain a central office within territories thereof, shall have their juridical status recognized by the other High Contracting Party provided that they pursue no aims within its territories contrary to its laws. They shall enjoy free access to the courts of law and equity, on conforming to the laws regulating the matter, as well for the prosecution as for the defense of rights in all the degrees of jurisdiction established by law.

"The right of such corporations and associations of either High Contracting Party so recognized by the other to establish themselves within its territories, establish branch offices and fulfill their functions therein shall depend upon, and be governed solely by, the consent of such Party as expressed in its National, State, or Provincial laws." 44 U. S. Stat. L. 2132, 2141.

The Chinese Exclusion Case. Chae Chan Ping v. United States

United States. Supreme Court. 1889.

130 *United States Reports* 581.

This case comes before us on appeal from an order of the Circuit Court of the United States for the Northern District of California refusing to release the appellant, on a writ of *habeas corpus*, from his alleged unlawful detention by Captain Walker, master of the steamship Belgic, lying within the harbor of San Francisco. The appellant is a subject of the Emperor of China and a laborer by occupation. He resided at San Francisco, California, following his occupation, from some time in 1875 until June 2, 1887, when he left for China on the steamship Gaelic, having in his possession a certificate, in terms entitling him to return to the United States, bearing date on that day, duly issued to him by the collector of customs of the port of San Francisco, pursuant to the provisions of section four of the restriction act of May 6, 1882, as amended by the act of July 5, 1884. 22 Stat. 58, c. 126; 23 Stat. 115, c. 220.

On the 7th of September, 1888, the appellant, on his return to California, sailed from Hong Kong in the steamship Belgic, which arrived within the port of San Francisco on the 8th of October following. On his arrival he presented to the proper custom-house officers his certificate, and demanded permission to land. The collector of the port refused the permit, solely on the ground that under the act of Congress, approved October 1, 1888, supplementary to the restriction acts of 1882 and 1884, the certificate had been annulled and his right to land abrogated, and he had been thereby forbidden again to enter the United States. 25 Stat. 504, c. 1064. The captain of the steamship, therefore, detained the appellant on board the steamer. Thereupon a petition on his behalf was presented to the Circuit Court of the United States for the Northern District of California, alleging that he was unlawfully restrained of his liberty, and praying that a writ of *habeas corpus* might be issued directed to the master of the steamship, commanding him to have the body of the appellant, with the cause of his detention, before the court at a time and place designated, to do and receive what might there be considered in the premises. A writ was accordingly issued, and in obedience to it the body of the appellant was produced before the court. Upon the hearing which followed, the court, after finding the facts substantially as stated, held as conclusions of law that the appellant was not entitled to enter the United States, and was not unlawfully restrained of his liberty, and ordered that he be remanded to the custody of the master of the steamship from which he had been taken under the writ. From this order an appeal was taken to this court

[The arguments of counsel and part of the opinion are omitted.]

Mr. Justice Field delivered the opinion of the court.

The appeal involves a consideration of the validity of the act of Congress of October 1, 1888, prohibiting Chinese laborers from entering the United States who had departed before its passage, having a certificate issued under the act of 1882 as amended by the act of 1884, granting them permission to return. The validity of the act is assailed as being in effect an expulsion from the country of Chinese laborers, in violation of existing treaties between the United States and the government of China, and of rights vested in them under the laws of Congress. . . .

[In an omitted part of the opinion the court reviewed the history of relations between China and the United States, considered the treaties concluded between the two countries and the legislation enacted to give effect thereto, and concluded that the Act of October 1, 1888, had necessarily repealed the conflicting provisions of prior treaties.]

There being nothing in the treaties between China and the United States to impair the validity of the act of Congress of October 1, 1888, was it on any other ground beyond the competency of Congress to pass it? If so, it must be because it was not within the power of Congress to prohibit Chinese laborers who had at the time departed from the United States, or should subsequently depart, from returning to the United States. Those laborers are not citizens of the United States; they are aliens. That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power. As said by this court in the case of The Exchange, 7 Cranch, 116, 136, speaking by Chief Justice Marshall: "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source."

While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. The powers

to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the States, and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations. As said by this court in the case of Cohens v. Virginia, 6 Wheat. 264, 413, speaking by the same great Chief Justice: "That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. It is their government, and in that character they have no other. America has chosen to be in many respects, and to many purposes, a nation; and for all these purposes her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can then in effecting these objects legitimately control all individuals or governments within the American territory. The constitution and laws of a State, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. These States are constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate." The same view is expressed in a different form by Mr. Justice Bradley, in Knox v. Lee, 12 Wall. 457, 555, where he observes that "the United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace and negotiations and intercourse with other nations; all which are forbidden to the state governments. It has jurisdiction over all those general subjects of legislation and sovereignty which affect the interests of the whole people equally and alike, and which require uniformity of regulations and laws, such as the coinage, weights and measures, bankruptcies, the postal system, patent and copyright laws, the public lands and interstate commerce, all which subjects are expressly or impliedly prohibited to the state governments. It has power to suppress insurrections, as well as to repel invasions, and to organize, arm, discipline and call into service the militia of the whole country. The President is charged with the duty and invested with the power to take care that the laws be faithfully executed. The judiciary has jurisdiction to decide controversies between the States, and between their respective citizens, as well as questions of national concern; and the government is clothed with power to guarantee

to every State a republican form of government, and to protect each of them against invasion and domestic violence."

The control of local matters being left to local authorities, and national matters being entrusted to the government of the Union, the problem of free institutions existing over a widely extended country, having different climates and varied interests, has been happily solved. For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.

To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determination, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers. If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases its determination is conclusive upon the judiciary. If the government of the country of which the foreigners excluded are subjects is dissatisfied with this action it can make complaint to the executive head of our government, or resort to any other measure which, in its judgment, its interests or dignity may demand; and there lies its only remedy.

The power of the government to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments. In a communication made in December, 1852, to Mr. A. Dudley Mann, at one time a special agent of the Department of State in Europe, Mr. Everett, then Secretary of State under President Fillmore, writes: "This government could never give up the right of excluding foreigners whose presence it might deem a source of danger to the United States." "Nor will this government consider such exclusion of American citizens from Russia necessarily a matter

of diplomatic complaint to that country." In a dispatch to Mr. Fay, our minister to Switzerland, in March, 1856, Mr. Marcy, Secretary of State under President Pierce, writes: "Every society possesses the undoubted right to determine who shall compose its members, and it is expected by all nations, both in peace and war." "It may always be questionable whether a resort to this power is warranted by the circumstances, or what department of the government is empowered to exert it; but there can be no doubt that it is possessed by all nations, and that each may decide for itself when the occasion arises demanding its exercise." In a communication in September, 1869, to Mr. Washburne, our minister to France, Mr. Fish, Secretary of State under President Grant, uses this language: "The control of the people within its limits, and the right to expel from its territory persons who are dangerous to the peace of the State, are too clearly within the essential attributes of sovereignty to be seriously contested. Strangers visiting or sojourning in a foreign country voluntarily submit themselves to its laws and customs, and the municipal laws of France, authorizing the expulsion of strangers, are not of such recent date, nor has the exercise of the power by the government of France been so infrequent, that sojourners within her territory can claim surprise when the power is put in force." In a communication to Mr. Foster, our minister to Mexico, in July, 1879, Mr. Evarts, Secretary of State under President Hayes, referring to the power vested in the constitution of Mexico to expel objectionable foreigners, says: "The admission that, as that constitution now stands and is interpreted, foreigners who render themselves harmful or objectionable to the general government must expect to be liable to the exercise of the power adverted to, even in time of peace, remains, and no good reason is seen for departing from that conclusion now. But, while there may be no expedient basis on which to found objection, on principle and in advance of a special case thereunder, to the constitutional right thus asserted by Mexico, yet the manner of carrying out such asserted right may be highly objectionable. You would be fully justified in making earnest remonstrances should a citizen of the United States be expelled from Mexican territory without just steps to assure the grounds of such expulsion, and in bringing the fact to the immediate knowledge of the Department." In a communication to Mr. W. J. Stillman, under date of August 3, 1882, Mr. Frelinghuysen, Secretary of State under President Arthur, writes: "This government cannot contest the right of foreign governments to exclude, on police or other grounds, American citizens from their shores." Wharton's International Law Digest, §206.

The exclusion of paupers, criminals and persons afflicted with incurable diseases, for which statutes have been passed, is only an application of the same power to particular classes of persons, whose presence is deemed injurious or a source of danger to the country. As applied to

them, there has never been any question as to the power to exclude them. The power is constantly exercised; its existence is involved in the right of self-preservation. As to paupers, it makes no difference by whose aid they are brought to the country. As Mr. Fish, when Secretary of State, wrote, in a communication under date of December 26, 1872, to Mr. James Moulding, of Liverpool, the government of the United States "is not willing and will not consent to receive the pauper class of any community who may be sent or may be assisted in their immigration at the expense of government or of municipal authorities." As to criminals, the power of exclusion has always been exercised, even in the absence of any statute on the subject. In a despatch to Mr. Cramer, our minister to Switzerland, in December, 1881, Mr. Blaine, Secretary of State under President Arthur, writes: "While, under the Constitution and the laws, this country is open to the honest and industrious immigrant, it has no room outside of its prisons or almshouses for depraved and incorrigible criminals or hopelessly dependent paupers who may have become a pest or burden, or both, to their own country." Wharton's Int. Law Dig., *supra.*

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract. Whatever license, therefore, Chinese laborers may have obtained, previous to the act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at any time, at its pleasure. Whether a proper consideration by our government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition and made it applicable only to persons departing from the country after the passage of the act, are not questions for judicial determination. If there be any just ground of complaint on the part of China, it must be made to the political department of our government, which is alone competent to act upon the subject. The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property, capable of sale and transfer or other disposition, not such as are personal and untransferable in their character. Thus in The Head Money Cases, the court speaks of certain rights being

in some instances conferred upon the citizens or subjects of one nation residing in the territorial limits of the other, which are "capable of enforcement as between private parties in the courts of the country." "An illustration of this character," it adds, "is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens." 112 U. S. 580, 598. The passage cited by counsel from the language of Mr. Justice Washington in Society for the Propagation of the Gospel v. New Haven, 8 Wheat. 464, 493, also illustrates this doctrine. There the learned justice observes that "if real estate be purchased or secured under a treaty, it would be most mischievous to admit that the extinguishment of the treaty extinguished the right to such estate. In truth, it no more affects such rights than the repeal of a municipal law affects rights acquired under it." Of this doctrine there can be no question in this court; but far different is this case, where a continued suspension of the exercise of a governmental power is insisted upon as a right, because, by the favor and consent of the government, it has not heretofore been exerted with respect to the appellant or to the class to which he belongs. Between property rights not affected by the termination or abrogation of a treaty, and expectations of benefits from the continuance of existing legislation, there is as wide a difference as between realization and hopes.

During the argument reference was made by counsel to the alien law of June 25, 1798, and to opinions expressed at the time by men of great ability and learning against its constitutionality. 1 Stat. 570, c. 58. We do not attach importance to those opinions in their bearing upon this case. The act vested in the President power to order all such aliens as he should judge dangerous to the peace and safety of the United States, or should have reasonable grounds to suspect were concerned in any treasonable or secret machination against the government, to depart out of the territory of the United States within such time as should be expressed in his order. There were other provisions also distinguishing it from the act under consideration. The act was passed during a period of great political excitement, and it was attacked and defended with great zeal and ability. It is enough, however, to say that it is entirely different from the act before us, and the validity of its provisions was never brought to the test of judicial decision in the courts of the United States.

Order affirmed.[33]

[33] "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. Vattel, lib. 2, §§94, 100, 1 Phillimore (3d ed.) c. 10, §220. In the United States this power is vested in the

Claim of J. H. Hollander

Guatemala and the United States. 1896.

Papers Relating to the Foreign Relations of the United States (1895) *Part II, page* 775.

[The following statement of the case and of the contention of the United States is taken from a dispatch of Mr. Olney, Secretary of State of the United States, to Mr. Young, Minister of the United States to Guatemala, January 30, 1896.]

In the year 1888 Mr. Hall was the minister of the United States at Guatemala. Mr. Hosmer was the United States consul-general there, and Hollander, an American citizen, was residing there publishing a newspaper by license of the Government of Guatemala. During that year Mr. Hollander made affidavit before Mr. Hosmer that Mr. Hall and certain high officials of Guatemala had been beneficiaries of a fraudulent overissue of bonds of that Government; that Mr. Hall's participation therein was shown by the books of certain bankers there, and that a certificate of a prominent citizen, Mr. Herrera, showed the complicity of the Guatemalan officials. Hollander filed the alleged certificate with Mr. Hosmer. Mr. Hall, hearing of these charges, asked Mr. Hosmer for Hollander's affidavits, the alleged certificate of Herrera, etc. These were refused, but copies were given him, and he (Mr. Hall)

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national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress." Gray, J., in Nishimura Ekiu v. United States, 142 U. S. 651, 659.

See also Musgrove v. Chun Teeong Toy [1891] A. C. 272; Lem Moon Sing v. United States, 158 U. S. 538; Fok Yung Yo v. United States, 185 U. S. 296; Japanese Immigrant Case, 189 U. S. 86; Turner v. Williams, 194 U. S. 279.

"One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests: Vattel, Law of Nations, book 1, s. 231; book 2, s. 125. . . . The power of expulsion is in truth but the complement of the power of exclusion." Lord Atkinson, in Attorney-General for Canada v. Cain [1906] A. C. 542, 546, 547.

See also In re Adam, 1Moo. P. C. 460; Robtelmes v. Brenan [1906] 4 C. L. R. 395; Fong Yue Ting v. United States, 149 U. S. 698; Wong Wing v. United States, 163 U. S. 228; Low Wah Suey v. Backus, 225 U. S. 460; Tiaco v. Forbes, 228 U. S. 549; Bugajewitz v. Adams, 228 U. S. 585; Lapina v. Williams, 232 U. S. 78; Mahler v. Eby, 264 U. S. 32.

The Constitution of Mexico, 1917, art. 33, provides that aliens "shall be entitled to the guarantees granted by Chapter I, Title I, of the present Constitution; but the Executive shall have the exclusive right to expel from the Republic forthwith, and without judicial process, any foreigner whose presence he may deem inexpedient." 111 Br. & For. S. P. 778, 793.

brought the matter to the attention of the Guatemalan Government, asking an investigation. The investigation was held and resulted in Hollander's arrest and imprisonment on February 8, 1889, on a charge of calumny and forgery. Before Hollander's trial came on and while he was in prison, he was, on May 14, 1889, expelled from the country by an Executive decree. The expulsion followed immediately on the decree, and he was not even allowed to see his family, or to make any business arrangements whatever.

Upon this state of facts this Government demanded a reasonable indemnity for Hollander, upon the ground that the harsh and hasty manner of his expulsion was in violation of international law. In its reply of December 22, 1893, the Guatemalan Government said:

"It is impossible to lay aside the right which the Government had to expel Mr. Hollander at the hour and in the conditions that, according to its judgment, were convenient. The Government was not under obligation to allow him more or less time to get out of the country, nor to accommodate him in any way. All the practices of international jurisprudence, supposing them to be certain and indisputable, fall down before a law clear that comes immediately from the sovereignty of a nation. The stranger who lands on our shore knows, or ought to know, that he is exposed to those eventualities, if he does not observe a convenient behavior, and he who puts in practice a right, as the Government of Guatemala has done, does not cause injury nor violate other people's rights. Whatever may be the consequences of Mr. Hollander's expulsion he must blame himself only, and lament them as the result of his want of prudence. This is an argument that, in my opinion, can never be answered satisfactorily. I shall say no more about it, because it seems unnecessary to explain a point in itself so clear. It is contradictory not to allow that the Government had the right to expel Mr. Hollander, and to want indemnity for a legal act."

"The practices of international law . . . fall down before a law clear that comes immediately from the sovereignty of a nation." The logical result of that proposition is that whatever a State by legal formula wills to do, it may do; and that international obligations are annulled, not infringed, by legalized administrative action in contravention of those obligations. The United States is unwilling to accept that proposition as seriously presented by Guatemala. I construe the language used to mean that as a rule of international law the right of expulsion is absolute and inherent in the sovereignty of a State; and that no other State can question the exercise of this right nor the manner of exercising it. It is possible some authority may be found in support of that view, and that it obtained in the earlier practice of nations; but the modern theory and the practice of Christian nations is believed to be founded on the principle that the expulsion of a foreigner is justifiable only

when his presence is detrimental to the welfare of the State, and that when expulsion is resorted to as an extreme police measure it is to be accomplished with due regard to the convenience and the personal and property interests of the person expelled.

In 1888 Rolin-Jacquemyns, the secretary-general of the Institute of International Law, made a report to that body on the "Right of expulsion of foreigners," which is published in the *Revue de Droit International* (Vol. XX, p. 498, and following). The report was in answer to a call by the association for an examination of the question "In what manner and within what limits governments may exercise the right of expulsion of foreigners?" This jurist says:

"The first condition of the existence of a state is not only the existence of a group of citizens who recognize its sovereignty, but also the existence of a territory on which this sovereignty is exercised, as a matter of fact and of right, to the exclusion of any other sovereign authority. But this sovereignty would be compromised if it were possible for persons under no political obligation to the state which they enter, who contribute nothing in the way of personal service and whose country, in short, is elsewhere, to install themselves there and defy the local authorities, by whom their presence is regarded as dangerous or injurious to the community."

Upon this principle of territorial sovereignty he formulates the fundamental rule that—

"Every state may limit the admission and the residence of foreigners upon its territory by such conditions as it deems necessary. But (he adds) there is another consideration which tends not to annul, but to restrain this exercise of territorial sovereignty. The individual expelled has the double quality of being a man and a citizen of another state. As a human being, he has the right to be exempt from needless harsh treatment and from unjust detriment to his interests; in his quality of citizen of another state, he has a right to invoke the protection of his country against unduly rigorous treatment and against spoliation of his property. The act of expulsion ought to conform to its direct, essential object, which is to relieve the soil of an obnoxious guest. The right of national sovereignty does not require nor permit more. Generally an official order to leave the country within a specified time is sufficient. If not, force may be employed. But forcible eviction should never assume a gratuitously vexatious character."

This author makes a practical distinction, furthermore, between the treatment of a transient visitor and that due a resident foreigner who has established a business or acquired property interests which would be ruined by sudden expulsion.

"In the latter case it is especially important (he says) that the government which expels should exercise every indulgence, and accord

all delay consistent with the public interests, if it would escape the charge of cruelty and masked persecution."

In closing his report, Mr. Rolin-Jacquemyns offers the following as one of five "conclusions:"

"Even in the absence of treaty, the state to which the expelled person belongs has a right to know the reason for the expulsion, and the communication of the reason can not be refused. Moreover, the expulsion should be accomplished with special regard for humanity and respect for acquired rights. Except in cases of special urgency, a reasonable time should be allowed to the expelled person to adjust his affairs to the new conditions. Lastly, except in cases of extradition, the expelled person ought to be allowed to depart by the route which he prefers."

Professor Bar (*Journal Dr. Int. Privé*, 1886, vol. 13, p. 5) quotes with approval Bluntschli's opinion that "the right to expel foreigners should not be considered as an unqualified right; if so, international relations would be impossible," and adds that, without denying the right of a state in certain contingencies to refuse foreigners access to its territory and to expel them from it, he confines himself to affirming "that the exercise of such a power should be limited to exceptional cases rigorously justified, and should not be at variance with the principles of international law and of the necessities of the case, nor in contravention of the practice of nations. . . . Any other course finds its condemnation in Vattel (*Dr. Int.*, II, 8, 104) who says: 'The sovereign has no right to grant an entrance into his state for the purpose of drawing foreigners into a snare.'"

At a later meeting of the Institute of International Law (1891), in which a set of rules was formulated for the regulation of expulsion, Professor Bar said, in criticising one of the proposed rules which provided for diplomatic reclamation in favor of the expelled foreigner:

"I do not doubt that the government of the expelled person may sometimes demand an indemnity in his behalf; but this is only an application of the general and unquestioned principle of the law of nations which prohibits the unjust treatment of foreigners, a principle that needs not the sanction of an express regulation." (*Inst. Dr. Int. Annuaire*, Vol. XI, p. 310.)

Calvo (*Dictionnaire de Droit International*, title Expulsion) says:

"But when a Government expels a foreigner without cause, and in a harsh, inconsiderate manner (*avec des formes blessantes*), the State of which the foreigner is a citizen has the right to base a claim upon this violation of international law and to demand adequate satisfaction."

To the same effect is Bluntschli (*Droit Int. Codifié*, art. 384.)

Some investigation has been made of the laws and practice of other powers touching the expulsion of foreigners, and they have been found to comport generally with the principles advocated by the jurists above quoted. These writers, Bar, Bluntschli, Calvo, and Rolin-Jacquemyns,

are specialists in the science of international law, and the opinions of no modern jurists are entitled to greater respect. Their utterances were made as statements of principle and without reference to any controversy in which their sympathies were engaged or by which their judgment might be biased.

In certain countries, of which Belgium is an example, the law relating to expulsion provides safeguards against abuse and injurious consequences, by requiring previous notice, by conceding the right of choice of the way out of the country, etc. In others, as in France, the law permits immediate expulsion, but the administration of it is tempered by executive regulation. In an Executive order of December 17, 1885, the French minister of the interior deprecated and forbade harsh execution of the law by subordinate functionaries. "Whatever may be the necessities," he said, "which in the interest of public order are imposed on the superior authorities, I believe that the Government of the Republic should be actuated in matters of this nature only by considerations of impartial humanity consistent with the wholesome enforcement of the law." Referring to certain instances of harsh execution of the law by the police authorities near the frontiers, he says:

"This is, in my opinion, a misconception of the sentiment of humanity to which I alluded above, and an application of the letter of the law with rigor which a free republican government like France can not afford to exercise toward foreigners of any nationality." (*Journal de Dr. Int. Privé*, vol. 13, 16, and 497.)

Expulsion is a police measure, having for its object the purging of the State of obnoxious foreigners. It is a preventive, not a penal process, and it can not be substituted for criminal prosecution and punishment by Judicial procedure. (See *Inst. Dr. Int. Ann.*, 286, 300.)

In no instance has an example been found of treatment such as that to which Hollander was subjected. Hollander had been admitted to residence in the Republic of Guatemala and encouraged to engage in business there. He lived for a long time in amity and intimacy with the high officers of the Republic, and those relations continued until he made the charge reflecting upon the integrity of certain of these officials. With the aid and support of the ruling powers he had built up a thriving newspaper and job-printing enterprise, which was in full operation at the time of his expulsion. The judicial powers of the Government of Guatemala at once took cognizance of Hollander's attack on the officials of the Government, and he was arrested upon the criminal charge of calumny and forgery. A trial and conviction upon that charge would have vindicated the Government and its officers and resulted in the punishment of Hollander if he was guilty of malicious libel and forgery. His acquittal would have been conclusive of his innocence. The circumstances of his expulsion give it the appearance of executive inter-

vention to take the matter out of the hands of the court, and, assuming the fact of his guilt, to administer punishment by way of instant and forcible expulsion. The fact that Hollander was expelled while awaiting trial, and in a manner that defeated the ends of justice judicially administered, is one of the most aggravating of the incidents which make the manner of his expulsion a flagrant violation of Guatemala's obligations to the United States respecting the treatment of our citizens. This high-handed treatment of Hollander carried also the appearance of discourtesy and unfriendliness toward the United States; and if not so intended, the action of the Executive implied disregard of an unmistakable character for the rights and sensibilities of a neighbor Republic which feels as a wound every injury to its citizens.

The treaty of 1849 between the United States and Guatemala (Art. XII) provides as follows:

"Both the contracting parties promise and engage formally to give their special protection to the persons and property of the citizens of each other, of all occupations, who may be in the territories subject to the jurisdiction of the one or of the other, transient or dwelling therein, leaving open and free to them the tribunals of justice for their judicial recourse on the same terms which are usual and customary with the natives or citizens of the country in which they may be; for which they may employ, in defense of their rights, such advocates, solicitors, notaries, agents, and factors as they may judge proper in all their trials at law; and such citizens or agents shall have free opportunity to be present at the decisions and sentences of the tribunals in (all) cases which may concern them, and likewise at the taking of all examinations and evidence which may be exhibited in the said trials."

This treaty was terminable in all its parts relating to commerce and navigation, but in all those parts which relate to peace and friendship Article XXXIII declares that it shall be "perpetually binding on both powers." Notice of the determination of the treaty was given by Guatemala in 1874, but July 9, 1888, that Government declared in a note to Mr. Hosmer, chargé d'affaires of the United States, that Article XII and some other provisions, being parts of the treaty which relate to peace and friendship and are based on the general principle of popular rights, "are to be completely observed, although no treaty exists which would establish them." The letter closes with the declaration that "the convention (treaty), except as regards the stipulations of a terminable character which it contains, can not be considered as having terminated." (Foreign Relations, 1886, pp. 149, 159.)

Without contending that the Guatemalan law of expulsion is in derogation of Article XII of the treaty, and without taking exception to that law as a piece of domestic legislation, but having regard to the manner and circumstances only of Hollander's expulsion, it was effected

in disregard of the rights guaranteed to citizens of the United States by that treaty, and of "the prescription which," quoting from the Guatemalan letter of June 9, 1888, "can not be denied in any civilized country of the earth."

Returning to a consideration of the facts, Hollander was held in prison on bail for more than three months, in the power of the Guatemalan authorities, awaiting trial. Then, suddenly and without notice, the judicial proceeding was abandoned and the accused was taken from prison, carried under guard to the coast, and put upon an outgoing vessel under a executive decree of expulsion, leaving his family, his business, and his property unprovided for. He was literally hurled out of the country, leaving behind wife and children, business, property, everything dear to him and dependent upon him. Why that abandonment of the judicial investigation and resort to summary expulsion by administrative decree, I do not inquire. But the United States takes this ground: The Government of Guatemala, whatever its laws may permit, had not the right in time of peace and domestic tranquillity to expel Hollander without notice or opportunity to make arrangements for his family and business, on account of an alleged offense committed more than three months before, Hollander having during the entire interval been in the power of the Government, subject to the proper enforcement of any of its laws, and at the time awaiting trial in the criminal court upon the identical charge upon which he was expelled. If expulsion was lawful and proper on the 14th of May, it was lawful and proper on the 8th of February preceding, when Hollander had already committed the offending act and had been held to answer for it in the courts of the country. After deliberating three months and more, with Hollander absolutely in its power, the executive authority expelled him in a manner that defeated the course of justice in the courts of the country; that violated the rules of international law and the existing provisions of the treaty, and was contrary to the practice of civilized nations. In so doing Guatemala did Hollander, and through him the United States, a grievous injury, which can not be allowed to go without protest. He is entitled, upon the undisputed facts, to a reasonable indemnity, and you are directed to inform the Government of Guatemala that the United States expects it to be paid.[34]

[The banishment of Hollander was subsequently revoked. U. S. For. Rel. (1896) 380.]

[34] "Arbitrary expulsions either without any or on insufficient cause, or in violation of the provisions of municipal law or of a treaty, or under harsh or violent circumstances unnecessarily injurious to the person affected have given rise to diplomatic claims and to awards by arbitral commissions." BORCHARD, Diplomatic Protection, 57. *Cf.* Petition of Brooks, 5 F. (2d) 238. See BOUVÉ, Exclusion and Expulsion of Aliens. On international responsibility for injuries to the nationals of foreign states, see §4, *infra*, 861.

TREATY BETWEEN GERMANY AND THE UNITED STATES

Article 1. Washington, December 8, 1923.

44 *United States Statutes at Large* 2132.

Art. 1. The nationals of each of the High Contracting Parties shall be permitted to enter, travel and reside in the territories of the other; to exercise liberty of conscience and freedom of worship; to engage in professional, scientific, religious, philanthropic, manufacturing and commercial work of every kind without interference; to carry on every form of commercial activity which is not forbidden by the local law; to own, erect or lease and occupy appropriate buildings and to lease lands for residential, scientific, religious, philanthropic, manufacturing, commercial and mortuary purposes; to employ agents of their choice, and generally to do anything incidental to or necessary for the enjoyment of any of the foregoing privileges upon the same terms as nationals of the state of residence or as nationals of the nation hereafter to be most favored by it, submitting themselves to all local laws and regulations duly established.

The nationals of either High Contracting Party within the territories of the other shall not be subjected to the payment of any internal charges or taxes other or higher than those that are exacted of and paid by its nationals.

The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law.

The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation.[35]

[35] The treaty deals in some detail with rights under laws establishing civil liability for injuries or death, freedom from visit or search of dwellings and places of business, the inheritance of real property and the disposal of personal property, freedom of worship, liability to draft for compulsory military service, freedom of commerce and navigation, equality of internal taxes and charges, equality of port shipping charges, the nationality of private vessels, the discharge and loading of cargoes at open ports, the organization of corporations and associations, mining privileges, commercial travellers, freedom of transit, and the privileges and functions of consuls. Article 12 dealing with the recognition and admission of corporations is reproduced in note 32, *supra*, 827. Articles dealing with the privileges of consuls are reproduced in ch. 6, §2, *supra*, 589.

"The network of commercial treaties by which the states, of the white race at least, are bound together, has practically established the rule of freedom of inter-

JOHNSTONE, APPELLANT, v. PEDLAR, RESPONDENT

Great Britain. House of Lords. 1921.

Law Reports [1921] 2 *Appeal Cases* 262.

Appeal from an order of the Court of Appeal in Ireland reversing an order of the King's Bench Division in Ireland and ordering judgment to be entered for the plaintiff in the action.

The respondent was an Irishman by birth, but had become a naturalised American citizen. In 1916 he returned to Ireland and since then he had, with some interruptions, resided in that country. The action was brought by the respondent against the appellant, the Chief Commissioner of the Dublin Metropolitan Police, for the return of a sum of cash and a cheque, both the property of the respondent, which had been found upon his person and seized by the police on his being arrested in Ireland for illegal drilling, with damages for their detention, or alternatively for damages for the conversion of the said money and cheque.

The substantial defence to the action was that the plaintiff was an alien and the said moneys and cheque were taken and detained by an officer of the Crown by the direction of the Crown as an act of State for the defence of the realm and for the prevention of crime.

At the trial of the action before Pim J. and a common jury the learned judge directed the jury to find for the appellant (the defendant) and entered judgment for him accordingly.

A motion by the respondent to have this judgment set aside and judgment entered for him instead was refused by the Divisional Court (Dodd, Gordon and Moore JJ.), but their decision was reversed by the Court of Appeal by a majority (Ronan and O'Connor L.JJ., O'Connor M. R. dissenting), and judgment was entered for the respondent for payment of the money and delivery up of the cheque. . . .

[The arguments of counsel, the opinions of Viscount Finlay, Lord Atkinson, and Lord Sumner, and parts of the opinions of Viscount Cave and Lord Phillimore are omitted.]

VISCOUNT CAVE.—My Lords, counsel for the appellant contended for the broad proposition that, where the personal property of an alien friend resident in this country is seized and detained by an officer of the Crown, and his act is adopted and ratified by the Crown as an act of State, the alien is without legal remedy. In my opinion this proposition cannot be sustained.

When a wrong has been done by the King's officer to a British subject, the person wronged has no legal remedy against the Sovereign, for "the

national intercourse. A government that would seek to-day to take advantage of its right to exclude all aliens would violate the spirit of international law and endanger its membership in the international community." BORCHARD, Diplomatic Protection, 46.

King can do no wrong"; but he may sue the King's officer for the tortious act, and the latter cannot plead the authority of the Sovereign, for "from the maxim that the King cannot do wrong it follows, as a necessary consequence, that the King cannot authorize wrong:" Tobin v. The Queen [(1864) 16 C. B. (N. S.) 310]; Feather v. The Queen. [6 B. & S. 257, 295.] On the other hand, where the person injured is an alien resident abroad, the above rule does not apply; and if the act causing the injury is adopted by the Sovereign as an act of State, the alien is without redress except by diplomatic action taken through the Government of his own country: Buron v. Denman [2 Ex. 167]; Secretary of State for India v. Kamachee Boye Sahaba. [(1859) 13 Moo. P. C. 22.]

But there is a third case—namely, where the person aggrieved is an alien ami resident here; and I think that it is the established law that such a case falls within the first and not within the second of the above categories. In early times an alien had no rights in public law, and in private law his rights were much restricted. It was laid down by Littleton (s. 198) that an alien could bring no action, real or personal, but as regards an alien ami this proposition was disputed by Coke, who said: "In this case the law doth distinguish betweene an alien, that is a subject to one that is an enemy to the King, and one that is subject to one that is in league with the King; and true it is that an alien enemie shall maintaine neither reall nor personall action, *donec terræ fuerint communes*, that is, untill both nations be in peace; but an alien that is in league, shall maintain personall actions; for an alien may trade and traffique, buy and sell, and therefore of necessity he must be of ability to have personall actions; but he cannot maintaine either reall or mixt actions:" Co. Litt. 129b. Certainly Littleton's rule was not recognized by the law merchant or in Chancery; and before the end of the sixteenth century it was established that at common law an alien friend could own chattels and sue on a contract or in tort in the same manner as a British subject: Dyer 2b. No doubt a friendly alien is not for all purposes in the position of a British subject. For instance, he may be prevented from landing on British soil without reason given: Musgrove v. Chun Teeong Toy [[1891] A. C. 272]; and having landed, he may be deported, at least if a statute authorizes his expulsion: Attorney-General for Canada v. Cain [[1906] A. C. 542]; and see In re Adam. [(1837) 1 Moo. P. C. 460.] But so long as he remains in this country with the permission of the Sovereign, express or implied, he is a subject by local allegiance with a subject's rights and obligations: Hale's Pleas of the Crown, vol. i., p. 542; Calvin's Case [(1608) 7 Rep. 6a]; De Jager v. Attorney-General of Natal [[1907] A. C. 326]; Porter v. Freudenberg: per Lord Reading C. J. [[1915] 1 K. B. 857, 869], including the right to sue the King's officer for a legal wrong. . . .

Further, an alien resident in this realm is entitled by statute to hold personal property here in the same manner in all respects as a natural-born British subject: British Nationality and Status of Aliens Act, 1914, s. 17; and it would be a serious derogation from that right if it were held that his property might be seized by an agent of the Crown without legal authority and without redress.

The above observations are sufficient to cover the present case, which your Lordships were invited to determine on broad lines. If it were necessary to go into the particular facts of this case, it would have to be considered whether the seizure by a police officer of money found on a person arrested within the realm can properly be described, even though ratified by a Minister, as an "act of State." It has been said that such an act must be done outside British territory: Cobbett's Leading Cases, vol. i., p. 18; see Musgrave v. Pulido [(1879) 5 App. Cas. 102, 112], and again that the expression "act of State" denotes "a catastrophic change constituting a new departure": per Moulton L. J., in Salaman v. Secretary of State for India [[1906] 1 K. B. 613, 640]; but it is unnecessary in the present case to determine whether the meaning of the term is so restricted. It is enough to say that in this case the defence of "an act of State" cannot prevail.

I should add that the judgment of O'Connor M. R. in the Court of Appeal was mainly founded upon the view that the right of a resident alien to protection is contingent on his observing the duty of allegiance while in the realm, and that the respondent, having been guilty of treasonable acts, had thereby forfeited his right to the protection of the King's Courts. But this question was not raised in the defence, and (either for that reason or because a decision on the wider question was desired) was not seriously argued in your Lordships' House, and accordingly I think it best to express no opinion upon it.

For the reasons given above I am of opinion that this appeal fails and should be dismissed. . . .

Lord Phillimore. My Lords, this case has merited, and has received, ample discussion; but at the conclusion I think I can put my reasons for a decision into a short compass.

When a subject sues another subject for a supposed tort, the defendant cannot plead as a defence that he did the act that is said to be a tort by authority of the King. The maxim "The King can do no wrong" is to be applied to litigation in this way: No one complained of for an act which is said to be a tort can withdraw the cognizance of that claim from the Courts of the land by averring that he did the act by command of the King; because if it was a lawful act, such averment is unnecessary, and if it was an unlawful act, he cannot be admitted to say that he was told to do it by the King. The defence set up in the present case is sometimes called the defence of an act of State. As regards this way

of looking at it, I cannot put the matter better or more tersely than as I found it put in one of the reasons given by the successful plaintiffs in their case as respondents before the Privy Council in Walker v. Baird [[1892] A. C. 491, 494]: "Because between Her Majesty and one of her subjects there can be no such thing as an act of State." And this proposition was finally accepted in the case of Walker v. Baird.

The next matter, then, that remains for inquiry is whether the subject for this purpose must be a natural-born or naturalised subject or whether the word also comprehends a temporary subject, that is, the citizen or subject of a friendly State residing in this country. As regards such aliens, the rules of international law and the common law of England and Ireland which agrees with international law are, I think, well established. To begin with the alien takes his character from his State. If his State is at war with ours his individual friendliness avails him nothing unless it enures to procure for him the special favour of licence from the King. If his State is in amity with ours he is considered an alien ami even though his personal intentions are hostile. His individual hostility does not entitle him to the character of an alien enemy. He can be executed for high treason, and is not entitled to be considered as a prisoner of war. By parity of reason neither does his individual hostility disentitle him to the rights conferred by law upon an alien ami, once he has entered this realm with permission from the King.

The King, however, can refuse any alien admission to the realm. This was established by the decision of the Privy Council in Musgrove v. Chun Teeong Toy [[1891] A. C. 272]; and that permission may in some respects be conditioned. Every State may, according to international law, make special laws regulating the acts and property of aliens within the realm. By the common law of England and Ireland an alien could not hold real estate, not even chattels real, for more than a short term. The *droit d'aubaine* existed in France till the Revolution. Most countries, including our own, have from time to time passed Alien Acts.

But an alien ami is never *exlex*, he is never subject to the arbitrary dispositions of the King. His rights may be limited, but whatever rights he has he can enforce by law just as an ordinary subject can. That is, I believe, both international law and the law of this country. No trace of any other doctrine is to be found in the text books, or in decided cases. The alien ami, once he is resident within the realm, is given the same rights for the protection of his person and property as a natural born or naturalised subject. . . .

From these propositions it would seem to follow that an alien ami complaining of a tort is in the position of an ordinary subject, and that no more against him than against any other subject can it be pleaded that the wrong complained of was, if a wrong, done by command of the King or was a so-called act of State.

From the moment of his entry into the country the alien owes allegiance to the King till he departs from it, and allegiance, subject to a possible qualification which I shall mention, draws with it protection, just as protection draws allegiance.

Then is there anything special in this case? The respondent has indeed no merits. On his own admission, he might have been tried, convicted and executed for high treason. His conduct shows evidence of much hostile feeling. He has since been expelled and rightly expelled from the country. But at the time when his money was taken from him, he was residing in the country, like any other alien, with the tacit permission of the King. He owed temporary allegiance to the King and for that reason could have been tried for high treason; but he was entitled till his trial to ordinary protection.

The case of an alien who would be refused admission to the country if his entrance had been known and who lands surreptitiously and continues to be in the country surreptitiously might give rise to other considerations. This is not such a case.

Also, I can conceive a case where an alien, though a citizen of a friendly State, might land on our shores with private hostile intent, and continue in our country with that same intent so that his whole stay was one transaction, and a continuous act of high treason. To such an alien, suing for a tort or possibly some particular class of tort, or possibly suing a public officer, it might be pleaded that he was disentitled to sue, or that the act was specially warranted, inasmuch as he had not the ordinary right to protection accorded by the King to an alien ami. I should not, however, like to do more than reserve my opinion till I had before me the precise language of the plea.

But, again, this is not the case before your Lordships' House. Counsel for the appellant desired to rest their case on the fourth paragraph of the statement of defence, and in that paragraph, the only character attributed to the plaintiff is that he was an alien. For the reasons given in the earlier part of my opinion this defence cannot stand.

If it should be necessary, as counsel for the appellant suggest, that in the disturbed state of Ireland there should be special provision in respect of aliens, this must be effected by legislation. As things are this citizen of the United States is entitled to our judgment, and the appeal should fail.

Order of the Court of Appeal in Ireland affirmed and appeal dismissed with costs.[36]

[36] "The legal position of the alien has in the progress of time advanced from that of complete outlawry, in the days of early Rome and the Germanic tribes, to that of practical assimilation with nationals, at the present time." BORCHARD, Diplomatic Protection, 33. "A sovereign may not allow the right of entrance into his territory granted to foreigners to prove detrimental to them; in receiving them he agrees to

LODEWYK JOHANNES DE JAGER v. THE ATTORNEY-GENERAL OF NATAL

Great Britain. Judicial Committee of the Privy Council. 1907.

Law Reports [1907] *Appeal Cases* 326.

This was a petition for special leave to appeal from a judgment, reported in (1901) Natal L. R. p. 65, of a special Court constituted by Act XIV. of 1900 of the Colony of Natal, whereby on March 14, 1901, the petitioner was adjudged guilty of high treason and was sentenced to five years' imprisonment and to pay a fine of 5000*l.*

It alleged that the petitioner was a burgher of the late South African Republic, who for ten years and at the date of the outbreak of war in 1899 was peaceably residing in Waschbank, in Natal, and continued to do so after the battle of Elandslaagte on October 21 of that year while the Boer forces occupied that part of Natal in which Waschbank is situated and the British forces had retired to Ladysmith, whereby he lost the effective protection of Her late Majesty; that the Boers administered the government and remained in occupation till March, 1900; that the petitioner was thereupon compellable to join, and did join, the Boer forces, and aided and assisted them both as commandant and as a commissioner and justice of the peace; and that after judgment as aforesaid he had undergone imprisonment and paid the fine imposed. . . .

[Part of the statement of the case is omitted.]

Sir R. Finlay, K. C., and A. R. Kennedy, for the petitioner, contended that the petitioner owed only a local and temporary allegiance to Her Majesty whilst he was a resident in Natal and was actually enjoying Her Majesty's protection. The obligation ceased to be binding upon him when he was deprived of that protection, and whilst, owing to the successful military occupation of the territory where he resided by the

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protect them as his own subjects and to see that they enjoy, as far as depends on him, perfect security." VATTEL, II, viii, §104 (FENWICK'S transl.).

See Constitution of Argentine, 1860, art. 20, DODD, I, 2, 7; Constitution of Belgium, 1831, art. 128, MCBAIN and ROGERS, 501, 518; Constitution of Bolivia, 1880, art. 4, RODRIGUEZ, II, 413; Constitution of Brazil, 1926, art. 72, Pan Am. Union, L. & T. S. No. 5, p. 34; Constitution of Costa Rica, 1871, art. 12, RODRIGUEZ, I, 326, 328; Constitution of Cuba, 1901, art. 10, RODRIGUEZ, II, 112, 114; Constitution of Czechoslovakia, 1920, art. 106, 120 Br. & For. S. P. 151, 170; Constitution of Ecuador, 1906, art. 28, 104 Br. & For. S. P. 918, 923; Constitution of Guatemala, 1879, arts. 13–15, RODRIGUEZ, I, 236, 238; Constitution of Haiti, 1918, art. 4, 112 Br. & For. S. P. 1113; Constitution of Honduras, 1924, arts. 11–14, 120 Br. & For. S. P. 590, 591; Constitution of Mexico, 1917, art. 33, 111 Br. & For. S. P. 778, 793; Constitution of Nicaragua, 1911, arts. 12–13, 107 Br. & For. S. P. 1038, 1040; Constitution of Panama, 1904, art. 9, RODRIGUEZ, I, 392, 394; Constitution of Paraguay, 1870, art. 33, RODRIGUEZ, II, 381, 388; Constitution of Peru, 1920, art. 39, Pan Am. Union, L. & T. S. No. 4, p. 7; Constitution of Portugal, 1911, art. 3, 105 Br. & For. S. P. 766; Constitution of Salvador, 1886, arts. 45–50, RODRIGUEZ, I, 260, 268; Constitution of Venezuela, 1925, art. 37.

Boer forces, he was deprived of that protection, and was *de facto* under the government and control of the South African Republic. Aid and assistance given to the Boer forces by the petitioner under those circumstances were not treasonable, but acts which he was legally compellable to perform. It was not alleged against him that he had joined the invading forces prior to their having become established in possession and government of the territory. Thereupon, as a burgher of the Republic, he was compellable to serve. His duty of allegiance to the Queen had ceased, and his acts of service to his own Government were not treasonable as alleged. Reference was made to Coke's 3rd Inst. p. 4; Hale's Pleas of the Crown, vol. i. p. 94; Foster's Crown Cases, 2nd ed. (1776), 1st discourse, s. 2, 3rd ed. p. 185; 2 Halleck's International Law, 3rd ed. p. 450.

H. A. Colefax, for the respondent, was not heard.

The judgment of their Lordships was delivered by

Lord Loreburn L. C. The petitioner Lodewyk Johannes De Jager was adjudged guilty of high treason by the special Court constituted by Act No. XIV. of 1900 of the Colony of Natal, and now seeks special leave to appeal to His Majesty in Council from that judgment and the sentence which followed. The circumstances and the questions of law raised are fully set out in the petition and need not be repeated here. Their Lordships have not to consider any facts or features of this case except the points of law upon which Sir Robert Finlay insisted.

It is old law that an alien resident within British territory owes allegiance to the Crown, and may be indicted for high treason, though not a subject. Some authorities affirm that this duty and liability arise from the fact that while in British territory he receives the King's protection. Hence Sir. R. Finlay argued that when the protection ceased its counterpart ceased also, and that as the British forces evacuated Waschbank on October 21, 1899, the petitioner was lawfully entitled to assist the invaders on and after October 24 without incurring the penalty of high treason.

Their Lordships are of opinion that there is no ground for this contention. The protection of a State does not cease merely because the State forces, for strategical or other reasons, are temporarily withdrawn, so that the enemy for the time exercises the rights of an army in occupation. On the contrary, when such territory reverts to the control of its rightful Sovereign, wrongs done during the foreign occupation are cognizable by the ordinary Courts. The protection of the Sovereign has not ceased. It is continuous, though the actual redress of what has been done amiss may be necessarily postponed until the enemy forces have been expelled. Their Lordships consider that the duty of a resident alien is so to act that the Crown shall not be harmed by reason of its having admitted him as a resident. He is not to take advantage of the

hospitality extended to him against the Sovereign who extended it. In modern times great numbers of aliens reside in this and in most other countries, and in modern usage it is regarded as a hardship if they are compelled to quit, as they rarely are, even in the event of war between their own Sovereign and the country where they so reside. It would be intolerable, and must inevitably end in a restriction of the international facilities now universally granted, if, as soon as an enemy made good his military occupation of a particular district, those who had till then lived there peacefully as aliens could with impunity take up arms for the invaders. A small invading force might thus be swollen into a considerable army, while the risks of transport (which in the case of oversea expeditions are the main risks of invasion) would be entirely evaded by those who, instead of embarking from their own country, awaited the expedition under the protection of the country against which it was directed. These considerations would not justify a British Court in deciding any case contrary to the law, but they offer an illustration of consequences which would follow if the law were as the petitioner maintains. There is no authority which compels their Lordships to arrive at so strange a conclusion. The questions raised are, no doubt, of general importance, but their Lordships, after hearing the arguments of counsel in support of the petition, do not consider the case to be attended with doubt, and they will therefore humbly advise His Majesty to dismiss this petition.[37]

There will be no order as to costs.

Truax and the Attorney General of the State of Arizona v. Raich

United States. Supreme Court. 1915.

239 *United States Reports* 33.

The facts, which involve the constitutionality under the equal protection provision of the Fourteenth Amendment of the Act of December

[37] See Carlisle v. United States, 16 Wall. 147.

"It is well settled by international law that foreigners temporarily resident in a country can not be compelled to enter into its permanent military service. It is true that in times of social disturbance or of invasion their services in police or home guards may be exacted, and that they may be required to take up arms to help in the defense of their place of residence against the invasion of savages, pirates, etc., as a means of warding off some great public calamity by which all would suffer indiscriminately. The test in each case, as to whether a foreigner can properly be enrolled against his will, is that of necessity. Unless social order and immunity from attack by uncivilized tribes can not be secured except through the enrollment of such a force, a nation has no right to call upon foreigners for assistance against their will." Bayard, Secretary of State, to Bell, United States Minister to the Netherlands, U. S. For. Rel. (1888) Pt. II, 1324, 1325. See Borchard, Diplomatic Protection, 63, 64. *Cf.* Treaty between Germany and United States, Dec. 8, 1923, art. 6, 44 U. S. Stat. L. 2132, 2136.

14, 1914, of the State of Arizona relative to the employment of aliens in that State, are stated in the opinion.

[The names of counsel are omitted.]

MR. JUSTICE HUGHES delivered the opinion of the court.

Under the initiative provision of the constitution of Arizona (Art. IV, §1), there was adopted the following measure which was proclaimed by the Governor as a law of the State on December 14, 1914:

"An act to protect the citizens of the United States in their employment against non-citizens of the United States, in Arizona, and to provide penalties and punishment for the violation thereof,

"Be it enacted by the People of the State of Arizona:

"Section 1. Any company, corporation, partnership, association or individual who is, or may hereafter become an employer of more than five (5) workers at any one time, in the State of Arizona, regardless of kind or class of work, or sex of workers, shall employ not less than eighty (80) per cent qualified electors or native born citizens of the United States or some sub-division thereof.

"Sec. 2. Any company, corporation, partnership, association or individual, their agent or agents, found guilty of violating any of the provisions of this Act shall be guilty of a misdemeanor, and, upon conviction thereof, shall be subject to a fine of not less than one hundred ($100.00) dollars, and imprisoned for not less than thirty (30) days.

"Sec. 3. Any employé who shall misrepresent, or make false statement, as to his or her nativity or citizenship, shall, upon conviction thereof, be subject to a fine of not less than one hundred ($100.00) dollars, and imprisoned for not less than thirty (30) days." Laws of Arizona, 1915. Initiative Measure, p. 12.

Mike Raich (the appellee), a native of Austria, and an inhabitant of the State of Arizona but not a qualified elector, was employed as a cook by the appellant William Truax, Sr., in his restaurant in the City of Bisbee, Cochise County. Truax had nine employés, of whom seven were neither 'native-born citizens' of the United States nor qualified electors. After the election at which the act was passed Raich was informed by his employer that when the law was proclaimed, and solely by reason of its requirements and because of the fear of the penalties that would be incurred in case of its violation, he would be discharged. Thereupon, on December 15, 1914, Raich filed this bill in the District Court of the United States for the District of Arizona, asserting among other things that the act denied to him the equal protection of the laws and hence was contrary to the Fourteenth Amendment of the Constitution of the United States. Wiley E. Jones, the attorney general of the State, and W. G. Gilmore, the county attorney of Cochise County, were made defendants in addition to the employer Truax, upon the allegation that these officers would prosecute the employer unless he

complied with its terms and that in order to avoid such a prosecution the employer was about to discharge the complainant. Averring that there was no adequate remedy at law, the bill sought a decree declaring the act to be unconstitutional and restraining action thereunder.

Soon after the bill was filed, an application was made for an injunction *pendente lite.* After notice of this application, Truax was arrested for a violation of the act, upon a complaint prepared by one of the assistants in the office of the County Attorney of Cochise County, and as it appeared that by reason of the determination of the officers to enforce the act there was danger of the complainant's immediate discharge from employment, the district judge granted a temporary restraining order.

The allegations of the bill were not controverted. The defendants joined in a motion to dismiss upon the grounds (1) that the suit was against the State of Arizona without its consent; (2) that it was sought to enjoin the enforcement of a criminal statute; (3) that the bill did not state facts sufficient to constitute a cause of action in equity; and (4) that there was an improper joinder of parties and the plaintiff was not entitled to sue for the relief asked. The application for an interlocutory injunction and the motion to dismiss were then heard before three judges, as required by §266 of the Judicial Code. The motion to dismiss was denied and an interlocutory injunction restraining the defendants, the attorney general and the county attorney, and their successors and assistants, from enforcing the act against the defendant Truax, was granted. 219 Fed. Rep. 273. This direct appeal has been taken.

As the bill is framed upon the theory that the act is unconstitutional, and that the defendants who are public officers concerned with the enforcement of the laws of the State are about to proceed wrongfully to the complainant's injury through interference with his employment, it is established that the suit cannot be regarded as one against the State. Whatever doubt existed in this class of cases was removed by the decision in Ex parte Young, 209 U. S. 123, 155, 161, which has repeatedly been followed. Ludwig v. West. Un. Tel. Co., 216 U. S. 146; West. Un. Tel. Co. v. Andrews, 216 U. S. 165; Herndon v. C., R. I. & P. Ry., 218 U. S. 135, 155; Hopkins v. Clemson College, 221 U. S. 636, 643–645; Philadelphia Co. v. Stimson, 223 U. S. 605, 607, 620; Home Tel. & Tel. Co. v. Los Angeles, 227 U. S. 278, 293.

It is also settled that while a court of equity, generally speaking, has 'no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors' (In re Sawyer, 124 U. S. 200, 210) a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property. Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207, 218; Dobbins v. Los Angeles, 195 U. S. 223, 241; Ex parte Young, *supra;* Philadelphia Co. v.

Stimson, *supra*, p. 621. The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law. It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employé has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will. Moran v. Dunphy, 177 Massachusetts, 485, 487; Berry v. Donovan, 188 Massachusetts, 353; Brennan v. United Hatters, 73 N. J. Law, 729, 743; Perkins v. Pendleton, 90 Maine, 166; Lucke v. Clothing Cutters, 77 Maryland, 396; London Guar. & Acc. Co. v. Horn, 101 Ill. App. 355, S. C., 206 Illinois, 493; Chipley v. Atkinson, 23 Florida, 206; Blumenthal v. Shaw, 23 C. C. A. 290, S. C., 77 Fed. Rep. 954. It is further urged that the complainant cannot sue save to redress his own grievance (McCabe v. Atchison, Topeka & Santa Fe Ry., 235 U. S. 151, 162); that is, that the servant cannot complain for the master, and that it is the master who is subject to prosecution, and not the complainant. But the act undertakes to operate directly upon the employment of aliens and if enforced would compel the employer to discharge a sufficient number of his employés to bring the alien quota within the prescribed limit. It sufficiently appears that the discharge of the complainant will be solely for the purpose of meeting of the requirements of the act and avoiding threatened prosecution under its provisions. It is, therefore, idle to call the injury indirect or remote. It is also entirely clear that unless the enforcement of the act is restrained the complainant will have no adequate remedy, and hence we think that the case falls within the class in which, if the unconstitutionality of the act is shown, equitable relief may be had.

The question then is whether the act assailed is repugnant to the Fourteenth Amendment. Upon the allegations of the bill, it must be assumed that the complainant, a native of Austria, has been admitted to the United States under the Federal law. He was thus admitted with the privilege of entering and abiding in the United States, and hence of entering and abiding in any State in the Union. (See Gegiow v. Uhl, Commissioner, decided October 25, 1915, *ante*, p. 3.) Being lawfully an inhabitant of Arizona, the complainant is entitled under the Fourteenth Amendment to the equal protection of its laws. The description—'any person within its jurisdiction'—as it has frequently been held, includes aliens. 'These provisions,' said the court in Yick

Wo v. Hopkins, 118 U. S. 356, 369 (referring to the due process and equal protection clauses of the Amendment), 'are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.' See also Wong Wing v. United States, 163 U. S. 228, 242; United States v. Wong Kim Ark, 169 U. S. 649, 695. The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other States. Thus in McCready v. Virginia, 94 U. S. 391, 396, the restriction to the citizens of Virginia of the right to plant oysters in one of its rivers was sustained upon the ground that the regulation related to the common property of the citizens of the State, and an analogous principle was involved in Patsone v. Pennsylvania, 232 U. S. 138, 145, 146, where the discrimination against aliens upheld by the court had for its object the protection of wild game within the States with respect to which it was said that the State could exercise its preserving power for the benefit of its own citizens if it pleased. The case now presented is not within these decisions, or within those relating to the devolution of real property (Hauenstein v. Lynham, 100 U. S. 483; Blythe v. Hinckley, 180 U. S. 333, 341, 342); and it should be added that the act is not limited to persons who are engaged on public work or receive the benefit of public moneys.[38] The discrimination here involved is imposed upon the conduct of ordinary private enterprise.

The act, it will be observed, provides that every employer (whether corporation, partnership, or individual) who employs more than five workers at any one time 'regardless of kind or class of work, or sex of workers' shall employ 'not less than eighty per cent. qualified electors or native born citizens of the United States or some subdivision thereof.' It thus covers the entire field of industry with the exception of enterprises that are relatively very small. Its application in the present case is to employment in a restaurant the business of which requires nine employés. The purpose of an act must be found in its natural operation and effect (Henderson v. Mayor, 92 U. S. 259, 268; Bailey v. Alabama, 219 U. S. 219, 244), and the purpose of this act is not only plainly shown by its provisions, but it is frankly revealed in its title. It is there described as 'An act to protect the citizens of the United States in their employment against non-citizens of the United States, in Arizona.' As the appellants rightly say, there has been no subterfuge. It is an act aimed at the employment of aliens, as such, in the businesses described.

[38] See Heim v. McCall, 239 U. S. 175; Crane v. New York, 239 U. S. 195; Borchard, Diplomatic Protection, 80.

Liberally, its terms might be taken to include with aliens those naturalized citizens who by reason of change of residence might not be at the time qualified electors in any subdivision of the United States, but we are dealing with the main purpose of the statute, definitely stated, in the execution of which the complainant is to be forced out of his employment as a cook in a restaurant, simply because he is an alien.

It is sought to justify this act as an exercise of the power of the State to make reasonable classifications in legislating to promote the health, safety, morals and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. Butchers' Union Co. v. Crescent City Co., 111 U. S. 746, 762; Barbier v. Connolly, 113 U. S. 27, 31; Yick Wo v. Hopkins, *supra;* Allgeyer v. Louisiana, 165 U. S. 578, 589, 590; Coppage v. Kansas, 236 U. S. 1, 14. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. It is no answer to say, as it is argued, that the act proceeds upon the assumption that 'the employment of aliens unless restrained was a peril to the public welfare.' The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor is necessarily involved. It must also be said that reasonable classification implies action consistent with the legitimate interests of the State, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. Fong Yue Ting v. United States, 149 U. S. 698, 713. The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality.

It is insisted that the act should be supported because it is not 'a total deprivation of the right of the alien to labor'; that is, the restric-

tion is limited to those businesses in which more than five workers are employed, and to the ratio fixed. It is emphasized that the employer in any line of business who employs more than five workers may employ aliens to the extent of twenty per cent. of his employés. But the fallacy of this argument at once appears. If the State is at liberty to treat the employment of aliens as in itself a peril requiring restraint regardless of kind or class of work, it cannot be denied that the authority exists to make its measures to that end effective. Otis v. Parker, 187 U. S. 606; Silz v. Hesterburg, 211 U. S. 31; Purity Co. v. Lynch, 226 U. S. 192. If the restriction to twenty per cent. now imposed is maintainable the State undoubtedly has the power if it sees fit to make the percentage less. We have nothing before us to justify the limitation to twenty per cent. save the judgment expressed in the enactment, and if that is sufficient, it is difficult to see why the apprehension and conviction thus evidenced would not be sufficient were the restriction extended so as to permit only ten per cent. of the employés to be aliens or even a less percentage, or were it made applicable to all businesses in which more than three workers were employed instead of applying to those employing more than five. We have frequently said that the legislature may recognize degrees of evil and adapt its legislation accordingly (St. Louis Consol. Coal Co. v. Illinois, 185 U. S. 203, 207; McLean v. Arkansas, 211 U. S. 539, 551; Miller v. Wilson, 236 U. S. 373, 384); but underlying the classification is the authority to deal with that at which the legislation is aimed. The restriction now sought to be sustained is such as to suggest no limit to the State's power of excluding aliens from employment if the principle underlying the prohibition of the act is conceded. No special public interest with respect to any particular business is shown that could possibly be deemed to support the enactment, for as we have said it relates to every sort. The discrimination is against aliens as such in competition with citizens in the described range of enterprises and in our opinion it clearly falls under the condemnation of the fundamental law.

The question of rights under treaties was not expressly presented by the bill, and, although mentioned in the argument, does not require attention in view of the invalidity of the act under the Fourteenth Amendment.

Order affirmed.[39]

Mr. Justice McReynolds dissenting.

[The dissenting opinion is omitted.]

[39] See In re Tiburcio Parrott, 1 Fed. 481; Yick Wo v. Hopkins, 118 U. S. 356; Fraser v. McConway & Torley Co., 82 Fed. 257; State v. Montgomery, 94 Me. 192; In re Case, 20 Ida. 128; Opinion of the Justices, 207 Mass. 601.

Terrace et al. v. Thompson, Attorney General of the State of Washington

United States. Supreme Court. 1923.

263 *United States Reports* 197.

Appeal from a decree of the District Court dismissing a bill brought by the appellants to enjoin the attorney general of Washington from enforcing the state Alien Land Law.

[The arguments of counsel and part of the opinion are omitted.]

Mr. Justice Butler delivered the opinion of the Court.

Appellants brought this suit to enjoin the Attorney General of Washington from enforcing the Anti-Alien Land Law of that State, c. 50, Laws, 1921, on the grounds that it is in conflict with the due process and equal protection clauses of the Fourteenth Amendment; with the treaty between the United States and Japan, and with certain provisions of the constitution of the State.

The appellants are residents of Washington. The Terraces are citizens of the United States and of Washington. Nakatsuka was born in Japan of Japanese parents and is a subject of the Emperor of Japan. The Terraces are the owners of a tract of land in King County which is particularly adapted to raising vegetables, and which for a number of years had been devoted to that and other agricultural purposes. The complaint alleges that Nakatsuka is a capable farmer and will be a desirable tenant of the land; that the Terraces desire to lease their land to him for the period of five years; that he desires to accept such lease, and that the lease would be made but for the act complained of. And it is alleged that the defendant, as Attorney General, has threatened to and will take steps to enforce the act against the appellants if they enter into such lease, and will treat the leasehold interest as forfeited to the State, and will prosecute the appellants criminally for violation of the act; that the act is so drastic and the penalties attached to its violation are so great that neither of the appellants may make the lease even to test the constitutionality of the act, and that, unless the court shall determine its validity in this suit, the appellants will be compelled to submit to it, whether valid or invalid, and thereby will be deprived of their property without due process of law and denied the equal protection of the laws.

The Attorney General made a motion to dismiss the amended complaint upon the ground that it did not state any matters of equity or facts sufficient to entitle the appellants to relief. The District Court granted the motion and entered a decree of dismissal on the merits. The case is here on appeal from that decree.

Section 33 of Article II of the Constitution of Washington prohibits the ownership of land by aliens other than those who in good faith have

declared intention to become citizens of the United States, except in certain instances not here involved. The act provides in substance that any such alien shall not own, take, have or hold the legal or equitable title, or right to any benefit of any land as defined in the act, and that land conveyed to or for the use of aliens in violation of the state constitution or of the act shall thereby be forfeited to the State. And it is made a gross misdemeanor, punishable by fine or imprisonment or both, knowingly to transfer land or the right to the control, possession or use of land to such an alien. It is also made a gross misdemeanor for any such alien having title to such land or the control, possession or use thereof, to refuse to disclose to the Attorney General or the prosecuting attorney the nature and extent of his interest in the land. The Attorney General and the prosecuting attorneys of the several counties are charged with the enforcement of the act. . . .

Is the act repugnant to the due process clause or the equal protection clause of the Fourteenth Amendment?

Appellants contend that the act contravenes the due process clause in that it prohibits the owners from making lawful disposition or use of their land, and makes it a criminal offense for them to lease it to the alien, and prohibits him from following the occupation of farmer; and they contend that it is repugnant to the equal protection clause in that aliens are divided into two classes,—those who may and those who may not become citizens, one class being permitted, while the other is forbidden, to own land as defined.

Alien inhabitants of a State, as well as all other persons within its jurisdiction, may invoke the protection of these clauses. Yick Wo v. Hopkins, 118 U. S. 356, 369; Truax v. Raich, *supra*, 39. The Fourteenth Amendment, as against the arbitrary and capricious or unjustly discriminatory action of the State, protects the owners in their right to lease and dispose of their land for lawful purposes and the alien resident in his right to earn a living by following ordinary occupations of the community, but it does not take away from the State those powers of police that were reserved at the time of the adoption of the Constitution. Barbier v. Connolly, 113 U. S. 27, 31; Mugler v. Kansas, 123 U. S. 623, 663; Powell v. Pennsylvania, 127 U. S. 678, 683; In re Kemmler, 136 U. S. 436, 449; Lawton v. Steel, 152 U. S. 133, 136; Phillips v. Mobile, 208 U. S. 472, 479; Hendrick v. Maryland, 235 U. S. 610, 622, 623. And in the exercise of such powers the State has wide discretion in determining its own public policy and what measures are necessary for its own protection and properly to promote the safety, peace and good order of its people.

And, while Congress has exclusive jurisdiction over immigration, naturalization and the disposal of the public domain, each State, in the absence of any treaty provision to the contrary, has power to deny to

aliens the right to own land within its borders. Hauenstein v. Lynham, 100 U. S. 483, 484, 488; Blythe v. Hinckley, 180 U. S. 333, 340. . . .

State legislation applying alike and equally to all aliens, withholding from them the right to own land, cannot be said to be capricious or to amount to an arbitrary deprivation of liberty or property, or to transgress the due process clause.

This brings us to a consideration of appellants' contention that the act contravenes the equal protection clause. That clause secures equal protection to all in the enjoyment of their rights under like circumstances. In re Kemmler, *supra;* Giozza v. Tiernan, 148 U. S. 657, 662. But this does not forbid every distinction in the law of a State between citizens and aliens resident therein. In Truax v. Corrigan, 257 U. S. 312, this Court said (p. 337):

"In adjusting legislation to the need of the people of a State, the legislature has a wide discretion and it may be fully conceded that perfect uniformity of treatment of all persons is neither practical nor desirable, that classification of persons is constantly necessary. . . . Classification is the most inveterate of our reasoning processes. We can scarcely think or speak without consciously or unconsciously exercising it. It must therefore obtain in and determine legislation; but it must regard real resemblances and real differences between things, and persons, and class them in accordance with their pertinence to the purpose in hand."

The rights, privileges and duties of aliens differ widely from those of citizens; and those of alien declarants differ substantially from those of nondeclarants. Formerly in many of the States the right to vote and hold office was extended to declarants, and many important offices have been held by them. But these rights have not been granted to nondeclarants. By various acts of Congress, declarants have been made liable to military duty, but no act has imposed that duty on nondeclarants. The fourth paragraph of Article I of the treaty invoked by the appellants, provides that the citizens or subjects of each shall be exempt in the territories of the other from compulsory military service either on land or sea, in the regular forces, or in the national guard, or in the militia; also from all contributions imposed in lieu of personal service, and from all forced loans or military exactions or contributions. The alien's formally declared *bona fide* intention to renounce forever all allegiance and fidelity to the sovereignty to which he lately has been a subject, and to become a citizen of the United States and permanently to reside therein markedly distinguishes him from an ineligible alien or an eligible alien who has not so declared.

By the statute in question all aliens who have not in good faith declared intention to become citizens of the United States, as specified in §1 (a), are called "aliens," and it is provided that they shall not

"own" "land," as defined in clauses (d) and (b) of §1 respectively. The class so created includes all, but is not limited to, aliens not eligible to become citizens. Eligible aliens who have not declared their intention to become citizens are included, and the act provides that unless declarants be admitted to citizenship within seven years after the declaration is made, bad faith will be presumed. This leaves the class permitted so to own land made up of citizens and aliens who may, and who intend to, become citizens, and who in good faith have made the declaration required by the naturalization laws. The inclusion of good faith declarants in the same class with citizens does not unjustly discriminate against aliens who are ineligible or against eligible aliens who have failed to declare their intention. The classification is based on eligibility and purpose to naturalize. Eligible aliens are free white persons and persons of African nativity or descent. Congress is not trammeled, and it may grant or withhold the privilege of naturalization upon any ground or without any reason, as it sees fit. But it is not to be supposed that its acts defining eligibility are arbitrary or unsupported by reasonable considerations of public policy. The State properly may assume that the considerations upon which Congress made such classification are substantial and reasonable. Generally speaking, the natives of European countries are eligible. Japanese, Chinese and Malays are not. Appellants' contention that the state act discriminates arbitrarily against Nakatsuka and other ineligible aliens because of their race and color is without foundation. All persons of whatever color or race who have not declared their intention in good faith to become citizens are prohibited from so owning agricultural lands. Two classes of aliens inevitably result from the naturalization laws,—those who may and those who may not become citizens. The rule established by Congress on this subject, in and of itself, furnishes a reasonable basis for classification in a state law withholding from aliens the privilege of land ownership as defined in the act. We agree with the court below (274 Fed. 841, 849) that:

"It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of, the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of noncitizens."

And we think it is clearly within the power of the State to include nondeclarant eligible aliens and ineligible aliens in the same prohibited class. Reasons supporting discrimination against aliens who may but who will not naturalize are obvious.

Truax v. Raich, *supra*, does not support the appellants' contention. In that case, the Court held to be repugnant to the Fourteenth Amend-

ment an act of the legislature of Arizona making it a criminal offense for an employer of more than five workers at any one time, regardless of kind or class of work, or sex of workers, to employ less than eighty per cent. qualified electors or native born citizens of the United States. In the opinion it was pointed out that the legislation there in question did not relate to the devolution of real property, but that the discrimination was imposed upon the conduct of ordinary private enterprise covering the entire field of industry with the exception of enterprises that were relatively very small. It was said that the right to work for a living in the common occupations of the community is a part of the freedom which it was the purpose of the Fourteenth Amendment to secure.

In the case before us, the thing forbidden is very different. It is not an opportunity to earn a living in common occupations of the community, but it is the privilege of owning or controlling agricultural land within the State. The quality and allegiance of those who own, occupy and use the farm lands within its borders are matters of highest importance and affect the safety and power of the State itself.

The Terraces, who are citizens, have no right safeguarded by the Fourteenth Amendment to lease their land to aliens lawfully forbidden to take or have such lease. The state act is not repugnant to the equal protection clause and does not contravene the Fourteenth Amendment.

. . .

[In an omitted part of the opinion the court held that the state act was not in conflict with the Treaty of commerce and navigation between Japan and the United States, Feb. 21, 1911, 37 U. S. Stat. L. 1504.]

The decree of the District Court is affirmed.[40]

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BRANDEIS think there is no justiciable question involved and that the case should have been dismissed on that ground.

MR. JUSTICE SUTHERLAND took no part in the consideration or decision of this case.

SECTION 4. NATIONALS OF FOREIGN STATES (INCLUDING INTERNATIONAL RESPONSIBILITY)

BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD

Page 177, section 73. 1915.

In the absence of an international legislature or court of justice the standard of duty of the state toward aliens and its international responsi-

[40] See BORCHARD, Diplomatic Protection, 33; FAUCHILLE, I, Pt. I, 888; HYDE, I, §§59–64; OPPENHEIM, 4th ed., I, §§314–326; 8 U. S. Code Ann. §§1–299.

bility for violation of its obligations may be considered the result of a gradual evolution in practice, states having in their mutual intercourse recognized certain duties as incumbent upon them. In the absence of a central authority to enforce this standard of duty upon the state of residence, international law has granted the home state of the alien who has suffered by a delinquency the right to demand and enforce compensation for the injuries sustained.[41] The remedy for a violation of international duty toward aliens lies in a resort to diplomatic measures for the pecuniary reparation of the injury; and these measures may range from the diplomatic presentation of a pecuniary claim to war. Self-help, tempered by the peaceful instrumentalities of modern times, such as arbitration, is the ultimate sanction of international obligations. In this very fact lies the difficulty of the present subject, for powerful states have at times exacted from weak states a greater degree of responsibility than from states of their own strength. Nevertheless, fundamental principles have in the course of time, through a constant growth in the number of cases of protection and of international claims, become more clearly defined, so that a closer study of the subject may be fruitful of practical results.

William, Gray, Administrator, v. The United States

United States. Court of Claims. 1886.

21 *Court of Claims Reports* 340.

[The reporter's statement of the case, the names of counsel, and part of the opinion are omitted. The case is stated fully in the opinion.]

Davis, J., delivered the opinion of the court:

This claim, one of the class popularly called "French spoliations," springs from the policy of the French revolutionary government between the execution of King Louis XVI and the year 1801, a policy which led to the detention, seizure, condemnation, and confiscation of our merchant vessels peacefully pursuing legitimate voyages upon the high seas. Over ninety years have these claims been the subject of discussion and agi-

[41] "The American citizen who goes into a foreign country, although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of our government; and if, without the violation of any municipal law, he should be oppressed unjustly, he would have a right to claim that protection, and the interposition of the American government in his favour, would be considered a justifiable interposition." Marshall, C. J., in Murray v. Schooner Charming Betsy, 2 Cr. 64, 120. See Constitution of Danzig, 1922, art. 76, 118 Br. & For. S. P. 119, 131; Constitution of Germany, 1919, art. 112, McBain and Rogers, 176, 198; Constitution of the Serb, Croat, and Slovene State, 1921, art. 20, McBain and Rogers, 348, 353.

tation, first between the two nations, and then between the individuals injured and the Government of the United States. Prolonged and heated negotiation resulted in the treaty of 1800, by which, it is urged on behalf of the claimants, their rights were surrendered to France for a consideration valuable to this Government. The claims being valid obligations admitted by the French Government, they contend that the United States, through this agreement, in which demands of the one nation were set off against those of the other, assumed as against their citizens these obligations and should pay them. This position is denied by the Government. . . .

Whatever the rights of the claimants, they are without remedy other than that which Congress may have seen fit to give them; and our power to grant redress, be our opinion as to the justice of their claims what it may, is limited by the terms of the remedial statute.[42] The force and effect of the act, by virtue of which the claimants appear at this bar seeking relief, must then be examined at the threshold of the discussion. The act authorizes "citizens of the United States or their legal representatives," having "valid claims to indemnity upon the French Government arising out of illegal captures, detentions, seizures, condemnations, and confiscations," prior to the ratification of the convention of 1800 with France, to apply here within a time limited (§1), that (§3) this court may "examine and determine the validity and amount" of their claims, the present ownership, and, if owned by an assignee, certain details in regard thereto.[43] The act excludes from its benefits claims embraced in certain conventions with France and Spain, concluded in 1803, 1819, and 1831, and with provisions as to rules of court, defense of the United States, evidence and other matters not important for our immediate purpose, directs this court, as to the claims thus placed within our jurisdiction, to report to Congress the first Monday of each December the facts found by us and our conclusions, which are to be taken, both as to law and facts, as advisory and not conclusive upon either party, the claimants or the Government.

So peculiar a jurisdiction was probably never before conferred upon a strictly judicial tribunal. The rights of the claimants, if any exist, arise from the acts of the political branch of the Government done in the protection and aid of the nation. For such rights there can be no remedy other than that granted by the legislature; in this instance the legislature has elected to transmit to the judiciary, under certain restric-

[42] "An act to provide for the ascertainment of claims of American citizens for spoliations committed by the French prior to the thirty-first day of July, eighteen hundred and one," 1885, c. 25, 23 U. S. Stat. L. 283.

[43] Section 3 of the act directed that the Court of Claims should "decide upon the validity of said claims according to the rules of law, municipal and international, and the treaties of the United States applicable to the same."

tions, the examination of the claimants' demands, with the proviso that the conclusion reached in this forum shall not be finally binding upon either party, but that the defendants, as well as the claimants, have reserved to them an appeal, not in the regular line of judicial procedure to the Supreme Court of the United States, but back again to that body, from which alone any remedy can come to the citizen for wrongs done him by his Government.

The reason for this peculiar grant of remedy is found in the nature of the claims, which spring from international controversies of the gravest character intimately entwined with the history of our struggle for independence; also in the age of the claims; and, lastly, in the absolutely indeterminate amount of financial responsibility which will be thrown upon the Government should the claims be found to exist as valid obligations due from the United States to their citizens. Good or bad, not one of these claims is enforceable but by the consent of the Congress, and the Congress can affix to that consent such condition as in their wisdom seems just and for the best interests of the Republic. The remedy now granted is an examination and advisory report by the judiciary, to be followed by a decision by the legislative branch of the Government. . . .

[In an omitted part of the opinion the Court reviewed in detail the history of relations between France and the United States from 1777, when negotiations for the first treaties began, to 1800, when the claim to indemnity for spoliations was abandoned.]

The findings show that the schooner Sally, owned by Americans, commanded by an American, and laden with an American cargo, while on a commercial voyage from Massachusetts to Spain, was, on the 5th day of June, 1797, seized by the French privateer Intrépide, taken to the port of Nantes, there condemned by a French tribunal, and "confiscated" for the benefit of the privateer. It was not alleged that she had violated the law of nations, either by attempting a blockade or by carrying contraband, or in any other manner, but that she had violated a local French municipal regulation "concerning the navigation of neutrals." It appears upon the face of the decree that the Government of France, through laws passed by its own legislature, valid within its territorial jurisdiction and upon its own ships, but not elsewhere, attempted to regulate the conduct of neutral merchantmen upon the high seas, where they were subject only to the laws of their own country and that law of abstract right and justice which by mutual consent has become crystallized into the law of nations. . . .

In default of express treaty provision no Government can prescribe to our merchantmen navigating the high seas the detailed form and number of the papers they are to carry, nor seize or confiscate those merchantmen for non-compliance with that nation's municipal statutes.

The seizure of this vessel, and of others under like conditions, was clearly illegal and unjustifiable.

The defendants say, further, the condemnation cannot be illegal because made by a prize court having jurisdiction, and the decisions of such courts are final and binding. This proposition is of course admitted so far as the *res* is concerned; the decision of the court, as to that, is undoubtedly final, and vests good title in the purchaser at the sale;[44] not so as to the diplomatic claim, for that claim has its very foundation in the judicial decision, and its validity depends upon the justice of the court's proceedings and conclusion. It is an elementary doctrine of diplomacy that the citizen must exhaust his remedy in the local courts before he can fall back upon his Government for diplomatic redress; he must then present such a case as will authorize that Government to urge that there has been a failure of justice. The diplomatic claim, therefore, is based not more upon the original wrong upon which the court decided than upon the action and conclusion of the court itself, and, diplomatically speaking, there is no claim until the courts have decided.[45] That decision, then, is not only not final, but, on the con-

[44] See Hudson v. Guestier, 6 Cr. 281, *supra*, 506.

[45] "There are several reasons for this limitation upon diplomatic protection: first, the citizen going abroad is presumed to take into account the means furnished by local law for the redress of wrongs; secondly, the right of sovereignty and independence warrants the local state in demanding for its courts freedom from interference, on the assumption that they are capable of doing justice; thirdly, the home government of the complaining citizen must give the offending government an opportunity of doing justice to the injured party in its own regular way, and thus avoid, if possible, all occasion for international discussion; fourthly, if the injury is committed by an individual or minor official, the exhaustion of local remedies is necessary to make certain that the wrongful act or denial of justice is the deliberate act of the state; and fifthly, if it is a deliberate act of the state, that the state is willing to leave the wrong unrighted." Borchard, Diplomatic Protection, 817.

The instructions for claimants issued by the United States Department of State contain the following paragraph: "8. Responsibility of Foreign Government.—Unless the responsibility for the loss or injury for which reparation is claimed is attributable to a foreign Government, efforts of the Government of the United States on behalf of the claimant will be futile. It is essential, therefore, for claimants to show that the responsibility for their losses or injuries is attributable to an official, branch, or agency of a foreign Government. If any legal remedies for obtaining satisfaction for, or settlement of, the losses or injuries sustained are afforded by a foreign Government before its judicial or administrative tribunals, boards, or officials, interested persons must ordinarily have recourse to and exhaust proceedings before such tribunals, boards, or officials as may be established or designated by the foreign Government and open to claimants for the adjustment of their claims and disputes. After such remedies have been exhausted with the result of a denial of justice attributable to an official, branch, or agency of a foreign Government, or have been found inapplicable or inadequate, or if no legal remedies are afforded, the Department of State will examine the claim with a view to ascertaining whether, in all the circumstances of the case and considering the international relations of the United States,

trary, is the beginning, the very corner-stone, of the international controversy. This leads us naturally to another point made by the defense in that the claimant did not "exhaust his remedy," because he did not prosecute an appeal. We of course admit that usually there is no foundation for diplomatic action until a case cognizable by the local courts is prosecuted to that of last resort; but this doctrine involves the admission that there are courts freely open to the claimant, and that he is unhampered in the protection of his rights therein, including his right of appeal. It is within the knowledge of every casual reader of the history of the time that no such condition of affairs in fact then existed.

The very valuable report of Mr. Broadhead shows (pp. 6 and 7) that prior to March 27, 1800, there was practically no appeal in these cases except to the department of the Loire-Inférieure; in the then existing state of bad feeling and modified hostilities, and under the surrounding circumstances, this was to the captains of the seized vessels, in most if not in all cases, a physical impossibility. Nor prior to the agreement of 1800 was there any practical reason for appealing to a court when the result, as our seamen believed, whether rightly or not, but still honestly, was a foregone conclusion, and while negotiations were progressing for a settlement; nor is there anything in these negotiations showing that a technical exhaustion of legal remedy would be required. We are of opinion that the claimant was not, under these purely exceptional circumstances, obliged to prosecute his case through the highest court, even if he could have done so, which we doubt.[46]

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the claim may properly be presented for settlement through diplomatic channels, by arbitration or otherwise. Local remedies are provided generally in foreign countries for the settlement of *contract claims* founded upon *contracts* with the *Government or its agencies*, or of *private claims* for losses or injuries due to the acts of *private individuals*, and in some countries, for the settlement of claims based on the *tortious acts* of the Government, or for the *malfeasance or misfeasance in office* of its officers. Local remedies, however, for the adjustment of claims growing out of *war* are seldom provided, as their settlement is generally comprehended in the treaty of peace." "Application for the Support of Claims against Foreign Governments," May 15, 1919, revision of Oct. 1, 1924.

[46] See also Cushing, Adm'r., v. United States, 22 Ct.Cl. 1, 40. "A claimant in a foreign state is not required to exhaust justice in such state when there is no justice to exhaust." Moore, Dig. Int. L., VI, 677. See New Granadian Passenger-Tax, 13 Op. Atty. Gen. 547.

Cf. Special Agreement between Great Britain and United States, Aug. 18, 1910, Terms of Submission, art. 3, 37 U. S. Stat. L. 1625, 1629; Convention between Mexico and United States, Sept. 8, 1923, art. 5, 43 U. S. Stat. L. 1730, 1734.

See Borchard, Diplomatic Protection, 817; Eagleton, Responsibility of States, ch. 5; Moore, Dig. Int. L., VI, 656.

The Case of the Portuguese Religious Properties

France, Great Britain, Spain and Portugal. Tribunal of the Permanent Court of Arbitration at The Hague. 1920.

Fachiri, "Expropriation and International Law," British Year Book of International Law (1925) 159, 167.

After the revolution of 1910 the Provisional Government of the Republic enacted a law, dated October 8, 1910, whereby all the property of the religious associations in Portugal was confiscated to the state. The British, French, and Spanish Governments protested on behalf of their nationals affected by this law and ultimately it was agreed to submit their claims to arbitration. The *compromis*, dated July 31, 1913, provides:

Art. 1: "The arbitral tribunal, composed as hereinafter provided, is charged with passing upon the claims relative to the properties of French, British and Spanish nationals expropriated by the Government of the Portuguese Republic after the proclamation of the Republic . . . " Art. 3: "The tribunal shall examine and decide the aforesaid claims in accordance with the conventional rights applicable thereto, or, that failing, according to the general provisions and principles of law and equity."[47] It is clear, therefore, that the questions whether there had been any breach of international law, and, if so, whether compensation was payable, were left entirely open for decision. It is important to observe that in the course of the arbitral proceedings there is no mention of, or reliance upon, treaty engagements. In the "*Observations générales*" presented by H. M. Government to the Tribunal, emphasis is laid upon the fact that the confiscatory measure contravened the acquired rights and expropriated the property of foreigners who had established themselves in the country on the faith of a legal system guaranteeing protection in these respects. The following passages may be cited:

"The Government of His Britannic Majesty do not in any way intend to constitute themselves judges of the legality or validity, from the point of view of the internal law of Portugal, of the acts of the Portuguese Government. That is a matter of internal politics with which they have no concern. But His Majesty's Government are of opinion that the Portuguese State in taking possession, as it has done, of property legally acquired by British nationals in conformity with the legislation of Portugal and under the cover and protection of its public and private law, has acted *contrary to the principles of the law of nations* which governs the relations between states. It is part of the generally recognized principles of international law that foreigners are subject to the laws of police and security of the state upon the territory of which

[47] An English text from 8 Am. Jour. Int. L. Suppl. 165, 166, has been substituted for the French text used by Fachiri.

they find themselves, and that the laws of that state also govern the rights of immovable property which they acquire there. In return for this subjection, foreigners are entitled to count upon the legal protection and guarantees under the cover of which they came into the country and acquired their rights."

"Respect of property, respect of acquired rights, these are the legal principles of all civilized countries. It is upon the security which they assure and the confidence they inspire that the relations entertained by nations with each other are based. It cannot be objected here that it is ill founded for a foreigner to complain of the measures applied to him when those measures are equally applicable to the nationals of the state on the territory of which he finds himself; the position in the two cases is not the same. Foreigners neither have nor had in Portugal the enjoyment of political rights; they neither have nor had any part in the public affairs of the country. When the nation demands, or lets its Government take, such and such a political measure, it has no right to complain. As a celebrated Portuguese jurist said: 'It is the nation's own act; but the foreigner who had no part therein, cannot be placed upon the same footing.' Finally, it will be observed that if the Portuguese Government had alleged that the dispossessions were due to *force majeure* riots or civil war, there might be a question as to whether and what responsibility they incurred.[48] But that is not the case here. The Portuguese State either took action itself, or else covered the spoliations complained of with its authority; it has, itself, voluntarily assumed the responsibility."[49]

The other Governments associated with Great Britain as "plaintiffs" presented similar observations. To these arguments, . . . what was the answer of the Portuguese Government? In their "*Observations générales*" they say this: "The Government of the Portuguese Republic reply that far from contesting the legal principles upon which the three Governments base these arguments, they approve them without reserve, respectful of law and equity." The defence of the Portuguese Government was founded upon a different consideration: *viz.*, that the properties did not belong to the individual claimants but to their religious associations, and ultimately the case was settled and judgment given by consent;[50] but this does not affect the value of the case as a precedent in view of the arguments put forward on the one side and accepted by the other.[51]

[48] See Don Pacifico Case, *infra*, 881; Claim Against Brazil, *infra*, 883; Case of The Montijo, *infra*, 883.

[49] Fachiri's transl. The proceedings were in French.

[50] For texts of the awards, see 15 Am. Jour. Int. L. 99.

[51] See King Case, Moore, Dig. Int. L., VI, 262; Delagoa Bay Railway Arbitration, Moore, Int. Arb., II, 1865, U. S. For. Rel. (1900) 903, 845. *Cf.* Williams, "International Law and the Property of Aliens," B. Y. B. Int. L. (1928) 1.

Claim of Mrs. Evan Williams and Mrs. Isabella Fournier[52]

Haiti and the United States. 1885.

Papers Relating to the Foreign Relations of the United States (1885) *pages* 518, 525.

[The following statement of the case is taken from a dispatch of Mr. Langston, Minister of the United States to Haiti, to Mr. Bayard, Secretary of State of the United States, May 22, 1885, *op. cit.*, 1885, p. 518.]

As regards the real property belonging to Mrs. Evan Williams and Mrs. Isabella Fournier, amounting in the first case to $16,000, and in the other to $1,500, the commissioners could not agree, the commissioners of the Haytian Government claiming that since foreigners cannot buy and hold real property in Hayti, according to the constitution and laws thereof, these citizens of the United States cannot recover the several amounts claimed for their property named.

On the other hand, the commissioners, American citizens named by this legation, very properly held that the possession and ownership evidenced by such possession, and admitted and proved by the deeds upon which the property in either case is held, entitle the claimants to a reasonable award, equal to the value of the property destroyed.

This matter of difference between the commissioners brings the principle of law and usage involved in such cases up for discussion and decision as between this legation and the Haytian Government.

[The following report on the question by Mr. Francis Wharton, Law Officer of the Department of State, was made the basis of a demand by the United States for indemnity for the claimants, *op. cit.*, 1885, p. 525.]

The question submitted by the accompanying papers is whether the fact that foreigners are prohibited by the local law from holding real estate in Hayti precludes them from making claim on the Government of Hayti under the recent commission for damages sustained by real estate owned by them in Hayti. The question, as thus put, answers itself. If a foreigner holds real estate under such a limitation, no matter how defeasible his title may be he owns something, for the arbitrary spoliation of which by the Government he has a claim for redress. A foreigner's title to real estate under such a limitation may be likened to that of a foreigner's title to real estate under the laws of many of our States. It is true that under such laws the foreigner is prohibited from holding real estate, yet it is equally true that he has an inchoate interest in such real estate when purchased by him and entered on, which can only be defeated by legal procedure in the nature

[52] Submitted, together with other claims of American citizens for property losses suffered during an insurrection at Port-au-Prince, Sept. 22–23, 1883, to a special mixed commission composed of two Haitian and two United States nationals. See U. S. For. Rel. (1885) 500, 510.

of an inquisition duly instituted. Nor is this position one of mere local legislation. Not only by the English common law, but by the old Roman law, as accepted in the Spanish settlements in America, a foreigner is entitled to hold real estate, where there is such a prohibition, against even the Government, until legal proceedings are taken for his eviction (Hammekin v. Clayton, 2 Woods, 336; Phillips v. Moore, 100 U. S. 208).

The rule is that an injury done to a *prima facie* title exposes the party inflicting the injury to legal process as unquestionably as if the title was perfect. Titles, no matter how imperfect, are not to be determined by violence. Even supposing that the sole title is that of possession, yet the possessor cannot be dispossessed except by process of law. And this view is strengthened in cases like the present, when the possessor, there being no adverse private interest, and the Government being the only party entitled to make complaint, is permitted by the Government to remain in possession. This validates his possession so far, at least, as to prevent his expulsion, except by legal process. In the present case, however, the damage complained of was inflicted, not by legal process, but by arbitrary and revolutionary violence, for whose consequences the Government of Hayti holds itself in other relations responsible.[53] If so, it is responsible for damages done by it to a title, which, though inchoate and imperfect, is nevertheless an interest whose spoliation is a subject of legal redress. I therefore respectfully report that the minister of the United States at Hayti be instructed to press these considerations on the Government of Hayti, and to ask for indemnity to these particular claimants for the damages thus sustained by them.

The Savage Claim

Salvador and the United States. Special Arbitration Tribunal. 1865.

Moore, History and Digest of the International Arbitrations to which the United States has been a Party, Volume II, page 1855.

In September 1851 a quantity of gunpowder belonging to Mr. Henry Savage, a citizen of the United States, was imported into Salvador and deposited in a temporary storehouse at Acajutla which was designated by the authorities for that purpose. The agent of the owner immediately proceeded to dispose of the powder, and had sold a part of it when in March 1852 a decree, dated the 24th of the preceding month, was published by the Government of Salvador by which it was declared that in six months from the date of the decree the sale of gunpowder should become a monopoly of the state, and that all gunpowder remaining

[53] On responsibility for acts of insurgents see Claim Against Brazil, *infra*, 883; Case of The Montijo, *infra*, 883.

after the expiration of that period should be removed from the country under penalty of being declared contraband. The decree further provided that, upon the publication thereof, persons having gunpowder should forthwith store it at a distance from all inhabited places, and that a fine of $50 should be imposed upon any person introducing for sale a greater quantity than 12 pounds.

It was alleged that as a result of this decree the sale of Mr. Savage's gunpowder became impossible; that an effort was made to sell it to the government, but that the government "declined to purchase except at a price ruinous to the owner," and that in the end the powder had to be abandoned, when it was sequestrated by the government.

A claim for indemnity was presented to the Government of Salvador on the ground (1) that as the gunpowder was an article of legal traffic, lawfully imported and stored under the direction of the authorities, it was to be considered as any other article of merchandise, and that the decree of February 24, 1852, was "to be measured by the same rule as would be applied to commercial enactments in regard to any other commodities legally imported;" (2) that the decree, being *ex post facto* in respect of the powder in question, violated the constitution of Salvador, which declared "any statute having a retroactive effect to be unjust, oppressive, and null," and that the sequestration of the powder violated another article of the constitution by which it was declared that the property of individuals should not be taken for public purposes without a previous payment of its value; and (3) that citizens of the United States were entitled to the protection of the constitutional guaranties under Article III. of the treaty between the United States and Salvador of January 2, 1850, by which it was provided that the citizens of each of the high contracting parties should have within the country of the other "the power . . . to engage in all kinds of trade, manufactures, and mining upon the same terms with the native citizens," to "enjoy all the privileges and concessions in these matters which are or may be made to the citizens of any country," and to "enjoy all the rights, privileges, and exemptions in navigation, commerce, and manufactures which native citizens do or shall enjoy, submitting themselves to the laws, decrees, or usages there established to which native citizens are subjected."

Mr. Partridge, United States minister, writing to Mr. Seward from San Salvador, February 25, 1864, reported that he had had an interview with the provisional president of the country in relation to the long-pending claim of Henry Savage, who was then a resident of Guatemala. The president was ready to refer it to arbitration, each party to designate an arbitrator and the arbitrators to choose an umpire. Mr. Partridge observed that the claim of Mr. Savage was not, in his opinion, "a clear and indisputable one for the amount he asks. There are," continued Mr. Partridge, "many equities upon the other side, and many delays

and failures on his part to comply with the regulations of the government (in regard to the storage, etc., of gunpowder, for the taking of which his claim arises), so that, as it seems to me, an arbitration would offer precisely the appropriate mode of disposing of the matter."

On April 13, 1864, Mr. Partridge reported that he had received a letter from Mr. Savage expressing his satisfaction with the disposition of the government to submit the case to arbitration. Soon afterward Mr. Savage, at Mr. Partridge's request, visited San Salvador, and an agreement was made with the government of Salvador to submit the claim to arbitration in Guatemala on June 1, 1864. An agreement to that effect was signed May 4 in triplicate, one of the copies being retained in the legation at San Salvador. Of the other copies one was retained by the Salvadorian Government, while the other was sent with the papers in the case to the United States legation in Guatemala. Mr. Partridge's proceedings were approved.

March 17, 1865, Mr Partridge reported that the referees, Messrs. M. J. Dardon, A. Andreu, and Fermin Armas, had, on the 21st of the preceding month, "finally adjudicated" the claim "in favor of Mr. Savage" by awarding him "four thousand four hundred and ninety-seven dollars and fifty cents (deducting therefrom the amount of duties due on said gunpowder and still remaining unpaid), with interest on said amount at the rate of six per cent per annum from the tenth day of December 1852 until paid."[54]

The Case of William Adam

Great Britain and the United States. Mixed Claims Commission. 1871.

Moore, History and Digest of the International Arbitrations to which the United States has been a Party, Volume III, page 3066.

In the case of William Adam (No. 72), the claimant, a British subject domiciled in England, alleged that he was, in 1862, the owner of certain

[54] On expropriation in consequence of the creation of state monopolies, see Sicilian Sulphur monopoly, 1836–1842, 28 Br. & For. S. P. 1163, 29 *ibid.* 175, 1225, 30 *ibid.* 111; Uruguayan Insurance monopoly, 1912, Scelle, "A propos de l'établissement du monopole des assurances en Uruguay," 30 Rev. du Dr. Pub. 637; Italian Insurance monopoly, 1912, Clunet, Consultation pour les Sociétés Étrangères d'Assurances sur la Vie Établies en Italie, and Wehberg, Das Völkerrecht und das Italienische Staatsversicherungsmonopol.

See also Borchard, Diplomatic Protection, 125; Bullington, "Problems of International Law in the Mexican Constitution of 1917," 21 Am. Jour. Int. L. 685; Bullington, "Land and Petroleum Laws of Mexico," 22 *ibid.* 50; Dunn, "International Law and Private Property Rights," 28 Col. L. Rev. 166; Fachiri, "Expropriation and International Law," B. Y. B. Int. L. (1925) 159; Williams, "International Law and the Property of Aliens," B. Y. B. Int. L. (1928) 1; 45 Jour. du Dr. Int. Privé 982.

bonds of a railroad company within the United States, amounting to $5,000 principal, with interest, payable half yearly, at six per cent per annum, the interest upon which had been regularly paid in specie up to the 31st December 1861; that in the year 1862 the Congress of the United States passed a law making paper money a legal tender, without any protection to preexisting contracts; and that immediately after that law the paper money of the United States became depreciated in value, and the claimant was thenceforward compelled to receive payment of his interest in such depreciated currency, and that the bonds themselves and the prospective interest to become due thereon had likewise become depreciated in consequence of the same legislation; that the Supreme Court of the United States had, in 1871, adjudged the act of 1862 valid in its application to preexisting debts. He submitted with his memorial a computation of his losses in the premises, and claimed damages $3,309, besides interest. A demurrer was interposed to the memorial on behalf of the United States, on the ground that it stated no case within the jurisdiction of the commission and no facts showing any liability for compensation to the claimant.

The Commission unanimously made an award as follows:

"The commissioners are of opinion that the matters alleged in the memorial do not constitute the basis of any valid claim against the United States. The claim is therefore disallowed."[55]

THE UNITED STATES OF AMERICA ON BEHALF OF MARY ANN TURNER, CLAIMANT, v. THE UNITED MEXICAN STATES

Mexico and the United States. General Claims Commission. 1927.

Opinions of Commissioners under the Convention Concluded September 8, 1923, between the United States and Mexico, page 416.

[The names of counsel and part of the Presiding Commissioner's opinion are omitted.]

VAN VOLLENHOVEN, PRESIDING COMMISSIONER: This claim is presented by the United States of America in behalf of Mary Ann Turner, an American national through the naturalization of her husband, against

[55] "A creditor in a national currency must follow the fate of the currency. But in substance a government which borrows when its currency is worth x, by its own action reduces x to $\frac{x}{10}$, and then repays its creditor a fraction only of the value which it borrowed, has confiscated the rest of that part of the creditor's property which was represented by the debt owing to him. If this confiscation gives no cause for international complaint—and there is a general agreement that it does not—it is difficult to predicate universal validity for the proposition that all confiscation of the private property of an alien is wrongful in international law." WILLIAMS, "International Law and the Property of Aliens," B. Y. B. Int. L. (1928) 1, 22.

the United Mexican States, on account of damages suffered from the death of her said husband, Edward Turner, a naturalized American national. Turner, who in the Spring of 1899 was a locomotive engineer in Mexico, had the misfortune to be involved in a train collision on March 20, 1899, at Encinar, Veracruz, which caused the death of the fireman serving on the other colliding engine. Turner was arrested about April 1, 1899, and sent first to the prison hospital at Orizaba, Veracruz, and afterwards to the prison in that place. He was free on bail until an uncertain date after June 14, 1899; was in jail again (first in Orizaba, the last few weeks in Veracruz) until January 28, 1900; and on the last date he died, without having had a trial. The United States alleges direct responsibility of Mexico for an illegal arrest, undue and illegal delay of proceedings, and inhuman treatment in prison, all of which contributed to causing Turner's death, and claims on behalf of his widow damages in the sum of $50,000.00, with interest thereon. . . .

According to the Mexican federal code of criminal procedure, which was applicable, the first stage of the proceedings, that of the preliminary investigations, should have ended within five months after the date on which the accused came at the disposal of the judge (some date between March 20 and April 1, 1899, both dates inclusive). If he was apprehended shortly after June 14, 1899, and therefore had been at the disposal of the Judge from about April 1, 1899, on, then he was illegally in jail from about September 1, 1899. But even if it is considered uncertain whether he was at the Court's disposal between June 14, and September 1, 1899, then at any rate he was illegally in jail from about November 15, 1899, on; and since the illness from which he died must have begun or at any rate increased during the two months between the middle of November, 1899, and January 28, 1900, Mexico must be liable for what befell Turner during this period of illegal custody. Though there is no convincing proof that his death was caused by his treatment in prison, there can be no doubt but that, if at liberty, he would have been able to take better measures for restoring his health than he could do either in prison, or in a prison hospital. If having a man in custody obligates a government to account for him, having a man in *illegal* custody doubtless renders a government liable for dangers and disasters which would not have been his share, or in a less degree, if he had been at liberty. . . .

This is a case of alleged direct responsibility for acts of authorities. Mexico, on the record, cannot be held responsible for Turner's death; but it should be held responsible for the bad effect of its illegal and careless custody on Turner's health. An amount of damages of $4,000.00, (four thousand dollars) without interest, would seem to express best the direct pecuniary damage, grief and indignity sustained by the claimant.

NIELSEN, COMMISSIONER: I am of the opinion that Turner was clearly the victim of mistreatment. He evidently was not in jail for the entire

period of ten months between the date of his arrest on March 20, 1899, as stated in the Memorial, or some days later, and the date of his death on January 28, 1900. But though he was free on bail a part of that time, he was continuously under accusation. There is no satisfactory explanation in the record why he was not tried. Evidence in the record indicates to my mind that he was innocent of the charge preferred against him, even though his arrest may have been justified. It seems to me to be clear that the accusation against him was of such a nature that its merits could speedily have been determined by a court.

FERNÁNDEZ MACGREGOR, COMMISSIONER: . . . It appears clear to me, notwithstanding the vagueness of the evidence presented by both sides in this case, that Turner was held prisoner without being brought to trial for a period which could be from three to five months more than he should have been, according to Mexican law, and that this fact, which means a violation of human liberty, renders Mexico liable conformably with principles of international law. Therefore, I believe that the claimant must be awarded the sum proposed by the Presiding Commissioner.

Decision. The Commission decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America, on behalf of Mary Ann Turner, $4,000.00 (four thousand dollars), without interest.[56]

THE UNITED STATES OF AMERICA ON BEHALF OF L. F. H. NEER AND PAULINE E. NEER, CLAIMANTS, v. THE UNITED MEXICAN STATES

Mexico and the United States. General Claims Commission. 1926.

Opinions of Commissioners under the Convention Concluded September 8, 1923, between the United States and Mexico, page 71.

[The following opinion was rendered by C. Van Vollenhoven, Presiding Commissioner, and G. Fernández MacGregor, Commissioner. Part of the opinion is omitted.]

1. This claim is presented by the United States against the United Mexican States in behalf of L. Fay H. Neer, widow, and Pauline E. Neer, daughter, of Paul Neer, who, at the time of his death, was employed as superintendent of a mine in the vicinity of Guanaceví, State of Durango,

[56] See also Chattin Case, Mex. U. S. Gen. Cl. Com'n., 422; Faulkner Case, *ibid.*, 86; Roberts Case, *ibid.*, 100. And see Cotesworth & Powell Case, Moore, Int. Arb., II, 2050; Garcia Case, Mex. U. S. Gen. Cl. Com'n., 163; Quintanilla Case, *ibid.*, 136; Roper Case, *ibid.*, 205; Stephens Case, *ibid.*, 397; Swinney Case, *ibid.*, 131; Venable Case, *ibid.*, 331. But indemnity should not be awarded, it has been said, "in the absence of convincing evidence of a pronounced degree of improper governmental administration." Adler Case, *ibid.*, 97, 100. See EAGLETON, Responsibility of States, 44.

Mexico. On November 16, 1924, about eight o'clock in the evening, when he and his wife were proceeding on horseback from the village of Guanaceví to their home in the neighborhood, they were stopped by a number of armed men who engaged Neer in a conversation, which Mrs. Neer did not understand, in the midst of which bullets seem to have been exchanged and Neer was killed. It is alleged that, on account of this killing, his wife and daughter, American citizens, sustained damages in the sum of $100,000.00; that the Mexican authorities showed an unwarrantable lack of diligence or an unwarrantable lack of intelligent investigation in prosecuting the culprits; and that therefore the Mexican Government ought to pay to the claimants the said amount. . . .

3. As to lack of diligence, or lack of intelligent investigation, on the part of the Mexican authorities, after the killing of Paul Neer had been brought to their notice, it would seem that in the early morning after the tragedy these authorities might have acted in a more vigorous and effective way than they did, and moreover, that both the special agent of the Attorney General of Durango (in his letter of November 24, 1924), and the Governor of that State, who proposed the removal of the Judge of Guanaceví, have shared this opinion. The Commission is mindful that the task of the local Mexican authorities was hampered by the fact that the only eye-witness of the murder was unable to furnish them any helpful information. There might have been reason for the higher authorities of the State to intervene in the matter, as they apparently did. But in the view of the Commission there is a long way between holding that a more active and more efficient course of procedure might have been pursued, on the one hand, and holding that this record presents such lack of diligence and of intelligent investigation as constitutes an international delinquency, on the other hand.

4. The Commission recognizes the difficulty of devising a general formula for determining the boundary between an international delinquency of this type and an unsatisfactory use of power included in national sovereignty. In 1910 John Bassett Moore observed that he did "not consider it to be practicable to lay down in advance precise and unyielding formulas by which the question of a denial of justice may in every instance be determined" (American Journal of International Law, 1910, p. 787), and in 1923 De Lapradelle and Politis stated that the evasive and complex character (*le caractére fuyant et complexe*) of a denial of justice seems to defy any definition (*Recueil des Arbitrages Internationaux*, II, 1923, p. 280). It is immaterial whether the expression "denial of justice" be taken in that broad sense in which it applies to acts of executive and legislative authorities as well as to acts of the courts, or whether it be used in a narrow sense which confines it to acts of judicial authorities only; for in the latter case a reasoning, identical to that which—under the name of "denial of justice"—applies

to acts of the judiciary, will apply—be it under a different name—to unwarranted acts of executive and legislative authorities. Without attempting to announce a precise formula, it is in the opinion of the Commission possible to go a little further than the authors quoted, and to hold (first) that the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial.

5. It is not for an international tribunal such as this Commission to decide, whether another course of procedure taken by the local authorities at Guanaceví might have been more effective. On the contrary, the grounds of liability limit its inquiry to whether there is convincing evidence either (1) that the authorities administering the Mexican law acted in an outrageous way, in bad faith, in wilful neglect of their duties, or in a pronounced degree of improper action, or (2) that Mexican law rendered it impossible for them properly to fulfil their task. No attempt is made to establish the second point. The first point is negatived by the full record of police and judicial authorities produced by the Mexican Agent, though the Commission feels bound to state once more that in its opinion better methods might have been used. From this record it appears that the local authorities, on the very night of the tragedy, November 16, went to the spot where the killing took place and examined the corpse; that on November 17 the Judge proceeded to the examination of some witnesses, among them Mrs. Neer; that investigations were continued for several days; that arrests were made of persons suspected; and that they were subsequently released for want of evidence. The American Agency in rebuttal offers nothing but affidavits stating individual impressions or suppositions. In the light of the entire record in this case the Commission is not prepared to hold that the Mexican authorities have shown such lack of diligence or such lack of intelligent investigation in apprehending and punishing the culprits as would render Mexico liable before this Commission.

6. Decision. The Commission accordingly decides that the claim of the United States is disallowed.[57]

[57] See also Díaz Case, Mex. U. S. Gen. Cl. Com'n., 143.

"It is an established principle of international law that a nation is responsible for wrongs done by its citizens to the citizens of a friendly power. Ordinarily this responsibility is discharged by a government rendering to a resident alien the same

[The separate opinion of Fred K. Nielsen, Commissioner, concurring in the decision that the claim be disallowed, is omitted.]

THE UNITED MEXICAN STATES ON BEHALF OF SALOMÉ LERMA VDA. DE GALVÁN, CLAIMANT, v. THE UNITED STATES OF AMERICA

Mexico and the United States. General Claims Commission. 1926.

Opinions of Commissioners under the Convention Concluded September 8, 1923, between the United States and Mexico, page 408.

[The names of counsel are omitted.]

NIELSEN, COMMISSIONER: 1. Claim is made in this case in the amount of 50,000 pesos, by the United Mexican States, in behalf of Salomé Lerma de Galván, mother of Adolfo Pedro Galván, a Mexican citizen, who was killed in August, 1921, at Driscoll, Texas, by an American citizen named Hugh K. Kondall. The facts in the case as disclosed by the record may be briefly summarized.

2. Kondall and Galván were employed as foreman and laborer, respectively, in the construction of a bridge at a point about a half mile north of the depot at Driscoll. On the morning of August 25, 1921, Galván had a slight altercation with the son of Kondall who supplied drinking water to the workmen. It appears that Kondall was angered when he learned of the episode and proceeded to his house where he probably procured a pistol. He thereupon returned to the place where Galván was working. There is evidence that the latter, when he knew that Kondall was armed with a pistol, proceeded with a raised hammer in his hand toward the spot where Kondall and another man were standing, and that Kondall thereupon twice shot Galván who died shortly thereafter.

3. Kondall was immediately taken into custody by the local authorities and charged with murder. On August 29, 1921, he was given a preliminary hearing before a justice of the peace at which several eye witnesses of the shooting were examined. The accused was required

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protection which it affords to its own citizens and bringing the perpetrators to trial and punishment." NOTT, CH. J., in Brown v. United States, 32 Ct. Cl. 432, 433.

"There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens." ROOT, "Basis of Protection to Citizens Residing Abroad," Am. Soc. Int. L. Proc. (1910) 16, 21.

to give a bond in the amount of $25,000 for his appearance before the Criminal District Court of Nueces County, at its October, 1921, term. No indictment was returned against Kondall at that term of the court, but in the following March an indictment was found against him, charging him with the murder of Galván, and trial was set for April 20, 1922. Subsequently the accused was admitted to bail in the sum of $5,000.

4. Accompanying the American Answer is a copy of the criminal court docket in this case from which the following is an extract:

"April 7, 1922. Case set for Thursday April 13, 1922, 10 A. M. Venire of fifty ordered for that date and hour. Writ returnable Tuesday.

"April 17, 1922. Case continued by agreement.

"December 14, 1922. Continued by operation of law.

"4/30/23. Set for May 14. Special venire of 60 ordered.

"5/14/23. Set for May 21.

"5/22/23. Continued by agreement.

"11/12/23. Set for 11/21.

"6/5/24. Continued by operation of law.

"5/8/25. Set for May 20. Venire of 50 men.

"5/20/25. Continued illness of parties."

5. From additional evidence filed by the United States it is shown that the trial of Kondall was further continued at the instance of the State "because of a defaulting witness" and set for hearing at the term of court beginning on October 25, 1926, and still further continued at that term of court until April, 1927, on account of absence of material witnesses for the State.

6. The record contains an affidavit executed on November 24, 1925, by George C. Westervelt, District Attorney for the Counties of Nueces, Kleberg, Kenedy, Willacy and Cameron, Texas. It is stated in this affidavit that several subpoenas were issued for the appearance at the several terms of court of Louis F. Johnston, an eye witness to the shooting of Galván, and that the State could not safely and successfully go to trial without the production of this witness.

7. It is alleged in behalf of Mexico that there was an unnecessary delay in the prosecution of a person charged with a capital crime, and that under international law the United States should make compensation in satisfaction of a denial of justice. This case presents no difficulties. The question at issue is whether it reveals a failure of compliance with the general principle of international law requiring authorities to take proper measures to apprehend and punish a person who appears to be guilty of a crime against an alien. The Commission is bound to conclude that there was a clear failure on the part of the authorities of the state of Texas to act in conformity with this principle. There was no difficulty in the apprehension of Kondall, and a preliminary trial was promptly

held. At this trial testimony was given from which it seems to be obvious that a grand jury could not properly fail to return an indictment for murder against Kondall. An indictment was found by a grand jury in March, 1922. After that it is plain that the authorities failed to take the proper steps to try the accused. There is no satisfactory explanation of continuances of the proceedings from time to time. Justification for the failure to bring the accused to justice cannot be found on the ground stated in the affidavit made by the District Attorney as late as November 24, 1925, that a certain eye witness had not been located. There is no reason to suppose that the legal machinery of the state of Texas is so defective that in a case in which a preliminary trial reveals that there were at least five eye witnesses to the shooting of Galván the authorities during a period of six years after the shooting found themselves unable to conduct a proper prosecution. If any such defect had existed it would not be an adequate defence to the claim presented by Mexico. If witnesses actually disappeared during the course of the long delay in the trial, then as argued by counsel for Mexico, that would be evidence of the evils incident to such delay. It may be observed that the argument in behalf of the United States appeared to be directed more to the question of the measure of damages than to a justification of the delay in the proceedings against the accused.

8. I am of the opinion that in the light of the principles underlying decisions rendered by the Commission in the past an award may properly be made in this case in the sum of $10,000.

Van Vollenhoven, Presiding Commissioner: I concur in Commissioner Nielsen's opinion.

Fernández MacGregor, Commissioner: I concur in Commissioner Nielsen's opinion.

Decision. The Commission decides that the Government of the United States of America shall pay to the Government of the United Mexican States in behalf of Salomé Lerma de Galván the sum of $10,000 (ten thousand dollars) without interest.[58]

[58] See also Janes Case, Mex. U. S. Gen. Cl. Com'n., 108; Kennedy Case, *ibid.*, 289; Mallén Case, *ibid.*, 254; Massey Case, *ibid.*, 228; Putnam Case, *ibid.*, 222; Richards Case, *ibid.*, 412; West Case, *ibid.*, 404. *Cf.* Brierly, "Theory of Implied State Complicity in International Claims," B. Y. B. Int. L. (1928) 42. And see Fabiani Case, Moore, Int. Arb., V, 4878; Borchard, Diplomatic Protection, 330 and *passim;* Eagleton, "Denial of Justice in International Law," 22 Am. Jour. Int. L. 538; Eagleton, Responsibility of States, 110 and *passim;* Moore, Int. Arb., III, 3073.

The United States formerly denied international responsibility for the acts of its state or local authorities upon the ground of constitutional irresponsibility. It has refused, however, to permit the federal organization of other states to be pleaded as an excuse. Moore, Dig. Int. L., VI, 815, 816. It admitted liability to pay indemnity for the lynching of certain Italians at New Orleans in 1891. Moore, Dig. Int. L., VI, 837, 840. *Cf.* Claims against Hawaii, 22 Op. Atty. Gen. 583, *infra*, 937. And it

The Case of Don Pacifico

Great Britain and Greece. 1847–1850.

Moore, Digest of International Law, Volume VI, page 852.

Few cases of mob violence are so celebrated as that of the Chevalier Pacifico, commonly called Don Pacifico, a British subject, who suffered injuries at the hands of a mob in Athens in the spring of 1847. This case, not by itself, but in connection with other cases, one of which involved the taking of the property of a British subject by the Greek Government without proper compensation, and another the arrest of a boat belonging to a British man-of-war, formed the subject of reprisals by Great Britain against Greece. The facts in the case of Don Pacifico were that it had for some years been the custom at Athens to burn on Easter day an effigy of Judas Iscariot. In 1847 the Government, in consequence of the presence of Baron C. M. de Rothschild, at Athens, endeavored to prevent the custom from being observed. A report was spread, however, to the effect that this interference with the popular custom was due to the Chevalier Pacifico, who was of the Jewish faith. His house was therefore attacked in the middle of the day by several hundred persons, who, as Sir Edmund Lyons, then British minister at Athens, declared "were aided, instead of being repressed, by soldiers and gendarmes, and who were accompanied and encouraged, if not headed, by persons whose presence naturally induced a belief amongst the soldiers and the mob, that the outrages they were committing would be indulgently treated by the Government." This charge was directly made to the Greek Government, together with a suggestion of compensation, on April 26, 1847. No answer was made to this letter, and on September 14 Sir E. Lyons sent to the minister of foreign affairs, by

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appears to have since accepted international responsibility, tacitly or by implication, where "neglect in the matter of prevention or prosecution" was clearly established. Hyde, I, §§290, 291.

Certain states have attempted to restrict international responsibility by constitutional or legislative definitions of denial of justice. Thus the Law of Salvador Relating to Foreigners, Sept. 29, 1886, art. 40, provides: "It is to be understood that there is a denial of justice only when the judicial authority refuses to make a formal declaration upon the principal subject or upon any incident of the suit in which he may have cognizance or which is submitted to his cognizance; consequently the fact alone that the judge may have pronounced a decision or sentence, in whatever sense it may be, although it may be said that the decision is iniquitous or given in express violation of law, cannot be alleged as a denial of justice." U. S. For. Rel. (1887) 69, 72. See also Guatemala, Decree of Feb. 21, 1894, arts. 42, 71–73, 86 Br. & For. S. P. 1281, 1286, 1290; Honduras, Decree of Apr. 10, 1895, arts. 34–37, 87 *ibid.* 703, 707; Borchard, Diplomatic Protection, 836; Moore, Dig. Int. L., VI, 267. But *cf.* Secretary Bayard, in Cutting Case, U. S. For. Rel. (1887) 751, 753, *supra*, 676, 678.

direction of Lord Palmerston, a demand for redress. The Greek Government took no notice of either of these notes. The names of some of those who participated in the outrage were given. Some of these persons, one of whom was said to be a son of General Tzavellas, again broke into Don Pacifico's house October 12, 1847.

No reply was made by the Greek Government till December 27, 1847. At length, upon the refusal of the Greek Government to comply with the British demands, reprisals were resorted to.

Palmerston, in his speech of June 25, 1850, said:

"In the middle of the town of Athens . . . M. Pacifico, living in his house, within forty yards of the great street, within a few minutes' walk of a guardhouse, where soldiers were stationed, was attacked by a mob. Fearing injury, when the mob began to assemble, he sent an intimation to the British minister, who immediately informed the authorities. Application was made to the Greek Government for protection. No protection was afforded. The mob, in which were soldiers and gens-d'arms, who, even if officers were not with them, ought, from a sense of duty to have interfered and to have prevented plunder—that mob, headed by the sons of the minister of war, not children of eight or ten years old, but older—that mob, for nearly two hours, employed themselves in gutting the house of an unoffending man, carrying away or destroying every single thing the house contained, and left it a perfect wreck. . . . The Greek Government neglected its duty, and did not pursue judicial inquiries, or institute legal prosecutions as it might have done for the purpose of finding out and punishing some of the culprits." Lord Palmerston also argued that Pacifico was not required to proceed at law for individual redress, (1) because the tribunals were "at the mercy of the advisers of the Crown, the judges being liable to be removed, and being often actually removed upon grounds of private interest and personal feeling," and (2) because any attempt to obtain reparation from individuals would be futile. He quoted Pacifico's statement that if the man he prosecuted was rich he would be acquitted, and that if he was a poor man he had nothing with which to make compensation if he was condemned. In fine, Palmerston said: "The Greek Government having neglected to give the protection they were bound to extend, and having abstained from taking means to afford redress, this was a case in which we were justified in calling on the Greek Government for compensation for the losses, whatever they might be, which M. Pacifico had suffered."[59]

[59] See also City of New Orleans v. Abbagnato, 62 Fed. 240; Moore, Dig. Int. L., VI, 837; Youmans Case, Mex. U. S. Gen. Cl. Com'n., 150. *Cf.* Wipperman Case, Moore, Int. Arb., III, 3039. And see Borchard, Diplomatic Protection, 220; Eagleton, Responsibility of States, 125; Hyde, I, §§290–293; Moore, Dig. Int. L., VI, 809.

Claim against Brazil

Brazil and the United States. 1893–1896.

Moore, Digest of International Law, Volume VI, page 966.

A citizen of the United States, who, at the beginning of the Brazilian insurrection in September, 1893, was carrying on business on an island in the harbor of Rio de Janeiro, sought to make a claim against the Government of Brazil for the destruction of some of his property, including certain lighters and small boats, and the breaking up of his business. It appeared that his place of business was directly in range of much of the firing between the opposing forces and was several times alternately occupied by the Government and the insurgents. He made no attempt to show what part of the damage was caused by the Government and what by the insurgents, but sought to make a claim for the entire damage caused by the revolution. The Department of State said: "It is a principle of public law too well settled to require the citation of authorities that a sovereign is not responsible for injuries done to alien residents by insurgents whom he can not control. There is no allegation that the Brazilian Government was able to prevent the acts of the insurgents in this case. The Department cannot therefore present a claim for damages done by them."[60]

The Case of The Montijo

Colombia and the United States. Special Arbitration Tribunal. 1875.

Moore, Digest of International Law, Volume VI, page 973.

In April, 1871, the American steamer Montijo was seized by revolutionists in Colombia. On the 21st of the following June Mr. Fish instructed the American minister at Bogota to apply for reparation in the case. The seizure was, he said, a piratical act for which it was expected that the authors would be held to be judicially accountable, and in this relation he specially referred to Article VIII. of the treaty between the United States and New Granada of December 12, 1846, which provided that vessels belonging to citizens of the contracting parties should not be liable to seizure for any military expedition or for any other purpose without the allowance of compensation. When such an act, therefore, was committed in the waters of Colombia by unauthorized persons, the obligation of that Government to make amends might, said Mr. Fish, be regarded as unquestionable. The case was subsequently referred to arbitration, and an award was made in favor of the claimants. In the course of his decision the umpire said: "It was, in the opinion of the

[60] See Sambiaggio Case, Venez. Arb. (1903) 666; Van Dissel & Co. Case, *ibid.*, 565.

undersigned, the clear duty of the President of Panama, acting as the constitutional agent of the Government of the Union, to recover the Montijo from the revolutionists and return her to her owner. It is true that he had not the means of doing so, there being at hand no naval or military force of Colombia sufficient for such a purpose; but this absence of power does not remove the obligation."[61]

BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD

Page 281, section 109. 1915.

Diplomatic protection is often invoked by citizens of one country in cases arising out of contracts entered into with citizens of another, or with a foreign government. Coincident with the constant growth of international intercourse and the exploitation of backward countries by foreign capital, this class of cases has assumed large proportions and has given rise to many perplexing and delicate diplomatic situations. The United States and one or two other important governments have differentiated these claims from tortious claims arising out of direct injuries committed by an authority of the state against the person or property of their citizens, either by declining to interpose in behalf of

[61] "In this case an amnesty was granted to the offenders by the President of the State of Panama; but, while this circumstance was much insisted upon in the argument before the arbitrators as a ground of liability, it was not the ground upon which the United States directed that the claim be presented to the Colombian Government. The umpire referred to the amnesty in his decision, but stated that the other ground, as above quoted, was a "stronger reason" for holding Colombia liable." MOORE, *op. cit.*, VI, 974. For a detailed report of the case, including the text of the award, see MOORE, Int. Arb., II, 1421. On the effect of amnesty upon international responsibility, see HYDE, I, §300.

"The records display a long list of insistent and severely pressed claims against certain of the Latin-American states. These states have usually, perforce, paid; but they have done so under protest, denominating their payments as *secours* rather than as indemnity; and they have, as has been seen, devised many ingenious though vain schemes for evading responsibility." EAGLETON, Responsibility of States, 145.

See ARIAS, "Non-Liability of States for Damages Suffered by Foreigners in the Course of a Riot, an Insurrection, or a Civil War," 7 Am. Jour. Int. L. 724; BAR, "De la responsabilité des États à raison des dommages soufferts par des étrangers en cas de troubles, d'émeute, ou de guerre civile," 31 Rev. de Dr. Int. 464; BORCHARD, Diplomatic Protection, 220, 228; CALVO, "De la non-responsabilité des États à raison des pertes et dommages éprouvés par des étrangers en temps de troubles intérieurs ou de guerres civiles," 1 Rev. de Dr. Int. 417; EAGLETON, Responsibility of States, 125; GARNER, "Responsibility of States for Injuries Suffered by Foreigners within their Territories on Account of Mob Violence, Riots and Insurrection," Am. Soc. Int. L. Proc. (1927) 49; GOEBEL, "International Responsibility of States for Injuries Sustained by Aliens on Account of Mob Violence, Insurrections and Civil Wars," 8 Am. Jour. Int. L. 802; 17 Inst. de Dr. Int. 96; Int. L. Assoc. Rep. (1922) 119, 127.

their contracting citizens or else by exercising more than ordinary scrutiny over a cause of action having its origin in contract. Fundamentally, it is the denial of justice which is the necessary condition for the interposition of a government on behalf of its citizen prejudiced by breach of contract. As a general rule, before a claim originating in a contract can come within the category of a denial of justice it must have been submitted to the courts for such judicial determination as is provided by the local law or in the contract.[62]

In the Matter of the Arbitration between the Republics of the United States and Salvador, in Respect of the Claim of the Salvador Commercial Company and Other Citizens of the United States, Stockholders in the Corporation which was Created and Existent under the Laws of Salvador, under the Name and Style of El Triunfo Company, Limited

Salvador and United States. Special Arbitration Tribunal.[63] 1902.

Papers Relating to the Foreign Relations of the United States, 1902, *page* 862.

Opinion of Sir Henry Strong and Don M. Dickinson.

[The third arbitrator, Señor Don José Rosa Pacas, declined to sign the award in which the arbitrators named above concurred. For the text of the award rendered by a majority of the arbitrators see U. S. For. Rel. (1902) 859. Part of the opinion is omitted.]

This controversy has its origin in schemes to establish and develop a new port on the Pacific coast of Central America, in the Republic of Salvador, on the Bay of Jiquilisco. . . .

In the late summer or fall of 1894 contesting petitions were presented to the Government of Salvador for a concession of the right, for a period of years, to establish steam navigation in the port of El Triunfo, setting forth the details of the proposed enterprise. One application was presented by Simon Sol, Luis Lopez, and Lorenzo Campos, and the other by Henry H. Burrell and George F. Thompson, citizens of the United States, and Gustavo Lozano and Emeterio S. Ruano, citizens of the

[62] "It may be doubted, however, whether the mere breach of a promise by a contracting State with respect to an alien is generally looked upon as amounting to internationally illegal conduct. Nor does the motive which impels such action appear to suffice to attach to it a lawless character which it would otherwise not possess. In the estimation of statesmen and jurists, international law is probably not regarded as denouncing the failure of a State to keep such a promise, until at least there has been a refusal either to adjudicate locally the claim arising from the breach, or, following an adjudication, to heed the adverse decision of a domestic court." Hyde, I, §303.

[63] See Protocol of Agreement for Arbitration, U. S. For. Rel. (1902) 857.

Republic of Salvador. The proposals were published in the official journal of the Republic by the proper executive department of the Government, and bids were invited for the franchise so sought.

These proceedings resulted in the awarding of the franchise or concession to the Burrell party, and on October 6, 1894, the Republic of Salvador granted them, for the period of twenty-five years, the exclusive right of steam navigation of the port, together with certain valuable privileges and as valuable exemptions. The grant was in the form of a bilateral contract, signed by the executive officers in behalf of the Government of Salvador as party of the one part and by the grantees as party of the other part. . . .

The constitution of Salvador requiring that such a concession must be submitted to the supreme legislature for ratification, it was so submitted and ratified by that body on April 15, 1895.

There can be no doubt that the privileges conferred were of very great value, but in turn there were most onerous reciprocal obligations. . . .

The concession also required that the grantees should form a corporation to take and operate the concession.

Thereupon, on October 25, 1894, that corporation was formed, and is called throughout the case El Triunfo Company, Limited. The capital stock of the corporation was divided into 1,000 shares.

This capital stock was acquired and distributed as follows: the Salvador Commercial Company, a corporation created and existing under the laws of the State of California, which, as clearly appears by the record, was the moving projector and spirit in the enterprise of developing the port of El Triunfo and in acquiring the concession, took a majority of the stock, that is to say, 501 shares. Henry H. Burrell, who was made the president of El Triunfo Company, and who was an American citizen, acquired and held 5 shares. Julius H. Ellis, who became the secretary of El Triunfo Company, and who was an American citizen, acquired and held 3 shares; J. B. Hays, an American citizen, 2 shares; Luis Maslin, an American citizen, 2 shares, and George F. Thompson, an American citizen, 15 shares, so that the total shares held by citizens of the United States in El Triunfo Company were 536 in number.

It is apparent that upon the execution of its contract with the Salvador Government, through which the concession was acquired, and upon the formation of the corporation required by the concession, El Triunfo Company entered upon the preparation and development of the port, and the performance of the requirements imposed upon it, with exceptional enterprise and vigor.

The concession having been granted on October 6, 1894, and the corporation having been formed with its American representation within nineteen days thereafter, there being no nucleus at the port or even the

beginning for a dock, or a known ship harbor within Jiquilisco Bay, it did, nevertheless, within four months and four days from the date of its incorporation—that is to say, on March 1, 1895—through many difficulties and embarrassments naturally incident to the initiation of such an enterprise, have that port ready, with sufficient equipment of every description to move and ship the coffee crop of 1895, and did ship that crop. . . .

There can be no doubt on this record that the company pushed forward the work of permanent equipment from March 1, 1895, with the same vigor and enterprise as had been displayed in the preparation for the shipment of the crop of the year 1895; for within one year and twenty-seven days from March 1, 1895, we find the president of the company reporting to the Government the entire completion of the permanent work and a full compliance with the contract on the part of those to whom the concession had been given.

This report was true, and this statement does not rest in any degree upon the testimony of the president or that given by or in behalf of the claimants, but upon the reports of the proper officials of the Government of Salvador, *viz*, its inspector-general, its secretary of the treasury, and its secretary of public works, who all report the completion of the enterprise in accordance with the contract, and a full compliance with their obligations in that regard by the grantees of the concession. . . .

It is of course obvious that the Salvador Government should be estopped from going behind those reports of its own officers on the subject and from attacking their correctness without supplementary evidence tending to show that such reports were induced by mistake or were procured by fraud or undue influence. No evidence of this kind is introduced. But were it otherwise, after the most careful and painstaking consideration of the evidence we are unable to discover anything in the record having any proper tendency to show any substantial or material failure of the company in this regard. . . .

From the beginning of 1896 to the autumn of 1898 it is evident to us, from the entire record, that the volume of business which came to this port after it was equipped and opened by El Triunfo Company was even larger than anyone, the most sanguine of the investors and believers in the profitable future of the enterprise, had anticipated. . . .

Naturally no profit was shown in the years 1895, 1896, and 1897, but the tendency to the meeting of both ends was certain from the beginning and increased with added momentum, demonstrating the future greatness of the enterprise, until, from the beginning of the year 1898, a steady balance of net profits was shown as long as the company operated, which was half the year, aggregating at the end of that time, according to the testimony introduced on behalf of Salvador by that Government's official accountant, the sum of $17,000 over and above all losses and

expenses of every kind, and according to the testimony introduced in behalf of the Salvador Commercial Company a much larger amount.

There can be no doubt that the record proves to a demonstration that the enterprise, which may properly have been considered an experiment up to the beginning of 1898, although it had shown an improving financial condition from the beginning of its business, was an assured financial success, equaling if not exceeding the most sanguine expectations of its promotors by this showing of profits on the steadily increasing business at the close of the first half of that year. A careful examination of the voluminous evidence in the case shows that from March 1, 1895, to the close of the first half of 1898 the percentage of gains on expenses and losses regularly increased at the rate of about 33⅓ per cent per annum.

It is clear to our minds that as soon as the success of the enterprise was so demonstrated, and its future as an exceptionally paying enterprise was assured, an intrigue commenced within the company, whose object was to oust the management and control the American interests and to wrest the concession from their hands and to appropriate it and the entire investment of the American shareholders for the benefit of the conspirators. There can be no other reasonable explanation of the events that now rapidly followed the stage of its affairs where the showing of profits and the percentage of increase promised such large returns for the future.

At the annual meeting of the shareholders, held on June 10, 1898, a full board of directors was elected, including Burrell and Ellis and Simon Sol, who had been one of the competitors for the concession as against the Burrell interests when it was granted in 1894. On the same day the board of directors met and organized, reelecting Burrell president, Sol as vice-president, and Ellis as treasurer. At the next general meeting of the shareholders, held on July 31, 1898, one of the Salvadorean directors resigned his office as director and secretary, and Luis Lopez was elected to fill the vacancy.

It may be of significance in passing that this is the same Luis Lopez who, joining with Sol, was a competitor for the franchise as aforesaid as against the American or Burrell party in 1894. At the meeting of directors held on this same day this same Luis Lopez was appointed secretary of the company.

In September, 1898, while the president of the company was at the city of San Salvador on its business, Sol assumed the office of president by clear usurpation and without any authority whatever, and without notice to Burrell or Ellis assumed to hold a meeting of directors at his own home in Santiago de Maria, at which the only attendants besides himself were the said Lopez and one Cochella, and then and there passed a resolution removing Burrell from the position of president and putting

himself in his place, and removing J. H. Ellis from the position of treasurer and putting Cochella in his place; so that the three, Sol, Lopez, and Cochella, the only attendants of the said alleged meeting, became by their own act the president, secretary, and treasurer of the company. Burrell received no notice of this meeting within time to reach it, and Ellis received no notice at all. These proceedings were clearly fraudulent and void, as shown by the record.

On October 14, 1898, another so-called meeting of the board of directors was held, which was assumed to be an extraordinary or special meeting, according to the minutes. This meeting was attended by Burrell and Ellis, although they received no notice of it; but having casually heard of it, in an endeavor to protect the interests of the American investors whom they represented, presented themselves.

Motions were offered by them in proper form at this meeting, and Sol, acting as president, refused to put the motions. Without detailing further the wholly illegal character of the meeting and of its proceedings, and the falsity of its minutes, the fact may be stated that under its proceedings a petition for adjudication of the bankruptcy of the company was authorized, and almost immediately filed in the court of first instance at Santiago de Maria, under the authority of the said alleged directors. Promptly following, on October 19, five days after the so-called meeting was held, a form of adjudication of bankruptcy was made by the court, and one Meardi was appointed receiver and custodian of the property and effects of the company.

This receiver at once possessed himself of all the books, papers, vouchers, and correspondence of the company and its officers, and these were withheld from the American investors and from their representatives. From that time free access to these papers was wholly denied them until after these proceedings were pending in Washington, and even then large quantities of such papers were never produced for their inspection. Immediately following this proceeding Ellis and Burrell, the sole representatives of the American capital invested in the company, were driven from Salvador in fear of their lives. . . .

The bankruptcy proceedings were, in our opinion, the result of a fraudulent conspiracy, which successfully imposed upon the court in which the proceedings were taken. On February 12, 1899, in order to move in the only proper legal manner for the restoration of the company's rights and its rehabilitation by turning out the conspirators and installing a representative directorate to move in the matter, a meeting of the shareholders was called, to be held on February 28, to concert measures for these purposes. The call for the meeting was published in the official journal of the Republic on February 13, 1899.

On the day following the president of the Republic issued an edict closing the port of El Triunfo against all importations. Thus was the

first step for relief met, thus was the concession stricken down and practically canceled and destroyed, and thus every effort of its owners and the American shareholders to extricate it from the results of the fraudulent manipulation of the conspiracy was paralyzed.

The Salvador Commercial Company presented to the Government its solemn protest against this decree. Every effort was made by the representatives of the American shareholders to obtain its revocation. All were in vain, and on May 13 the executive granted a concession to others, citizens of Salvador, of everything that had been covered by the franchise and concession of October 6, 1894. The owners of the American interests presented their solemn protest to the executive against this grant, but no attention was paid to it or to them.

Then followed the appeal of the American citizens interested to their Government for its intervention for their protection and for reclamation.

In view of this history it need hardly be said that the evidence discloses that at the time the proceedings in bankruptcy were taken by the false and fraudulent representatives of this company no creditor had complained and no creditor had a just cause of complaint against it for nonpayment of its debts. On the contrary, its complete financial success and the certainty of its prosperous future had been but then completely assured.

It is claimed that the United States can not in this case make reclamation for its nationals, the shareholders in El Triunfo Company who had thus been despoiled, for the reason that such citizens as so invested their money in the Republic of Salvador must abide by the laws of that country, and seek their remedy, if any they have, in the courts of Salvador; and, moreover, that before reclamation can be successfully urged against Salvador in their behalf it must be shown that such citizens of the United States, having appealed to the courts of the Republic, have been denied justice by those courts.

The general proposition of international law as thus stated is not denied.

If the Government of Salvador had not intervened to destroy the franchise and concession of El Triunfo Company, and thus despoiled the American shareholders of their interests in that enterprise, an appeal might have been, as it was evidently intended to be, made to the courts of Salvador for relief from the bankruptcy proceedings. The first step to that end would be the turning out of the conspiring directors and the installment of a proper directory by the supreme authority of the corporation, the shareholders' meeting.

But by the executive decrees, rather than by the bankruptcy proceedings, the property rights of the American citizens involved were irrevocably destroyed. . . .

It is not the denial of justice by the courts alone which may form the basis for reclamation against a nation, according to the rules of international law.

"There can be no doubt"—says Halleck—"that a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity."

The law enacted by the Congress of Salvador in relation to foreigners provides (art. 39):

"Only in case of the denial of justice, or of a voluntary delay of its administration, can foreigners appeal to the diplomatic forum, but only after having exhausted in vain the ordinary remedies provided by the laws of the Republic."

It is apparent in this case that an appeal to the courts for relief from the bankruptcy would have been in vain after the acts of the executive had destroyed the franchise, and that such a proceeding would have been a vain thing is the sufficient answer to the argument based upon this law of Salvador.

What would have profited these despoiled American citizens if they had successfully appealed to the courts for the setting aside of the bankruptcy proceedings, after the concession was destroyed by the closing of the port of El Triunfo and the grant of the franchise to strangers?

Said Mr. Fish to minister Foster:

"Justice may as much be denied when it would be absurd to seek it by judicial process as if denied after being so sought."

Again, this is not a case of the despoliation of an American citizen by a private citizen of Salvador, on which, on appeal to the courts of Salvador, justice has been denied the American national, nor is it a case where the rules applying to that class of reclamations, so numerous in international controversies, have to do. This is a case where the parties are the American nationals and the Government of Salvador itself as a party to the contract; and in this case, in dealing with the other party to the contract, the Government of Salvador is charged with having violated its promises and agreements by destroying what it agreed to give, what it did give, and what it was solemnly bound to protect.

Some one of the most respected authorities in international law, Lewis Cass, has laid down the undoubted rule and its exception, as broad as the rule, when he says that—

"When citizens of the United States go to a foreign country, they go with an implied understanding that they are to obey its laws and submit themselves in good faith to its established tribunals. When they do business with its citizens, or make private contracts there, it is not to be expected that either their own or the foreign government is

to be made a party to this business or these contracts, or will undertake to determine any dispute to which they give rise. . . .

"The case is widely different when the foreign government becomes itself a party to important contracts, and then not only fails to fulfill them, but capriciously annuls them, to the great loss of those who have invested their time, labor, and capital in their reliance upon its good faith and justice." [Wharton's Digest, §230.]

In any case, by the rule of natural justice obtaining universally throughout the world wherever a legal system exists, the obligation of parties to a contract to appeal for judicial relief is reciprocal. If the Republic of Salvador, a party to the contract which involved the franchise to El Triunfo Company, had just grounds for complaint that under its organic law the grantees had, by misuser or nonuser of the franchise granted, brought upon themselves the penalty of forfeiture of their rights under it, then the course of that Government should have been to have itself appealed to the courts against the company and there, by the due process of judicial proceedings, involving notice, full opportunity to be heard, consideration, and solemn judgment, have invoked and secured the remedy sought.

It is abhorrent to the sense of justice to say that one party to a contract, whether such party be a private individual, a monarch, or a government of any kind, may arbitrarily, without hearing and without impartial procedure of any sort, arrogate the right to condemn the other party to the contract, to pass judgment upon him and his acts, and to impose upon him the extreme penalty of forfeiture of all his rights under it, including his property and his investment of capital made on the faith of that contract.

Before the arbitrament of natural justice all parties to a contract, as to their reciprocal rights and their reciprocal remedies, are of equal dignity and are equally entitled to invoke for their redress and for their defense the hearing and the judgment of an impartial and disinterested tribunal.

It follows that the Salvador Commercial Company and the other nationals of the United States who were shareholders in El Triunfo Company, as hereinbefore named, are entitled to compensation for the result of the destruction of the concession and for the appropriation of such property as belonged to that company, excepting such property as was accumulated and constructed under the terms of the concession, to be vested in and owned by the Republic, to the extent of the interests of such American citizens in said concession and such property. . . .

We have not discussed the question of the right of the United States under international law to make reclamation for these shareholders in El Triunfo Company, a domestic corporation of Salvador, for the reason that the question of such right is fully settled by the conclusions reached

in the frequently cited and well-understood Delagoa Bay Railway Arbitration.[64]

The particulars and items of the damages found are definitely stated in the formal award and its schedule this day signed.[65]

THE UNITED STATES OF AMERICA ON BEHALF OF NORTH AMERICAN DREDGING COMPANY OF TEXAS, CLAIMANT, v. THE UNITED MEXICAN STATES

Mexico and the United States. General Claims Commission. 1926.

Opinions of Commissioners under the Convention Concluded September 8, 1923, between the United States and Mexico, page 21.

[The following opinion was rendered by C. van Vollenhoven, Presiding Commissioner, and G. Fernández Macgregor, Commissioner.]

This case is before this Commission on a motion of the Mexican Agent to dismiss. It is put forward by the United States of America on behalf of North American Dredging Company of Texas, an American corporation, for the recovery of the sum of $233,523.30 with interest thereon, the amount of losses and damages alleged to have been suffered by claimant for breaches of a contract for dredging at the port of Salina Cruz, which contract was entered into between the claimant and the Government of Mexico November 23, 1912. The contract was signed at Mexico City. The Government of Mexico was a party to it. It had for its subject matter services to be rendered by the claimant in Mexico. Payment therefor was to be made in Mexico. Article 18, incorporated by Mexico as an indispensable provision, not separable from the other provisions of the contract, was subscribed to by the claimant for the purpose of securing the award of the contract. Its translation by the Mexican Agent reads as follows:

"The contractor and all persons who, as employees or in any other capacity, may be engaged in the execution of the work under this contract either directly or indirectly, shall be considered as Mexicans in all matters, within the Republic of Mexico, concerning the execution of such work and the fulfillment of this contract. They shall not claim, nor shall they have, with regard to the interests and the business connected with this contract, any other rights or means to enforce the same than those granted by the laws of the Republic to Mexicans, nor shall they enjoy any other rights than those established in favor of Mexicans. They are consequently deprived of any rights as aliens, and

[64] MOORE, Int. Arb., II, 1865, U. S. For. Rel. (1900) 903, 845.

[65] See BORCHARD, Diplomatic Protection, 281; EAGLETON, Responsibility of States, 157; MOORE, Dig. Int. L., VI, 705; MOORE, Int. Arb., IV, 3425.

under no conditions shall the intervention of foreign diplomatic agents be permitted, in any matter related to this contract."

1. The jurisdiction of the Commission is challenged in this case on the grounds (first) that claims based on an alleged nonperformance of contract obligations are outside the jurisdiction of this Commission and (second) that a contract containing the so-called Calvo clause deprives the party subscribing said clause of the right to submit any claims connected with his contract to an international commission.

2. The Commission, in its decision this day rendered on the Mexican motion to dismiss the Illinois Central Railroad Company case, Docket No. 432 [Mex. U. S. Gen. Cl. Com'n., p. 15], has stated the reasons why it deems contractual claims to fall within its jurisdiction. It is superfluous to repeat them. The first ground of the motion is therefore rejected.

3. The Calvo clause. The Commission is fully sensible of the importance of any judicial decision either sustaining in whole or in part, or rejecting in whole or in part, or construing the so-called "Calvo clause" in contracts between nations and aliens. It appreciates the legitimate desire on the part of nations to deal with persons and property within their respective jurisdictions according to their own laws and to apply remedies provided by their own authorities and tribunals, which laws and remedies in no wise restrict or limit their international obligations, or restrict or limit or in any wise impinge upon the correlative rights of other nations protected under rules of international law. The problem presented in this case is whether such legitimate desire may be accomplished through appropriate and carefully phrased contracts; what form such a contract may take; what is its scope and its limitations; and does clause 18 of the contract involved in this case fall within the field where the parties are free to contract without violating any rule of international law?

4. The Commission does not feel impressed by arguments either in favor of or in opposition to the Calvo clause, in so far as these arguments go to extremes. The Calvo clause is neither upheld by all outstanding international authorities and by the soundest among international awards nor is it universally rejected. The Calvo clause in a specific contract is neither a clause which must be sustained to its full length because of its contractual nature nor can it be discretionarily separated from the rest of the contract as if it were just an accidental postscript. The problem is not solved by saying yes or no; the affirmative answer exposing the rights of foreigners to undeniable dangers, the negative answer leaving to the nations involved no alternative except that of exclusion of foreigners from business. The present stage of international law imposes upon every international tribunal the solemn duty of seeking for a proper and adequate balance between the sovereign right of national

jurisdiction, on the one hand, and the sovereign right of national protection of citizens on the other. No international tribunal should or may evade the task of finding such limitations of both rights as will render them compatible within the general rules and principles of international law. By merely ignoring world-wide abuses either of the right of national protection or of the right of national jurisdiction no solution compatible with the requirements of modern international law can be reached.

5. At the very outset the Commisson rejects as unsound a presentation of the problem according to which if article 18 of the present contract were upheld Mexico or any other nation might lawfully bind all foreigners by contract to relinquish all rights of protection by their governments. It is quite possible to recognize as valid some forms of waiving the right of foreign protection without thereby recognizing as valid and lawful every form of doing so.

6. The Commission also denies that the rules of international public law apply only to nations and that individuals can not under any circumstances have a personal standing under it. As illustrating the antiquated character of this thesis it may suffice to point out that in article 4 of the unratified International Prize Court Convention adopted at The Hague in 1907 and signed by both the United States and Mexico and by 29 other nations this conception, so far as ever held, was repudiated.[66]

7. It is well known how largely the increase of civilization, intercourse, and interdependence as between nations has influenced and moderated the exaggerated conception of national sovereignty. As civilization has progressed individualism has increased; and so has the right of the individual citizen to decide upon the ties between himself and his native country. There was a time when governments and not individuals decided if a man was allowed to change his nationality or his residence, and when even if he had changed either of them his government sought to lay burdens on him for having done so. To acknowledge that under the existing laws of progressive, enlightened civilization a person may voluntarily expatriate himself but that short of expatriation he may not by contract, in what he conceives to be his own interest, to any extent loosen the ties which bind him to his country is neither consistent with the facts of modern international intercourse nor with corresponding developments in the field of international law and does not tend to promote good will among nations.

8. Lawfulness of the Calvo clause. The contested provision, in this case, is part of a contract and must be upheld unless it be repugnant to a recognized rule of international law. What must be established is not that the Calvo clause is universally accepted or universally recognized, but that there exists a generally accepted rule of international law condemning the Calvo clause and denying to an individual the right

[66] *Cf.* BORCHARD, Diplomatic Protection, 16, *supra*, 78.

to relinquish to any extent, large or small, and under any circumstances or conditions, the protection of the government to which he owes allegiance. Only in case a provision of this or any similar tendency were established could a parallel be drawn between the illegality of the Calvo clause in the present contract and the illegality of a similar clause in the Arkansas contract declared void in 1922 by the Supreme Court of the United States (257 U. S. 529) because of its repugnance to American statute provisions. It is as little doubtful nowadays as it was in the day of the Geneva Arbitration that international law is paramount to decrees of nations and to municipal law; but the task before this Commission precisely is to ascertain whether international law really contains a rule prohibiting contract provisions attempting to accomplish the purpose of the Calvo clause.

9. The commission does not hesitate to declare that there exists no international rule prohibiting the sovereign right of a nation to protect its citizens abroad from being subject to any limitation whatsoever under any circumstances. The right of protection has been limited by treaties between nations in provisions related to the Calvo clause. While it is true that Latin-American countries—which are important members of the family of nations and which have played for many years an important and honorable part in the development of international law—are parties to most of these treaties, still such countries as France, Germany, Great Britain, Sweden, Norway, and Belgium, and in one case at least even the United States of America (Treaty between the United States and Peru dated September 6, 1870, Volume 2, Malloy's United States Treaties, at page 1426; article 37) have been parties to treaties containing such provisions.

10. What Mexico has asked of the North American Dredging Company of Texas as a condition for awarding it the contract which it sought is, "If all of the means of enforcing your rights under this contract afforded by Mexican law, even against the Mexican Government itself, are wide open to you, as they are wide open to our own citizens, will you promise not to ignore them and not to call directly upon your own Government to intervene in your behalf in connection with any controversy, small or large, but seek redress under the laws of Mexico through the authorities and tribunals furnished by Mexico for your protection?" and the claimant, by subscribing to this contract and seeking the benefits which were to accrue to him thereunder, has answered, "I promise."

11. Under the rules of international law may an alien lawfully make such a promise? The Commission holds that he may, but at the same time holds that he can not deprive the government of his nation of its undoubted right of applying international remedies to violations of international law committed to his damage. Such government fre-

quently has a larger interest in maintaining the principles of international law than in recovering damage for one of its citizens in a particular case, and manifestly such citizen can not by contract tie in this respect the hands of his government. But while any attempt to so bind his government is void, the Commission has not found any generally recognized rule of positive international law which would give to his government the right to intervene to strike down a lawful contract, in the terms set forth in the preceding paragraph 10, entered into by its citizen. The obvious purpose of such a contract is to prevent abuses of the right to protection, not to destroy the right itself—abuses which are intolerable to any self-respecting nation and are prolific breeders of international friction. The purpose of such a contract is to draw a reasonable and practical line between Mexico's sovereign right of jurisdiction within its own territory, on the one hand, and the sovereign right of protection of the government of an alien whose person or property is within such territory, on the other hand. Unless such line is drawn and if these two coexisting rights are permitted constantly to overlap, continual friction is inevitable.

12. It being impossible to prove the illegality of the said provision, under the limitations indicated, by adducing generally recognized rules of positive international law, it apparently can only be contested by invoking its incongruity to the law of nature (natural rights) and its inconsistency with inalienable, indestructible, unprescriptible, uncurtailable rights of nations. The law of nature may have been helpful, some three centuries ago, to build up a new law of nations, and the conception of inalienable rights of men and nations may have exercised a salutary influence, some one hundred and fifty years ago, on the development of modern democracy on both sides of the ocean; but they have failed as a durable foundation of either municipal or international law and can not be used in the present day as substitutes for positive municipal law, on the one hand, and for positive international law, as recognized by nations and governments through their acts and statements, on the other hand. Inalienable rights have been the cornerstones of policies like those of the Holy Alliance and of Lord Palmerston; instead of bringing to the world the benefit of mutual understanding, they are to weak or less fortunate nations an unrestrained menace.

13. Interpretation of the Calvo clause in the present contract. What is the true meaning of article 18 of the present contract? It is essential to state that the closing words of the article should be combined so as to read: "being deprived, in consequence, of any rights as aliens in any matter connected with this contract, and without the intervention of foreign diplomatic agents being in any case permissible in any matter connected with this contract." Both the commas and the phrasing show that the words "in any matter connected with this contract" are a

limitation on either of the two statements contained in the closing words of the article.

14. Reading this article as a whole, it is evident that its purpose was to bind the claimant to be governed by the laws of Mexico and to use the remedies existing under such laws. The closing words "in any matter connected with this contract" must be read in connection with the preceding phrase "in everything connected with the execution of such work and the fulfillment of this contract" and also in connection with the phrase "regarding the interests or business connected with this contract". In other words, in executing the contract, in fulfilling the contract, or in putting forth any claim "regarding the interests or business connected with this contract", the claimant should be governed by those laws and remedies which Mexico had provided for the protection of its own citizens. But this provision did not, and could not, deprive the claimant of his American citizenship and all that that implies. It did not take from him his undoubted right to apply to his own Government for protection if his resort to the Mexican tribunals or other authorities available to him resulted in a denial or delay of justice as that term is used in international law. In such a case the claimant's complaint would be not that his contract was violated but that he had been denied justice. The basis of his appeal would be not a construction of his contract, save perchance in an incidental way, but rather an internationally illegal act.

15. What, therefore, are the rights which claimant waived and those which he did not waive in subscribing to article 18 of the contract? (a) He waived his right to conduct himself as if no competent authorities existed in Mexico; as if he were engaged in fulfilling a contract in an inferior country subject to a system of capitulations; and as if the only real remedies available to him in the fulfillment, construction, and enforcement of this contract were international remedies. All these he waived and had a right to waive. (b) He did not waive any right which he possessed as an American citizen as to any matter not connected with the fulfillment, execution, or enforcement of this contract as such. (c) He did not waive his undoubted right as an American citizen to apply to his Government for protection against the violation of international law (internationally illegal acts) whether growing out of this contract or out of other situations. (d) He did not and could not affect the right of his Government to extend to him its protection in general or to extend to him its protection against breaches of international law. But he did frankly and unreservedly agree that in consideration of the Government of Mexico awarding him this contract, he did not need and would not invoke or accept the assistance of his Government with respect to the fulfillment and interpretation of his contract and the execution of his work thereunder. The conception that a citizen in doing so impinges upon

a sovereign, inalienable, unlimited right of his government belongs to those ages and countries which prohibited the giving up of his citizenship by a citizen or allowed him to relinquish it only with the special permission of his government.

16. It is quite true that this construction of article 18 of the contract does not effect complete equality between the foreigner subscribing the contract on the one hand and Mexicans on the other hand. Apart from the fact that equality of legal status between citizens and foreigners is by no means a requisite of international law—in some respects the citizen has greater rights and larger duties, in other respects the foreigner has—article 18 only purposes equality between the foreigner and Mexicans with respect to the execution, fulfillment, and interpretation of this contract and such limited equality is properly obtained.

17. The Commission ventures to suggest that it would strengthen and stimulate friendly relations between nations if in the future such important clauses in contracts as article 18 in the contract in question were couched in such clear, simple, and straightforward language, frankly expressing its purpose with all necessary limitations and restraints as would preclude the possibility of misinterpretation and render it insusceptible of such extreme construction as sought to be put upon article 18 in this instance, which if adopted would result in striking it down as illegal.

18. The Calvo clause and the claimant. If it were necessary to demonstrate how legitimate are the fears of certain nations with respect to abuses of the right of protection and how seriously the sovereignty of those nations within their own boundaries would be impaired if some extreme conceptions of this right were recognized and enforced, the present case would furnish an illuminating example. The claimant, after having solemnly promised in writing that it would not ignore the local laws, remedies, and authorities, behaved from the very beginning as if article 18 of its contract had no existence in fact. It used the article to procure the contract, but this was the extent of its use. It has never sought any redress by application to the local authorities and remedies which article 18 liberally granted it and which, according to Mexican law, are available to it, even against the Government, without restrictions, both in matter of civil and of public law. It has gone so far as to declare itself freed from its contract obligations by its *ipse dixit* instead of having resort to the local tribunals to construe its contract and its rights thereunder. And it has gone so far as to declare that it was not bound by article 7 of the contract and to forcibly remove a dredge to which, under that article, the Government of Mexico considered itself entitled as security for the proper fulfillment of its contract with claimant. While its behavior during the spring and summer of 1914, the latter part of the Huerta administration, may be in part explained by the unhappy

conditions of friction then existing between the two countries in connection with the military occupation of Veracruz by the United States, this explanation can not be extended from the year 1917 to the date of the filing of its claim before this Commission, during all of which time it has ignored the open doors of Mexican tribunals. The record before this Commission strongly suggests that the claimant used article 18 to procure the contract with no intention of ever observing its provisions.

19. The Calvo clause and the Claims Convention. Claims accruing prior to the signing of the Treaty must, in order to fall within the jurisdiction of this Commission under Article I of the Treaty, either have been "presented" before September 8, 1923, by a citizen of one of the Nations parties to the agreement "to (his) Government for its interposition with the other", or, after September 8, 1923, "such claims"—*i.e.*, claims presented for interposition—may be filed by either Government with this Commission. Two things are therefore essential, (1) the presentation by the citizen of a claim to his Government and (2) the espousal of such claim by that Government. But it is urged that when a Government espouses and presents a claim here, the private interest in the claim is merged in the Nation in the sense that the private interest is entirely eliminated and the claim is a national claim, and that therefore this Commission can not look behind the act of the Government espousing it to discover the private interest therein or to ascertain whether or not the private claimant has presented or may rightfully present the claim to his Government for interposition. This view is rejected by the Commission for the reasons set forth in the second paragraph of the opinion in the Parker claim (Docket No. 127) [Mex. U. S. Gen. Cl. Com'n., p. 35], this day decided by this Commission, and need not be repeated here.

20. Under article 18 of the contract declared upon the present claimant is precluded from presenting to its Government any claim relative to the interpretation or fulfillment of this contract. If it had a claim for denial of justice, for delay of justice or gross injustice, or for any other violation of international law committed by Mexico to its damage, it might have presented such a claim to its Government, which in turn could have espoused it and presented it here. Although the claim as presented falls within the first clause of Article I of the Treaty, describing claims coming within this Commission's jurisdiction, it is not a claim that may be rightfully presented by the claimant to its Government for espousal and hence is not cognizable here, pursuant to the latter part of paragraph 1 of the same Article I.

21. It is urged that the claim may be presented by claimant to its Government for espousal in view of the provision of Article V of the Treaty, to the effect "that no claim shall be disallowed or rejected by the Commission by the application of the general principle of inter-

national law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim." This provision is limited to the application of a general principle of international law to claims that may be presented to the Commission falling within the terms of Article I of the Treaty, and if under the terms of Article I the private claimant can not rightfully present its claim to its Government and the claim therefore can not become cognizable here, Article V does not apply to it, nor can it render the claim cognizable, nor does it entitle either Government to set aside an express valid contract between one of its citizens and the other Government.

22. Extent of the present interpretation of the Calvo clause. Manifestly it is impossible for this Commission to announce an all-embracing formula to determine the validity or invalidity of all clauses partaking of the nature of the Calvo clause, which may be found in contracts, decrees, statutes, or constitutions, and under widely varying conditions. Whenever such a provision is so phrased as to seek to preclude a Government from intervening, diplomatically or otherwise, to protect its citizen whose rights of any nature have been invaded by another Government in violation of the rules and principles of international law, the Commission will have no hesitation in pronouncing the provision void. Nor does this decision in any way apply to claims not based on express contract provisions in writing and signed by the claimant or by one through whom the claimant has deraigned title to the particular claim. Nor will any provision in any constitution, statute, law, or decree, whatever its form, to which the claimant has not in some form expressly subscribed in writing, howsoever it may operate or affect his claim, preclude him from presenting his claim to his Government or the Government from espousing it and presenting it to this Commission for decision under the terms of the Treaty.

23. Even so, each case involving application of a valid clause partaking of the nature of the Calvo clause will be considered and decided on its merits. Where a claim is based on an alleged violation of any rule or principle of international law, the Commission will take jurisdiction notwithstanding the existence of such a clause in a contract subscribed by such claimant. But where a claimant has expressly agreed in writing, attested by his signature, that in all matters pertaining to the execution, fulfillment, and interpretation of the contract he will have resort to local tribunals, remedies, and authorities, and then wilfully ignores them by applying in such matters to his Government, he will be held bound by his contract and the Commission will not take jurisdiction of such claim.

24. Summary of the considerations on the Calvo clause. (a) The Treaty between the two Governments under which this Commission is constituted requires that a claim accruing before September 8, 1923, to

fall within its jurisdiction must be that of a citizen of one Government against the other Government and must not only be espoused by the first Government and put forward by it before this Commission but, as a condition precedent to such espousal, must have been presented to it for its interposition by the private claimant.

(b) The question then arises, Has the private claimant in this case put itself in a position where it has the right to present its claim to the Government of the United States for its interposition? The answer to this question depends upon the construction to be given to article 18 of the contract on which the claim rests.

(c) In article 18 of the contract the claimant expressly agreed that in all matters connected with the execution of the work covered by the contract and the fulfillment of its contract obligations and the enforcement of its contract rights it would be bound and governed by the laws of Mexico administered by the authorities and courts of Mexico and would not invoke or accept the assistance of his Government. Further than this it did not bind itself. Under the rules of international law the claimant (as well as the Government of Mexico) was without power to agree, and did not in fact agree, that the claimant would not request the Government of the United States, of which it was a citizen, to intervene in its behalf in the event of internationally illegal acts done to the claimant by the Mexican authorities.

(d) The contract declared upon, which was sought by claimant, would not have been awarded it without incorporating the substance of article 18 therein. The claimant does not pretend that it has made any attempt to comply with the terms of that article, which as here construed is binding on it. Therefore the claimant has not put itself in a position where it may rightfully present this claim to the Government of the United States for its interposition.

(e) While it is true that under Article V of the Treaty the two Governments have agreed "that no claim shall be disallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim,". this provision is limited to claims falling under Article I and therefore rightfully presented by the claimant.

(f) If it were necessary to so construe article 18 of the contract as to bind the claimant not to apply to its Government to intervene diplomatically or otherwise in the event of a denial of justice to the claimant growing out of the contract declared upon or out of any other situation, then this Commission would have no hesitation in holding such a clause void *ab initio* and not binding on the claimant.

(g) The foregoing pertains to the power of the claimant to bind itself by contract. It is clear that the claimant could not under any

circumstances bind its Government with respect to remedies for violations of international law.

(h) As the claimant voluntarily entered into a legal contract binding itself not to call as to this contract upon its Government to intervene in its behalf, and as all of its claim relates to this contract, and as therefore it can not present its claim to its Government for interposition or espousal before this Commission, the second ground of the motion to dismiss is sustained.

25. Decision. The Commission decides that the case as presented is not within its jurisdiction and the motion of the Mexican Agent to dismiss it is sustained and the case is hereby dismissed without prejudice to the claimant to pursue his remedies elsewhere or to seek remedies before this Commission for claims arising after the signing of the Treaty of September 8, 1923.[67]

[The concurring opinion of Edwin B. Parker, Commissioner, is omitted.]

[67] See CALVO, 5th ed., I, §§204–205. And see BORCHARD, Diplomatic Protection, 792; EAGLETON, Responsibility of States, 168; RALSTON, Int. Tribunals, 2d ed., 58

On the Drago doctrine, see U. S. For. Rel. (1903) 1; BORCHARD, *op. cit.*, 308; DRAGO, "State Loans in their Relation to International Policy," 1 Am. Jour. Int. L. 692, 14 Rev. Gén. de Dr. Int. Pub. 251; HERSHEY, "Calvo and Drago Doctrines," 1 Am. Jour. Int. L. 26; MOULIN, Le Doctrine de Drago. And see Hague Convention II, 1907, Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, 36 U. S. Stat. L. 2241; HIGGINS, Hague Peace Conferences, 180; SCOTT, "Hague Convention Restricting the Use of Force to Recover on Contract Claims," 2 Am. Jour. Int. L. 78.

On international responsibility, in general, see ANZILOTTI, Teoria Generale della Responsibilità dello Stato nel Diritto Internazionale; ANZILOTTI, "La responsabilité internationale des États à raison des dommages soufferts par des étrangers," 13 Rev. Gén. de Dr. Int. Pub. 5, 285; BORCHARD, Diplomatic Protection; DE VISSCHER, "La responsabilité des États," Bibliotheca Visseriana, II, 87; EAGLETON, Responsibility of States; FAUCHILLE, I, Pt. I, 513; JESS, Politische Handlungen Privater gegen das Ausland und das Völkerrecht; OPPENHEIM, 4th ed., I, §§148–167; RALSTON, Int. Tribunals, 326; RUEGGER und BURCKHARDT, Die völkerrechtliche Verantwortlichkeit des Staates für die auf seinem Gebiete begangenen Verbrechen; SCHOEN, Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen, 10 Z. f. V., Ergänzungsheft 2; STRUPP, "Das völkerrechtliche Delikt," in Stier Somlo, III, 1; League of Nations, Committee of Experts on Codification, Questionnaire on Responsibility of States, L. of N. Doc., C. 46. M. 23, 1926, V, 20 Am. Jour. Int. L. Spec. Suppl. 176; 23 Am. Jour. Int. L. Suppl., Special Number, 131.

CHAPTER IX

SUCCESSION IN THE LAW OF NATIONS

SECTION 1. SUCCESSION OF GOVERNMENTS

The Sapphire

United States. Supreme Court. 1871.

11 *Wallace's Reports* 164.

This was an appeal from the Circuit Court of the United States for the District of California.

The case was one of collision between the American ship Sapphire and the French transport Euryale, which took place in the harbor of San Francisco on the morning of December 22, 1867, by which the Euryale was considerably damaged. A libel was filed in the District Court two days afterwards, in the name of the Emperor Napoleon III, then Emperor of the French, as owner of the Euryale, against the Sapphire. The claimants filed an answer, alleging, among other things, that the damage was occasioned by the fault of the Euryale. Depositions were taken, and the court decreed in favor of the libellant, and awarded him $15,000, the total amount claimed. The claimants appealed to the Circuit Court, which affirmed the decree. They then, in July, 1869, appealed to this court. In the summer of 1870, Napoleon III was deposed. The case came on to be argued here February 16, 1871. . . .

[Part of the statement of the case, the arguments of counsel, and part of the opinion are omitted.]

Mr. Justice Bradley delivered the opinion of the court. . . .

[In an omitted part of the opinion the court considered and sustained the right of the Emperor Napoleon to bring suit in a United States court.]

The next question is, whether the suit has become abated by the recent deposition of the Emperor Napoleon. We think it has not. The reigning sovereign represents the national sovereignty, and that sovereignty is continuous and perpetual, residing in the proper successors of the sovereign for the time being. Napoleon was the owner of the Euryale, not as an individual, but as sovereign of France. This is substantially averred in the libel. On his deposition the sovereignty does not change, but merely the person or persons in whom it resides.

The foreign state is the true and real owner of its public vessels of war. The reigning Emperor, or National Assembly, or other actual person or party in power, is but the agent and representative of the national sovereignty. A change in such representative works no change in the national sovereignty or its rights. The next successor recognized by our government is competent to carry on a suit already commenced and receive the fruits of it. A deed to or treaty with a sovereign as such enures to his successors in the government of the country. If a substitution of names is necessary or proper it is a formal matter, and can be made by the court under its general power to preserve due symmetry in its forms of proceeding. No allegation has been made that any change in the real and substantial ownership of the Euryale has occurred by the recent devolution of the sovereign power. The vessel has always belonged and still belongs to the French nation. . . .

[In an omitted part of the opinion the court considered the merits, concluding that both vessels were at fault and that damages should have been divided equally.]

Decree of the Circuit Court reversed, and the cause remitted to that court with directions to enter a decree

In conformity with this opinion.

LEHIGH VALLEY R. CO. v. STATE OF RUSSIA

United States. Circuit Court of Appeals, Second Circuit. 1927.

21 *Federal Reporter*, 2*d Series*, 396.

In Error to the District Court of the United States for the Southern District of New York. . . .

[The names of counsel are omitted. Only so much of the opinion is reproduced as deals with questions of recognition, governmental succession, and state continuity.]

Before Manton, L. Hand, and Swan, Circuit Judges.

MANTON, CIRCUIT JUDGE: The defendant in error [State of Russia] has recovered a judgment against the plaintiff in error [Lehigh Valley R. Co.] for loss of explosives and ammunition while in transit from the United States to Russia and while in its possession as carrier in its freight yards at Jersey City, N. J. The loss is due to a fire and explosion occurring July 30, 1916, and it is admitted that the fire was incendiary in its origin. The action by the defendant in error was instituted by the Russian government, and after the deposition of the then government of Russia, pursuant to an order granted, the action was continued in the name of the state of Russia.[1] . . .

[1] Russian Government v. Lehigh Valley R. Co., 293 Fed. 135.

At the outset the railroad company attacks the right of the defendant in error to maintain the suit, and to do so in the courts of the United States. The right to recover damages for breach of this carrier's obligation became the property of the state of Russia on July 30, 1916, when the loss occurred. The government was then the Russian Imperial Government. The right of a foreign government to sue is now well recognized. Oetjen v. Central Leather Co., 246 U. S. 297, 38 S. Ct. 309, 62 L. Ed. 726; The Sapphire, 78 U. S. (11 Wall.) 164, 20 L. Ed. 127. It is equally a settled rule of law that the foreign relations of our government are committed by the Constitution to the executive and legislative departments of our government, and what is done by such departments is not subject to judicial inquiry or decision. In re Cooper, 143 U. S. 472, 12 S. Ct. 453, 36 L. Ed. 232; Williams v. Suffolk Ins. Co., 13 Pet. 420, 10 L. Ed. 226; United States v. Palmer, 3 Wheat. 610, 4 L. Ed. 471; The Penza (D. C.) 277 F. 91. Who may be the sovereign *de jure* or *de facto* of a territory is a political question; not judicial. Oetjen v. Central Leather Co., *supra;* Jones v. United States, 137 U. S. 212, 11 S. Ct. 80, 34 L. Ed. 691. The state is a community or assemblage of men, and the government the political agency through which it acts in international relations. State of Texas v. White, 7 Wall. 700, 19 L. Ed. 227; Cherokee Nation v. Georgia, 5 Pet. 52, 8 L. Ed. 25; Foulke, International Law, vol. 1, pp. 62, 82, 102, 192. The foreign state is the true or real owner of its property, and the agency the representative of the national sovereignty. The Sapphire, *supra;* The Rogdai (D. C.) 278 F. 294.

On July 5, 1917, Mr. Boris Bakhemeteff was recognized by our State Department as the accredited representative of the Russian government —the provisional Russian Government—as successor to the Imperial Russian Government. He continued as such until July 30, 1922. At that date he retired, and the custody of the property of the Russian government, for which Bakhemeteff was responsible, was recognized by the State Department to vest in Mr. Ughet, the financial attaché of the Russian embassy. The Soviet government, which later secured control of the Russian government, was never recognized by our State Department, and ever since the diplomatic status with our government was never altered by the termination of the ambassador's duties. Therefore the provisional Russian Government is the last that has been recognized, and after its ambassador retired its property was considered by the State Department to vest in its financial attaché. Prior to his retirement, and while the accredited ambassador, Mr. Bakhemeteff authorized the suits here considered, which were commenced July 23, 1918.

Various preliminary attacks by motions to dismiss the complaint have been made, and the District Court has in each instance properly

denied them, recognizing the principles of law referred to and their application to the fact that there has been no change recognized in the government or agency for Russia by the political branches of our government. Mr. Ughet, by the State Department's determination, is entitled to the custody in the United States of the property of Russia, and as part of that duty he was authorized to continue the suits for the state of Russia. This duty became obvious. It became important to avoid efforts to destroy the right of action as a basis of keeping its property, when motions to dismiss were made and delays occurred which would give rise to the bar of limitation to sue. The question of Mr. Ughet's power under his agency is generally important, because of the change in name of the plaintiff in the action to the state of Russia in substitution of the Imperial Russian Government. We must judicially recognize that the state of Russia survives.

Abatement of the action or a dismissal could only be sustained by reason of the non-existence of the state, or the action of our government to no longer recognize the agency once accredited and never revoked. The action was properly started by an unquestioned agency. The attorneys and the agency thus employed were obliged to continue until some other government was recognized. It has been recognized that diplomatic agents of one state, while in another, may commence and maintain actions on behalf of their state while they are recognized as such. Republic of Mexico v. De Arangoiz, 12 N. Y. Super. Ct. 643. Proof of the agency or of the diplomat is dependent entirely upon the political fact of the recognition by the political department of the government. The courts may not independently make inquiry as to who should or should not be recognized. The argument of the plaintiff in error is directed entirely toward the court making its own investigation, in expectation that there would be some other government found, either *de facto* or *de jure*. This we may not do. Kennett v. Chambers, 14 How. 38, 14 L. Ed. 316; Agency of Canadian Car Co. v. American Can Co. (C. C. A.) 258 F. 363, 6 A. L. R. 1182; Russian Socialist Federated Republic v. Cibrario, 235 N. Y. 255, 139 N. E. 259. If it be a fact that there is a Russian Socialist Federated Republic now in charge of the government of Russia, it would bring no different result here.

Where there is a change of government, foreign states must of necessity judge for themselves whether they will continue their accustomed diplomatic relations with the prince whom they choose to regard as the legitimate sovereign. Wheaton on International Law, p. 332. It matters little whether the recognized state co-operates in it or not. Moore's Digest of International Law, vol. 1, p. 73. It is for the executive and legislative departments to say in what relations any other country stands toward it. Courts of justice cannot make the decision. Agency of Canadian Car Co. v. American Can Co., *supra;* Moore's International

Law, vol. 1, p. 63. Nor does the personal withdrawal of an ambassador affect the relations with the government. Hyde, International Law, vol. 1, p. 731; Moore's Digest of International Law, vol. 4, p. 437. And, unless the political department of our government has decided otherwise, the judiciary recognizes the condition of things with respect to another country which once existed, and is still subsisting because of no other recognition. Phillips v. Payne, 92 U. S. 130, 23 L. Ed. 649; The Ambrose Light (D. C.) 25 F. 412.

"Changes in the government or the internal policy of a state do not as a rule affect its position in international law. A monarchy may be transformed into a republic, or a republic into a monarchy; absolute principles may be substituted for constitutional, or the reverse; but, though the government changes, the nation remains, with rights and obligations unimpaired." Moore, Digest International Law, vol. 1, p. 249.

The granting or refusal of recognition has nothing to do with the recognition of the state itself. If a foreign state refuses the recognition of a change in the form of government of an old state, this latter does not thereby lose its recognition as an international person. Oppenheim, International Law, p. 120; Moore, Digest of International Law, vol. 1, p. 298. The suit did not abate by the change in the form of government in Russia; the state is perpetual, and survives the form of its government. The Sapphire, *supra.* The recognized government may carry on the suit, at least until the new government becomes accredited here by recognition.[2]

The argument that the plaintiff in error may at some future time, if the Soviet régime is recognized by our government, be compelled to pay again what it is obliged to pay now, is fallacious. It is only the acts performed in its own territory that can be validated by the retroactive effect of recognition. Acts theretofore performed outside its own territory cannot be validated by recognition. The former are illustrated in Underhill v. Hernandez, 168 U. S. 250, 18 S. Ct. 83, 42 L. Ed. 456, where the acts in question were performed in Venezuela; Oetjen v. Central Leather Co., *supra,* and Ricaud v. American Metal Co., 246 U. S. 304, 38 S. Ct. 312, 62 L. Ed. 733, where there were acts of confiscation in Mexico; and the English case of Luther v. Sagor [1921] 3 K. B. 532, acts performed in Russia. The latter are illustrated by Kennett v. Chambers, *supra;* U. S. v. Trumbull (D. C.) 48 F. 99; Agency of Canadian Car Co. v. American Can Co., *supra.*

[2] "The Soviet Republic is in international law merely a new Government in power in an old state. It stands in the same relation to the Government of the Czar as the Government of the First Republic in France stood to the Government of Louis XVI." Williams, in B. Y. B. Int. L. (1927) 45, 46. But *cf.* the new constitutions of Russia, in McBain and Rogers, 379, 385, and 120 Br. & For. S. P. 889.

Following these principles, we agree with the contention of the defendant in error that the state of Russia, as a plaintiff, may continue the prosecution through the agency vested in Mr. Ughet, and the plaintiff in error will be protected as against any possible future claims of a subsequent recognized government of Russia, if payment be made as directed in this judgment. . . .

Judgment affirmed, with costs.[3]

UNITED STATES OF AMERICA v. PRIOLEAU

Great Britain. Court of Chancery. 1866.

35 *Law Journal Reports, Chancery, New Series*, 7.

The bill in this suit was filed, by the United States of America, in their corporate capacity, against the defendants Prioleau and others, members of a firm of Fraser, Trenholm & Co., carrying on business at Liverpool, and also against certain other persons, among whom was the Mersey Docks and Harbour Board, and prayed for a decree for delivery up to the plaintiffs of certain cotton consigned to Fraser, Trenholm & Co.; for an injunction restraining the delivery of the cotton to any other person than the plaintiffs; restraining also the principal defendants from obtaining possession of or selling the cotton, and from negotiating the bills of lading thereof; and for the appointment of a receiver, with power to sell the cotton.

The facts on which the plaintiffs relied were as follows: Certain subjects of the United States had risen in rebellion and established a government under the style of the Government of the Confederate States, which government had, however, before the filing of the bill, ceased to exist. During its existence it had received as part of its public property certain monies and goods, and, among other things, a large quantity of cotton, including the cotton the subject of the present suit. This latter cotton, amounting to 1,356 bales, or thereabouts, was, by the order of the Confederate Government, shipped at Galveston, in Texas, one of the Confederate States, and taken to Havana, where it was consigned to an agent of Fraser & Co. It was there reshipped on board a ship called the Aline, and sent to England, with a view to its being sold there on behalf of the Confederate Government. The Aline sailed from Havana on the 10th of June, 1865, with the cotton on board, and she arrived at Liverpool early in July. The cotton was consigned to the defendants Fraser, Trenholm & Co., and was of the value of at least 40,000*l*. The rebellion having come to an end, the Confederate

[3] *Cf.* Union of Soviet Republics v. Belaiew, 42 T. L. R. 21; Union of Soviet Republics v. Onou, 69 S. J. & W. R. 676. *Cf.* also Claims of Royal Bank of Canada and Central Costa Rica Petroleum Co., 18 Am. Jour. Int. L. 147, *supra*, 174.

Government had been dissolved, and the persons who had constituted that government had ceded to the plaintiffs all the public property thereof, including, as the plaintiffs alleged, the cotton in question, which the plaintiffs asserted to be now their absolute property. The plaintiffs had accordingly served a notice on the defendants requiring them not to deal with the cotton without the consent of the plaintiffs.

The defendants Fraser, Trenholm & Co., however, asserted that they had a lien upon the cotton to the extent of at least 20,000*l.*, and from their evidence it appeared that an agreement, dated the 7th of July, 1864, was made between the defendant Prioleau of the one part, and one M'Rae, who was therein described as the duly authorized agent of the Confederate Government, of the other part, whereby it was (amongst other things) agreed that Prioleau should build eight steam vessels, which should as and when built be let out to hire to M'Rae, and be employed by him in the transport of cotton and other produce from the Confederate States; that Prioleau should receive on consignment all the cotton and other produce brought in the said vessels, and should sell the same according to the instructions he should receive for that purpose; that all the usual expenses incident to the sailing of the said vessels should from time to time, as the same were expended or incurred, be recouped out of the proceeds of the said consignments; that M'Rae should be entitled to direct in what manner one-half of the net proceeds should be expended or withdrawn from the hands of Prioleau, and as to the other half of such net proceeds, it should remain in the hands of Prioleau until the same should amount to the gross purchase-money of the said vessels; and that thereupon M'Rae should be entitled to purchase the same vessels, and that Prioleau should thereupon deliver them over, or so many of them as might then remain.

It appeared that Prioleau had expended 20,000*l.* in sailing the ships, in addition to the cost of building them, all of which 20,000*l.*, as well as the cost of building some of the ships, was unsatisfied; that the cotton arrived at Havana, and was delivered to the agent of Fraser & Co. there, before the surrender of General Kirby Smith's army in Texas, but after the surrender of the other Confederate armies; that some of the ships were not completed when the Confederate Government ceased to exist; and that the members of the firm of Fraser, Trenholm & Co. were Americans, with the exception of Prioleau, who was a naturalized British subject.

The case now came on, by way of motion for an injunction and receiver.

[The arguments of counsel and part of the opinion are omitted.]

Wood, V. C.—There are one or two points which, I think, are tolerably clear in this case. The first point is with reference to the right of the United States of America, at this moment, to the cotton, subject to

the agreement. I treat it first in that way. It has scarcely been disputed on the present argument, and could hardly be disputed at any future stage of the inquiry, that the right is clear and distinct, because the cotton in question is the admitted result of funds raised by a *de facto* government, exercising authority in what were called the Confederate States of America; that is to say, several of those States which, in union, formerly constituted the United States, and which now, in fact, constitute them; and that *de facto* government, exercising its powers over a considerable number of States (more than one would be quite enough), raises money—be it by voluntary contribution, or be it by taxation, is not of much importance. The defendant Prioleau, in cross-examination, admits that they exercised considerable power of taxation; and with those means, and claiming to exercise that authority, they obtained from several of the States of America funds, by which they purchased this cotton for the use of the *de facto* government. That being so, and that *de facto* government being displaced, I apprehend it is quite clear that the United States of America (that is to say, the government which has been successful in displacing the *de facto* government, and whose authority was usurped or displaced, or whatever term you may choose to apply to it), the authority being restored, stand, in reference to this cotton, in the position of those who have acquired, on behalf of the citizens of the United States, a public property; because otherwise, as has been well said, there would be nobody who could sue in respect of, or deal with, property that has been raised, not by contribution of any one sovereign state (which might raise a question, owing to the peculiar constitution of the Union, if it had been raised in Virginia or Texas, or in any given State), but the cotton is the produce of levies, voluntary or otherwise, on the members of the several States which have united themselves into the United States of America, and which are now under the control of the present plaintiffs, and are represented, for all purposes, by the present plaintiffs. That being so, the right of the present plaintiffs to this cotton, subject to this agreement, is, I think, clear, because the agreement is an agreement purporting to be made on behalf of the then *de facto* existing government, and not of any other persons. That case of The King of the Two Sicilies and the case of The King of Spain, and other cases of the same kind, which it is not necessary to go through, shew that whenever a government *de facto* has obtained the possession of property, as a government, and for the purposes of the government *de facto*, the government which displaces it succeeds to all the rights of the former government, and, among other things, succeeds to the property they have so acquired.

Now I come to the second head of the question, and I confess at this moment, as at present advised (of course it will be open to more argument hereafter), I do not feel much doubt on the subject, namely, the question

whether or not, taking this property, they must or must not take it subject to the agreement. It appears to me, at present, they must take it subject to the agreement. It is an agreement entered into by a *de facto* government, treating with persons who have a perfect right to deal with them. . . . The Courts of every country recognize a government *de facto* to this extent, for the purpose of saying—you are established *de facto*, if you are carrying on the course of government, if you are allowed by those whom you affect to govern to levy taxes on them, and they pay those taxes, and contribution is made accordingly, or you are acquiring property, and are at war, having the rights of belligerents, not being treated as mere rebels, but having the rights of belligerents, by persons who say they are the authorized government of the country. Other nations can have nothing to do with that matter. They say we are bound to protect our subjects who treat with the existing government; and we must give to those subjects, in our country, every right which the government *de facto* can give to them, and must not allow the succeeding government to assert any right as against the contracts which have been entered into by the government *de facto;* but, as expressed by Lord Cranworth in the case referred to, they must succeed in every respect to the property as they find it, and subject to all the conditions and liabilities to which it is subject and by which they are bound. . . . If the case had been this (and it is the only case I can consider as making any difference, but that difference would be fatal to the plaintiffs' case in another point of view): if they had been a set of marauders, a set of robbers (as was said to be the case in the kingdom of Naples, truly or untruly), devastating the country, and acquiring property in that way, and then affecting to deal with your subjects in England, it would not be the United States, but the individuals who had been robbed and suffered, who could come as plaintiffs. That would be fatal to the claim of the United States as plaintiffs. The United States could only come to claim this because it has been raised by public contribution; and although the United States, who are now the government *de facto* and *de jure*, claim it as public property, yet it would not be public property unless it was raised, as I have said, by exercising the rights of government, and not by means of mere robbery and violence.

I confess, therefore, I have so little doubt that this agreement is one that would be binding on the plaintiffs, that I cannot act against these gentlemen without securing to them the reasonable benefit of this agreement; and I cannot put them under any terms which would exclude them from the reasonable benefit of what they are entitled to, and must be held entitled to, as I think, at the hearing of the cause. . . .

. . . Therefore the proper order will be to appoint Mr. Prioleau receiver, he, however, giving security for the value *ultra*. I think I will fix it at 20,000*l*. at once; he either giving security for 20,000*l*., or

undertaking, on or before the 2nd of November next, to pay 20,000*l.* into court.[4]

KEITH v. CLARK

United States. Supreme Court. 1878.

97 *United States Reports* 454.

Error to the Supreme Court of the State of Tennessee.

The facts are stated in the opinion of the court.

[The names of counsel and part of the opinion are omitted.]

MR. JUSTICE MILLER delivered the opinion of the court.

The plaintiff in error, who was plaintiff below, sued the defendant for the sum of $40, which he had paid in lawful money under protest for taxes due the State of Tennessee, after he had tendered to the defendant that sum in the circulating notes of the Bank of Tennessee, which defendant refused to receive. . . .

As the same facts are involved in the question of jurisdiction and the issue on the merits, it may be as well to state them.

They appear in a bill of exceptions taken at the trial on the first appeal, which was a trial *de novo* before a jury. The defendant was a collector of taxes, to whom plaintiff had tendered $40 of the bills of the Bank of Tennessee, which, with other lawful money tendered at the same time, was the amount due. The offer of plaintiff was founded on

[4] "I apprehend it to be the clear public universal law that any government which *de facto* succeeds to any other government, whether by revolution or restoration, conquest or reconquest, succeeds to all the public property, to everything in the nature of public property, and to all rights in respect of the public property of the displaced power, whatever may be the nature or origin of the title of such displaced power. Any such public money in any treasury, any such public property found in any warehouses, forts, or arsenals, would, on the success of the new or restored power, vest *ipso facto* in such power; and it would have the right to call to account any fiscal or other agent, or any debtor or accountant to or of the persons who had exercised and had ceased to exercise the authority of a government, the agent, debtor, or accountant having been the agent, debtor, or accountant of such persons in their character or pretended character of a government. But this right is the right of succession, is the right of representation, is a right not paramount, but derived, I will not say under, but through, the suppressed and displaced authority, and can only be enforced in the same way, and to the same extent, and subject to the same correlative obligations and rights as if that authority had not been suppressed and displaced, and was itself seeking to enforce it." JAMES, V. C., in United States v. McRae, L. R. 8 Eq. 69, 75.

See King of Two Sicilies v. Willcox, 1 Sim. N. S. 301; United States v. McRae, *supra;* Yucatan v. Argumedo, 92 Misc. (N. Y.) 547.

"It was held by the mixed commission under Arts. XII.-XVII. of the treaty between the United States and Great Britain, signed at Washington, May 8, 1871, that the United States was not internationally liable for the debts of the Confederacy, or for the acts of the Confederate forces." MOORE, Dig. Int. L., I, 60. See Barrett Case, Moore, Int. Arb., III, 2900; Hanna Case, *ibid.*, III, 2982.

the twelfth section of the charter of the bank, enacted in 1838 by the legislature of the State, which reads thus:—

"Be it enacted that the bills or notes of the said corporation originally made payable, or which shall have become payable on demand, in gold or silver coin, shall be receivable at the treasury of this State, and by all tax-collectors and other public officers, in all payments for taxes or other moneys due to the State."

It was proved that the bills were issued subsequently to May 6, 1861, and were known as the "Torbet or new issue," and were worth in the brokers' market about twenty-five cents on the dollar.

The court charged the jury that if the notes tendered were issued subsequently to May 6, 1861, and during the existence of the State government established at that date in hostility to the government of the United States, then defendant was not legally bound to receive them in payment of plaintiff's taxes. And the reason given for this was, that while the Constitution of the United States protected the contract of the section of the charter we have cited from repudiation by State legislation as to notes issued prior to the act of secession of May 6, 1861, it conferred no such protection as to notes issued while the State was an insurrectionary government; and that consequently the provisions of sect. 6 of the schedule to the constitutional amendment of 1865, which declared that all the notes of the bank issued after the date above mentioned were null and void, and forbade any legislature to pass laws for their redemption, was a valid exercise of State authority. On this instruction the jury found a verdict for the defendant.

In the Supreme Court the judgment rendered on this verdict was affirmed, without any opinion or other evidence of the grounds on which it was so affirmed. . . .

In entering upon this inquiry we start with the proposition, that unless there is something in the relation of the State of Tennessee and the bank, after the date mentioned, to the government of the United States, or something in the circumstances under which the notes now sued on were issued, that will repel the presumption of a contract under the twelfth section, or will take the contract out of the operation of the protecting clause of the Federal Constitution; this court has established already that there was a valid contract to receive them for taxes, and that the law which forbade this to be done is unconstitutional and void.

Those who assert the exception of these notes from the general proposition are not very well agreed as to the reasons on which it shall rest, and we must confess that, as they are presented to us, they are somewhat vague and shadowy. They may all, however, as far as we understand them, be classed under three principal heads.

1. The first is to us an entirely new proposition, urged with much earnestness by the counsel who argued the case orally for the defendant.

It is, in substance, that what was called the State of Tennessee prior to the 6th of May, 1861, became, by the ordinance of secession passed on that day, subdivided into two distinct political entities, each of which was a State of Tennessee. One of them was loyal to the Federal government, the other was engaged in rebellion against it. One State was composed of the minority who did not favor secession, the other of the majority who did. That these two States of Tennessee engaged in a public war against each other, to which all the legal relations, rights, and obligations of a public war attached. That the government of the United States was the ally of the loyal State of Tennessee, and the confederated rebel States were the allies of the disloyal State of Tennessee. That the loyal State of Tennessee, with the aid of her ally, conquered and subjugated the disloyal State of Tennessee, and by right of conquest imposed upon the latter such measure of punishment and such system of law as it chose, and that by the law of conquest it had the right to do this. That one of the laws so imposed by the conquering State of Tennessee on the conquered State of Tennessee was this one, declaring that the issues of the bank during the temporary control of affairs by the rebellious State was to be held void; and that, as conqueror and by right of conquest, the loyal State had power to enact this as a valid law.

It is a sufficient answer to this fanciful theory that the division of the State into two States never had any actual existence; that, as we shall show hereafter, there has never been but one political society in existence as an organized State of Tennessee, from the day of its admission to the Union in 1796 to the present time. That it is a mere chimera to assert that one State of Tennessee conquered by force of arms another State of Tennessee, and imposed laws upon it; and, finally, that the logical legerdemain by which the State goes into rebellion, and makes, while thus situated, contracts for the support of the government in its ordinary and usual functions, which are necessary to the existence of social life, and then, by reason of being conquered, repudiates these contracts, is as hard to understand as similar physical performances on the stage.

2. The second proposition is a modification of this, and deserves more serious attention. It is, as we understand it, that each of the eleven States who passed ordinances of secession and joined the so-called Confederate States so far succeeded in their attempt to separate themselves from the Federal government, that during the period in which the rebellion maintained its organization those States were in fact no longer a part of the Union, or, if so, the individual States, by reason of their rebellious attitude, were mere usurping powers, all of whose acts of legislation or administration are void, except as they are ratified by positive laws enacted since the restoration, or are recognized as valid on the principles of comity or sufferance.

We cannot agree to this doctrine. It is opposed by the inherent powers which attach to every organized political society possessed of the right of self-government; it is opposed to the recognized principles of public international law; and it is opposed to the well-considered decisions of this court.

"Nations or States," says Vattel, "are bodies politic, societies of men united together for the promotion of their mutual safety and advantage by the joint efforts of their combined strength. Such a society has her affairs and her interests. She deliberates and takes resolutions in common, thus becoming a moral person who possesses an understanding and a will peculiar to herself, and is susceptible of obligations and rights." Law of Nations, sect. 1.

Cicero and subsequent public jurists define a State to be a body political or society of men united together for the purpose of promoting their mutual safety and advantage by their combined strength. Wheaton, International Law, sect. 17. Such a body or society, when once organized as a State by an established government, must remain so until it is destroyed. This may be done by disintegration of its parts, by its absorption into and identification with some other State or nation, or by the absolute and total dissolution of the ties which bind the society together. We know of no other way in which it can cease to be a State. No change of its internal polity, no modification of its organization or system of government, nor any change in its external relations short of entire absorption in another State, can deprive it of existence or destroy its identity. *Id.*, sect. 22.

Let us illustrate this by two remarkable periods in the history of England and France.

After the revolution in England, which dethroned and decapitated Charles I., and installed Cromwell as supreme, whom his successors called a usurper; after the name of the government was changed from the Kingdom of England to the Commonwealth of England; and when, after all this, the son of the beheaded monarch came to his own, treaties made in the interregnum were held valid,—the judgments of the courts were respected, and the obligations assumed by the government were never disputed.

So of France. Her bloody revolution, which came near dissolving the bonds of society itself, her revolutionary directory, her consul, her Emperor Napoleon, and all their official acts, have been recognized by the nation, by the other nations of Europe, and by the legitimate monarchy when restored, as the acts of France, and binding on her people.

The political society which in 1796 became a State of the Union, by the name of the State of Tennessee, is the same which is now represented as one of those States in the Congress of the United States. Not only is it the same body politic now, but it has always been the same. There has been perpetual succession and perpetual identity. There has from

that time always been a State of Tennessee, and the same State of Tennessee. Its executive, its legislative, its judicial departments have continued without interruption and in regular order. It has changed, modified, and reconstructed its organic law, or State Constitution, more than once. It has done this before the rebellion, during the rebellion, and since the rebellion. And it was always done by the collective authority and in the name of the same body of people constituting the political society known as the State of Tennessee.

This political body has not only been all this time a State, and the same State, but it has always been one of the United States,—a State of the Union. Under the Constitution of the United States, by virtue of which Tennessee was born into the family of States, she had no lawful power to depart from that Union. The effort which she made to do so, if it had been successful, would have been so in spite of the Constitution, by reason of that force which in many other instances establishes for itself a status, which must be recognized as a fact, without reference to any question of right, and which in this case would have been, to the extent of its success, a destruction of that Constitution. Failing to do this, the State remained a State of the Union. She never escaped the obligations of that Constitution, though for a while she may have evaded their enforcement. . . .

[In an omitted part of the opinion the court reviewed Texas v. White, 7 Wall. 700, and White v. Hart, 13 Wall. 646.]

If the State of Tennessee has through all these transactions been the same State, and has been also a State of the Union, and subject to the obligations of the Constitution of the Union, it would seem to follow that the contract which she made in 1838 to take for her taxes all the issues of the bank of her own creation, and of which she was sole stockholder and owner, was a contract which bound her during the rebellion, and which the Constitution protected then and now, as well as before. Mr. Wheaton says: "As to public debts,—whether due to or from the State,—a mere change in the form of the government, or in the person of the ruler, does not affect their obligation. The essential power of the State, that which constitutes it an independent community, remains the same: its accidental form only is changed. The debts being contracted in the name of the State, by its authorized agents, for its public use, the nation continues liable for them, notwithstanding the change in its internal constitution. The new government succeeds to the fiscal rights, and is bound to fulfil the fiscal obligations, of the former government." International Law, sect. 30. And the citations which he gives from Grotius and Puffendorf sustain him fully.

We are gratified to know that the Supreme Court of the State of Tennessee has twice affirmed the principles just laid down in reference to the class of bank-notes now in question. . . .

3. The third proposition on which the judgment of the courts of Tennessee is supported is, that the notes on which the action is brought were issued in aid of the rebellion, to support the insurrection against the lawful authority of the United States, and are therefore void for all purposes.

The principle stated in this proposition, if the facts of the case come within it, is one which has repeatedly been discussed by this court. The decisions establish the doctrine that no promise or contract, the consideration of which was something done or to be done by the promisee, the purpose of which was to aid the war of the rebellion or give aid and comfort to the enemies of the United States in the prosecution of that war, is a valid promise or contract, by reason of the turpitude of its consideration. . . .

[In an omitted part of the opinion the court reviewed Texas v. White, 7 Wall. 700; Hanauer v. Doane, 12 Wall. 342; and Williams v. Bruffy, 96 U. S. 176; citing also Horn v. Lockhart, 17 Wall. 570; and Sprott v. United States, 20 Wall. 459.][5]

There is, however, in the case before us nothing to warrant the conclusion that these notes were issued for the purpose of aiding the rebellion, or in violation of the laws or the Constitution of the United States. There is no plea of that kind in the record. No such question was submitted to the jury which tried the case. The sole matter stated in defence, either by facts found in the bill of exceptions, or in the decree of the court, is that the bills were issued after May 6, 1861, while the State was in insurrection, and therefore come within the amended Constitution of 1865, declaring them void. The provision of the State Constitution does not go upon the ground that the State bonds and bank-notes, which it declared to be invalid, were issued in aid of the rebellion, but that they were issued by a usurping government,—a reason which we have already demonstrated to be unsound. Not only is there nothing in the Constitution or laws of Tennessee to prove that these notes were issued in support of the rebellion, but there is nothing known to us in public history which leads to this conclusion. The opinion of the Supreme Court, which we have already cited, states that the bank was engaged in a legitimate business at this time, receiving deposits, and otherwise performing the functions of a bank; and though, as is abundantly evident, willing enough to repudiate these notes as receivable for taxes, that court held them to be valid issues of the bank, in the teeth of the ordinance declaring them void.

It is said, however, that considering the revolutionary character of the State government at that time, we must presume that these notes were issued to support the rebellion.

But while we have the Supreme Court of Tennessee holding that the bank during this time was engaged in a legitimate banking business, we

[5] *Cf.* Thorington v. Smith, 8 Wall. 1, *supra*, 145.

have no evidence whatever that these notes were issued under any new law of the rebel State government, or by any interference of its officers, or that they were in any manner used to support the State government. If this were so, it would still remain that the State government was necessary to the good order of society, and that in its proper functions it was right that it should be supported.

We cannot infer, then, that these notes were issued in violation of any Federal authority. . . .

The judgment of the Supreme Court of Tennessee will, therefore, be reversed, and the case remanded to that court for further proceedings in accordance with this opinion; and it is

So ordered.[6]

Mr. Chief Justice Waite, Mr. Justice Bradley, and Mr. Justice Harlan dissented.

[The dissenting opinions are omitted.]

SECTION 2. SUCCESSION OF STATES

Barclay v. Russell

Great Britain. High Court of Chancery. 1797.

3 *Vesey, Jr., Chancery Reports* 424.

In 1733 the Government of the Province of Maryland in North America, then existing under Letters Patent from the Crown of Great Britain, granting the Province with very extensive powers to Lord Baltimore as proprietary governor, whose assent to all acts of Assembly was required, formed a project to create a paper circulation by an issue of bills, proposed to continue in circulation for thirty-three years. For this purpose, by an Act of Assembly passed in 1733, three Commissioners were appointed; and in order to provide a fund for the reduction in course of time and the final discharge of this debt a duty was imposed upon the exportation of tobacco, to be collected by bills of exchange to be given by the ship master for the duty of the specific cargo according to a rate specified; and most of these bills being drawn upon London, they were to be remitted to England by the commissioners for issuing the bills of credit; and the money, when paid, was to be vested in three

[6] "The State can only act by its constituted authorities,—in other words, by its government; and if that government is a usurping and illegal government, the State itself and the legal government, which takes the place of the usurping government, are not bound by its acts." Bradley, J., dissenting, in Keith v. Clark, *supra*, 472.

Cf. Republic of Peru v. Peruvian Guano Co., 36 Ch. D. 489; Republic of Peru v. Dreyfus Brothers & Co., 38 Ch. D. 348; French Claims Against Peru, 16 Am. Jour. Int. L. 480. *Cf.* also Claims of Royal Bank of Canada and Central Costa Rica Petroleum Co., 18 Am. Jour. Int. L. 147, *supra*, 174; Hopkins Case, Mex. U. S. Gen. Cl. Com'n., 42.

trustees resident in London; who were to invest the money so paid in Bank-stock, to lay out the dividends, and keep annual accounts of the stock bought and sold, &c. By this fund so created a sum according to calculation would have been provided sufficient to have totally discharged the bills of credit within the period intended. . . .

[Part of the statement of the case, part of the arguments of counsel, and part of the opinion are omitted.]

The bills were issued accordingly: but no advance was made in the reduction; and at the expiration of thirty-one years, no payment had taken place. On the contrary a larger issue was made to the same effect in 1765. Another act for the same purpose passed in 1769. The idea then was, that in twelve years from that time, means would be found to cancel them all. No progress however was made towards cancelling them: instead of that another act following the plan of the act of 1733 passed in 1773. The trustees last appointed by the act of 1769, were Hanbury, Russell, and Grove. In 1779 the government of Maryland established in consequence of the disturbances in America and the declaration of independence, passed an act for calling in the bills of credit; and the manner, in which it was proposed, was by giving to the holders bills of exchange drawn upon the trustees in London; and it was provided, that those trustees should be discharged from the trust: they were directed to transfer the stock; and five persons resident in Maryland were appointed to be trustees of the stock in England in their place. The act also directed that some persons resident at Paris should endeavor to obtain a passport for a person to go over to see to the prosecution of the act. That act having no effect, another act was passed in 1780; which directed a person called the Treasurer of the Western-Shore to draw bills upon the trustees in England, and to sell them in America; and that in case the trustees should refuse to act, or should suffer the bills to be protested, or in case the British government should interfere, the holders of those bills should have a right to attach the property of the three trustees, each of whom had some property in Maryland, and the property of Lord Baltimore's representatives. That act producing no effect but the confiscation, another act passed in June, 1783, before the treaty of peace; by which act the government of Maryland took upon itself to discharge the trustees, and to appoint Mr. Chase to act in their place. Upon the treaty of peace in September, 1783, Chase came over under that appointment; and the trustees refusing to transfer, he filed a bill; upon which Russell and Grove upon motion discharged themselves, and transferred the stock to the Accountant-General. That cause proceeded no farther.

The partnership, in which Hanbury, one of the trustees, was a principal partner, were creditors of Daniel Delaney to the amount of 12,000*l.*; for which debt he gave them a mortgage upon his plantations

in Maryland. Those plantations had been confiscated to the use of the State. After the treaty of peace an application was made by the partnership of Hanbury to the State of Maryland upon the ground of that clause in the treaty, under which they would have been entitled to recover the debt due from Delaney. That application in 1786, produced an Act of Assembly empowering Chase to assign to the surviving partners of Hanbury's house a portion of the bank stock to the amount of 11,000*l.* The bill was filed by the surviving partners of Hanbury, claiming under that assignment, and suggesting some claim upon the fund by the several Defendants. The Defendants were Chase; Grove the surviving trustee; the representatives of Russell and his partners, concerned in considerable iron-works in Maryland, that had been attached under the act of 1780; Mr. Harford devisee of Lord Baltimore; and the Attorney General. . . . The fund had accumulated to the amount of 60,000*l.*

Mr. Mansfield, Mr. Graham, and Mr. Harvey, for the Plaintiffs; and Mr. Richards and Mr. Abbot, for the Defendant Chase. The New State acquired by the treaty the rights of the Old State. The form of government only was changed: in other respects the State remained the same. According to Grotius and Puffendorf by a change of the form of government none of the rights of a nation are altered; debts due to and from it remain: Grotius *De Jure Belli*, lib. 2, c. 9, §8. If it could have any other effect, it must be, that the persons, who usurped the government, acquired all the rights of the province as a conquered nation: there is no doubt except as to incorporeal rights; upon which Puffendorf *De Jure Belli*, lib. 8, c. 6, §23, has much argument . . . but Grotius, lib. 3, c. 7, §4, delivers a decisive opinion, that incorporeal rights pass as well as corporeal. Therefore if this money is considered merely as a debt, the State of Maryland has a right to it. But money in the funds is not like a mere debt, but like money in a bureau; where it can be had, when called for. The definitive treaty provides, that creditors shall meet with no impediment on either side in recovering *bona fide* debts; and if the subjects of the State have that right individually, they must have it in their collective capacity as a Province or a Nation. . . .

Mr. Mitford and Mr. Alexander, for the Defendant Harford. Upon Ogden v. Folliott and other cases the Act of 1780 could have no operation upon property in this country. The assent of this Defendant was as necessary to the disposal of this stock, as here the King's assent would be necessary, if it was to be at the disposal of Parliament; for the proprietary was as much a part of that legislature. The treaty ceded nothing but the land, territorial rights, and certain rights, which are specified; and that specification shows, nothing, that was not specified, was intended. All the rights, the inhabitants of Maryland had before, were not ceded: for instance; the right to be natural born subjects of

Great Britain and Ireland was not ceded. The King had no right in this stock or the disposition of it before the treaty: till which it was in the two Houses of Assembly with the consent of the Lord and Proprietary. The arguments from the writers upon the Law of Nations upon the conquest of one nation by another assume, that Maryland was a nation; which it was not. The true state of the question is, that part of a nation took from the State, of which it originally formed part, all control, formed itself into a new nation, and insists, that the property of those, who had the government of the country before, should be transferred to it. In that case so much only is conquered as can be absolutely possessed, or is ceded: but where the Old State is totally conquered, the New State becomes the old one; and all the rights are transferred; but upon the ground, that they are *idem populas*. . . . The Plaintiffs cannot claim except by a transfer from the Old State to the new one; and that fails entirely. The violent acts of the inhabitants can give them no right. No act of his Majesty could or affects to do it. The treaty of peace certainly did not. . . .

Lord Chancellor [Loughborough] (after stating the case). The acts of 1779 and 1780, the object of which, it is obvious, was, not to call in the bills, but to get access to this fund, are both extravagant, even according to the circumstances of the times; for even if there was no interference of the British Government, it was totally impossible for the trustees with any regard to their duty or their interest to have at all complied with the project of either of those measures. They could not make themselves liable by accepting the bills: nor, while there was any law existing in this country, could they take upon themselves to sell the stock; which would have been a breach of trust. Therefore the idea of confiscating their property, and much more that of Lord Baltimore, was grossly unjust. The partnership of Hanbury had a very good cause of demand against the State; that they having destroyed the security for the debt from Delaney should account to them to the extent of their mortgage. That produced the assignment, under which the Plaintiffs claim. The representatives of the partnership of Russell attempted in argument to raise their claim up to a specific lien; and Mr. Harford endeavored to set up a claim to this stock, as property belonging to the Old State and accruing to him by forfeiture as proprietary. The question, upon which all the rest must depend, is, whether the present State of Maryland had a right to make the assignment to the Plaintiffs. For the Plaintiffs it was argued, that all right belonging to Maryland in its former condition as a body corporate is transferred to the new self-created Government, and by the effect and operation of the treaty of peace.

First, with regard to the treaty of peace: in the whole form of that treaty the only effect is to recognize the existence of the new dominion.

From the declaration of independence it considers it, no matter how created, as an independent power: but there is nothing, by which any thing at all is either ceded or granted to this New State of Maryland. Whatever is within the reach of the acts passed, and the authority, by which those acts passed, that State may take; and we must consider them by virtue of the relation in the treaty as acts, we have no right to dispute. They may be just or unjust morally: but they must be binding. But to what extent the authority making those acts could go is a question. Money, stock, or securities, might have belonged to the former State as a political body: but it is perfectly clear, neither land nor money beyond their power can be affected by their political acts. They must be regulated and disposed of by the law of the country, where that land or money is placed. The treaty acknowledges their independence from the year 1776; and no act, they could have done in the character of an independent State, could affect property not subject to their local jurisdiction. It is obvious, nothing in the treaty recognizes as valid the act of 1779 discharging the trustees, appointing new trustees, and directing a transfer of the stock here. They have no right as an independent State to make such an act as that. No foreign authority of the Germanic body or France or Spain could do such an act. Nothing, they could do with regard to this, can be implied from the treaty. There might have been an express article in the treaty upon their claim to this subject. It might have been the subject of a specific article. Such a demand is a fit subject of treaty; to be settled as between States independent. I can find no general principle in any writer upon the Law of Nations, if it was proper for me to decide by reference to those laws; but I have looked for my own satisfaction; and I find no general principle carrying it farther, than that the new formed Government may invest itself with all the rights, that it can command: no farther. The old Government of Maryland, a Government of a singular species, existing by Letters Patent, in some degree similar to a corporation, possessing rights in England, must sue in England, and ought to be regulated by the law of England; under which it has its existence. In the argument it was said, the present State of Maryland has some species of right to stand in the place of the old Government, being now acknowledged to be a legitimate Government. I can admit, that there is a semblance of equity in the claim upon the part of the present State of Maryland. The stock was certainly purchased at the expense of the people of Maryland. It was purchased by their money, and fairly; for the tax being laid upon the tobacco of Maryland, that tobacco in comparison with the tobacco of Virginia and other States would come to market with just the disadvantage of that tax. The purchase was made for the benefit of the people of Maryland, to be applied to public uses in that State. It is true, its original destination may be preserved. These are considerations very fit to be weighed:

there may be other considerations, that would balance a little in the scale against them: but the effect of these considerations cannot be settled here; for it is obvious, that in stating these points I am stating, not a judicial, but a political, equity; the foundation of representations to be made from State to State, exceedingly fit to be weighed: perhaps considerations in favor of some of the Defendants might counterbalance a little: but there is no equity upon these considerations, upon which this Court can decide.

Consider then the situation, in which the fund now stands. It is upon a specific trust declared by the act of 1733. Standing in the name of the Accountant General, it is exactly as if vested in trustees. The specific execution of that trust is perfectly impossible now. The power, by which the trustees are to be created, is an Act of Assembly; which could not pass an act without the consent of the proprietor, who no longer exists. There is no specific purpose therefore, that the will of the present Government can point out, for which purpose according to the original creation of the trust I can direct the trustees to transfer. Therefore it is the common case; a trust without any specific purpose, to which it can be applied. The consequence is inevitable; that it is for his Majesty to appoint, for what purpose that stock shall be applied; considering it still in the name of the surviving trustee Grove. The result of my opinion therefore is, that the right to dispose of this money is vested in the Crown.[7]

Irish Free State and Others, Plaintiffs, v. Guaranty Safe Deposit Company and Others, Defendants

United States. New York Supreme Court, New York County. 1927.

129 *Miscellaneous Reports* (*New York*) 551.

Action in equity for judgment declaring plaintiff to be owner of proceeds of balance of subscriptions to certain loans to an organization which was seeking to set up by force in Ireland the Republic of Ireland.

[The names of counsel and part of the opinion are omitted. The case is stated in the opinion.]

Peters, J. This is an action in equity wherein the plaintiff Irish Free State seeks a judgment adjudging that it is the owner of and entitled to the possession of funds and property hereinafter described, and that the defendants Stephen M. O'Mara and Eamonn De Valera render an account of said funds and property, together with an account of all other funds and property received by them under a certain trust agreement. The funds and property in question consist of moneys on deposit

[7] See Dolder v. Lord Huntingfield, 11 Ves. Jr. 283, 294; Society for Propagation of Gospel v. New Haven, 8 Wh. 464, 487.

with the defendant Harriman National Bank and certain securities contained in safe deposit boxes, all within the jurisdiction of this court. Said funds and property represent the proceeds of the balance of subscriptions to two certain loans of an organization which was seeking to set up by force in Ireland a Republic of Ireland which would be free and independent of any allegiance whatsoever to the government of Great Britain and Ireland. Sums aggregating something over $6,000,000 were subscribed by citizens or inhabitants of this country. The greater portion of the amounts subscribed was transferred to Ireland and used for the purposes for which they were subscribed. The balance not so transferred amounts in the aggregate to approximately $2,500,000, and it is this balance which is the subject of this action. Each subscriber to the loans subsequently received a printed form of bond certificate in the amount subscribed, which read as follows:

"Republic of Ireland. Bond Certificate & —— To ——: I, Eamonn De Valera, President of the Elected Government of the Republic of Ireland, acting in the name of and by the authority of the elected representatives of the Irish Nation, issue this certificate in acknowledgment of your subscription of $—— to the first national loan of the Republic of Ireland. This certificate is not negotiable but is exchangeable if presented at the Treasury of the Republic of Ireland one month after the international recognition of the said Republic for one $—— Gold Bond of the Republic of Ireland. Said Bond to bear interest at five per cent per annum from the first day of the seventh month after the freeing of the territory of the Republic of Ireland from Britain's military control, and said Bond to be redeemable at par within one year thereafter.

"Eamonn De Valera,
"President."

The uncontradicted purport of the testimony is to the effect that these moneys were loaned for the purpose of establishing a free and independent Republic of Ireland. It is admitted, of course, that no such republic was established and the court must now determine in this action the title to these unexpended moneys.

The plaintiff Irish Free State claims possession of the funds by title paramount, contending that it succeeded the organization called the "Irish Republic," whether this court decides that such organization constituted a *de facto* government or whether it was merely an organized rebellion against the authority of the duly constituted government of Great Britain and Ireland. The defendant trustees deny that title and claim that they have a right to continue in possession of the funds. This court by two previous orders has permitted two bondholder committees to intervene. One of these committees, called the "Hearn Committee," contends that said plaintiff is not in any view of the case

entitled to the possession of the funds which were subscribed solely for the purpose of the so-called Irish Republic, or, in the alternative, that if the court decides that such plaintiff is entitled to the funds, then and in that event the bondholders are entitled to the full amount of their subscriptions, with accrued interest; that they have a lien upon the moneys and securities now within the jurisdiction of the court, and that a judgment should be entered in favor of the individual bondholders for their *pro rata* share of the funds now in control of the said trustees. The other committee, called the "Noonan Committee," admits the right of said plaintiff to receive the funds in question, but contends that the court should require as a condition that plaintiff should carry out the contract and deliver bonds of the plaintiff, of the full amount of the subscriptions, to the subscribers. This committee says further that if this court has no power to make such a condition because of the fact that the said plaintiff is a sovereign power, then the moneys in question should be delivered to said plaintiff without conditions. The plaintiff, the Irish Free State, in reply contends that it is a sovereign power and that, therefore, this court cannot in its judgment render any affirmative judgment against it or prescribe any conditions binding upon it. While the testimony and the exhibits are voluminous, the historical facts upon which the decision of the court must be predicated are not numerous and are in the main undisputed. The legal conclusions to be drawn from such facts are vigorously disputed.

By the Act of Union of 1800, enacted by the King and Parliaments of Great Britain and of Ireland, Ireland formed a part of the United Kingdom of Great Britain and Ireland with one parliament called the Parliament of the United Kingdom of Great Britain and Ireland, consisting of a House of Lords and a House of Commons, and sitting at Westminster, Eng. From time to time efforts were made by some of the people of Ireland to establish a free nation, at times by parliamentary means and at other times through armed resistance to the government. The events upon which the decision of this case must be founded began on April 24, 1916, when there occurred in Dublin what is known in Irish history as the "Easter Uprising," by an armed force known as the "Irish Volunteers." Independence was declared and the Republic of Ireland proclaimed. This uprising was short-lived, being sternly suppressed by the military forces of the British government. The Irish Volunteers continued in existence, reorganized their forces and engaged in Irish political activities. In or about 1918 an Irish political party known as the "Sinn Fein Party," adopted the policy of sending forward candidates for parliamentary elections in Ireland on a pledge that if elected they would not attend the Parliament at Westminster, but would assemble in Ireland and constitute themselves a parliament for Ireland, and as such would take over the government of the country. In Decem-

ber, 1918, the British Parliament was duly dissolved and new elections were ordered for members in the House of Commons. At this election the constituencies in Ireland were entitled to elect 105 members to the House of Commons to sit in the British Parliament. The Sinn Fein party took advantage of the election machinery to elect candidates who had pledged themselves as aforesaid. All members elected at said election in Ireland were summoned to a meeting to be held at the official residence of the Lord Mayor, known as the "Mansion House," in Dublin on the 21st of January, 1919. This summons was issued pursuant to the aforesaid pledge made by the Sinn Fein candidates, and all of the elected Sinn Fein candidates, except those who were in the custody of the British military forces or abroad on political missions, assembled at the appointed place on January 21, 1919, and constituted themselves a parliament for Ireland, to which they gave the name of "Dail Eireann." This parliament or assembly will be hereinafter called the "First Dail." The majority of candidates elected in constituencies other than Sinn Fein candidates were elected for seats in so-called Northern Ireland, and these members did not attend the meetings of Dail Eireann. This First Dail issued a proclamation of independence, adopted a provisional constitution and standing rules and orders and set up a ministry, and attempted to perform varied governmental functions in Ireland. This Dail on April 1, 1919, elected the defendant De Valera Prime Minister, and on April 10, 1919, authorized a loan of £1,000,000, £500,000 to be offered for immediate subscription, £250,000 for subscription at home and £250,000 for subscription abroad. The plaintiff, Rev. Michael Fogarty, the defendant De Valera and one James O'Mara were appointed trustees for one year for the funds to be raised and subsequently executed a trust agreement in respect of such funds. A further loan of $23,750,000 was authorized by the Dail in August, 1919. The trustees were reappointed for the succeeding year. After the formation of the Dail Eireann organization the military forces of the British government became active in the work of suppressing the revolt. The activities of the First Dail will now be noted. This Dail set up ministries and a civil service for offices.

A force of unpaid volunteers was maintained, any members of which captured by the British in action or with arms even if not in action, were almost invariably executed after summary military trial. The force was small and active and because it was small it had to strike frequently at different points. Its real nature, however, is shown by the testimony that it was housed, fed and *concealed* by the population generally. Courts were set up which in fact first became effective after the treaty hereinafter mentioned. The British local boards were largely ousted. The Dail organization maintained no post offices, printed no stamps, exercised no supervision over railroads which were maintained by the British

government, issued no money or currency, had no school system and raised no taxes. It maintained a secret police force, appointed consular agents who had no official status in the countries to which they were sent. It set up a land commission and passed decrees. The uncontradicted testimony is that throughout the period of the First Dail and the hereinafter described Second Dail and until the treaty hereinafter mentioned, though persons were appointed to ministerial positions and staffs were appointed to help them, it was impossible for them to have any permanent location for the reason that during the entire period everyone connected with the Dail was hunted down by the British and all office equipment was of a portable character capable of instantaneous removal at the approach of the British military forces. An entire department might find it necessary to make a hurried removal through a skylight or down a drainpipe at a moment's notice.

The courts tentatively set up were, like the ministry, continuously "on the run." They sat in private houses; sometimes in fields, cellars and wherever it was possible to congregate for a sufficient length of time. The Dail did not maintain jails. Occasionally persons were held by the Dail authorities, but only for short periods, and they generally had to be "on the run" with their captors. Records were always in danger of seizure. This Dail organization was never recognized by any foreign country. Another indication of the nature of the Dail organization, upon the question whether it was a *de facto* government, is apparent from a provision in the trust deed, before mentioned, which devolved the duty of disbursing the Dail funds upon the trustees or "such of them as may be *free* to act" in the event that neither a quorum of the Dail or the ministry were available or able to meet. From all the foregoing it is apparent that the Dail organization was never a *de facto* government but simply an organization fostering a rebellion or revolt against the British government in Ireland.

In an attempt to bring peace and quiet to the Irish people a statute called the "Government of Ireland Act" was enacted by the King and Parliament of Great Britain and Ireland in the year 1920, which was designed to confer upon Ireland a measure of home rule.[8] This act provided for a separate government for six counties and two boroughs in the northeast of Ireland, defined in the act as Northern Ireland, and a separate government for the rest of Ireland, defined in the act as Southern Ireland. To make this act effective, elections were ordered for the election of members of the Parliaments of Northern and Southern Ireland, respectively, by a proclamation of the King of England, to take place in May and June, 1921. The first Dail adopted a resolution to the effect that said election should be regarded as an election of members to the Dail, and that that body would automatically dissolve on the

[8] 10 & 11 Geo. V. c. 67.

meeting of the new body. In other words, the De Valera organization again took advantage of the British election machinery in Ireland for the election of members to a new assembly which is hereinafter called the Second Dail. Candidates of the Sinn Fein party made the same pledges as in the election of 1918. Candidates elected were summoned to meet at the Mansion House, Dublin, and on August 16, 1921, 120 members elected on a Sinn Fein program assembled at the appointed place and constituted themselves the Second Dail Eireann under the constitution adopted by the First Dail. Candidates elected to the House of Commons and to the Senate for Northern Ireland made and constituted a government under the aforesaid Government of Ireland Act. The Parliament of Southern Ireland, which was provided for by said act, was summoned to meet on June 28, 1921. The House of Commons met on that day. The First Dail ignored the two Parliaments provided for by the Government of Ireland Act.

On July 11, 1921, a truce was declared between the forces of the British government and the volunteer forces of Dail Eireann. On August 26, 1921, a new ministry was elected by the Second Dail, with the defendant De Valera as president; a further loan of $20,000,000 in the United States was authorized, and the three trustees of the loan funds were elected for the years 1921–1922. On September 14, 1921, the Second Dail appointed plenipotentiaries to treat with the British government in an effort to secure permanent peace for Ireland. These plenipotentiaries entered into negotiations at London with the British delegates headed by D. Lloyd-George, Prime Minister of England. The great obstacle to peace throughout these negotiations was the insistence by the Irish delegates on independence for Ireland and the insistence on the other hand on the part of Lloyd-George that independence would never be granted Ireland. The official correspondence relating to these negotiations is in evidence. Lloyd-George guarded most zealously against any action which would in any way involve a recognition by the British government of the independence of Ireland. In the communication to Mr. De Valera dated September 17, 1921, Mr. Lloyd-George stated: "It is idle to say that a conference in which we had already met your delegates as representatives of an independent and sovereign state would be a conference 'without prejudice.' To receive them as such would constitute a formal and official recognition of Ireland's severance from the King's dominions."

In another communication dated September 29, 1921, Mr. Lloyd-George stated to Mr. De Valera: "His Majesty's Government have given close and earnest consideration to the correspondence which has passed between us since their invitation to you to send delegates to a conference at Inverness. In spite of their sincere desire for peace and in spite of the more conciliatory tone of your last communication, they

cannot enter a conference upon the basis of this correspondence. Notwithstanding your personal assurance to the contrary, which they much appreciate, it might be argued in future that the acceptance of a conference on this basis had involved them in a recognition which no British Government can accord. On this point they must guard themselves against any possible doubt. There is no purpose to be served by any further interchange of explanatory and argumentative communications upon this subject. The position taken up by his Majesty's Government is fundamental to the existence of the British Empire and they cannot alter it."

It is apparent that the British government never recognized the De Valera organization, and never receded from the position that it was the only duly constituted government within the territory comprising Ireland.

In this last letter Lloyd-George invited a meeting of the delegates with a view to ascertaining how an association of Ireland with the community of nations known as the British Empire might best be reconciled with Irish national aspirations, which invitation was accepted.

The circumstances surrounding the acceptance of the proposed treaty are best related by Mr. Barton, one of the Dail delegates, as given by him upon the floor of the Dail. The conference had precipitately and definitely broken down on December 4, 1921. Contact was re-established the next day with the English representatives and in the struggle that ensued Arthur Griffith, a Dail delegate, sought repeatedly to have the decision between war and peace on the terms of the proposed treaty referred back to the Dail. This proposal Mr. Lloyd-George negatived, stating that the delegates must either accept or reject the proposed treaty. Mr. Barton states: "Speaking for himself and his colleagues, the English prime minister with all the solemnity and the power of conviction that he alone of all men I met, can impart by word and gesture . . . declared that the signature and recommendation of every member of our delegation was necessary or war would follow immediately. He gave us until ten o'clock to make up our minds, and it was then about eight-thirty. We returned to our house to decide upon our answer. The issue before us was whether we should stand behind our proposals for external association, face war and maintain the Republic, or whether we should accept inclusion in the British Empire and take peace."

On December 6, 1921, articles of agreement were signed at London by the British and Irish delegations, which provided that Ireland should have the same constitutional status in the community of nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia and the Dominion of New Zealand, with a Parliament having power to make laws for the order and good government of Ireland, and an executive responsible to that Parliament, and should be styled

and known as the Irish Free State. The position of the Irish Free State with relation to the British Parliament and government was to be similar to that of the Dominion of Canada. The representative of the Crown in Ireland was to be appointed by the King. The oath to be taken by members of the Parliament of the Irish Free State provided that the deponent would be faithful to his Majesty King George the Fifth, his heirs and successors by law. The Irish Free State assumed liability for the service of the public debt of the United Kingdom as existing at the date of the agreement and towards the payment of war pensions as existing on that date, the sum to be determined by agreement or by arbitration. Until arrangements were made between the British and Irish Free State the former undertook the defense of Ireland by sea. The Irish Free State undertook to afford to the British government in time of peace harbor and other facilities indicated in and annexed to the agreement, and in time of war with a foreign power such harbor and other facilities as the British government might require. Until the expiration of one month from the passing of the act of Parliament for the ratification of the agreement the powers of the Parliament and the government of the Irish Free State were not to be exercisable as respects Northern Ireland, and no election was to be held for the return of members to serve in the Parliament of the Irish Free State for constituencies in Northern Ireland unless a resolution was passed by both houses of Parliament of Northern Ireland in favor of the holding of such election before the end of said month. If before the expiration of said month an address was presented to his Majesty by both houses of the Parliament of Northern Ireland the powers of the Parliament and government of the Irish Free State were no longer to extend to Northern Ireland and the provisions of the Government of Ireland Act of 1920, so far as they related to Northern Ireland, were to continue to be of full force and effect.[9]

On December 8, 1922, pursuant to these provisions of the treaty, an address was presented to the King by the Parliament of Northern Ireland to the effect that the powers of the government of the Free State should no longer extend to Northern Ireland. Since that time Northern Ireland has been governed by its own Parliament under the Government of Ireland Act.

It was further provided that steps should be taken for the summoning of a meeting of the members of Parliament elected for constituencies in Southern Ireland, under the provisions of the Government of Ireland Act; for the setting up of a provisional government and that the British government should take steps necessary to transfer to such provisional government the powers and machinery requisite for the discharge of its duties.

[9] 26 L. of N. T. S. 10. See 27 *ibid.* 449, 450.

It was further provided that the treaty should be submitted by the British government for the *approval* of the British Parliament and by the Irish signatories *to a meeting summoned for the purpose of the members elected to sit in the House of Commons of Southern Ireland.* If approved, the treaty was to be ratified by the necessary legislation.

On January 7, 1922, the Dail Eireann approved the treaty. *This approval was a voluntary action as such action was not requisite under the treaty.* Following the approval of the treaty by the Dail Eireann delegates, defendant De Valera and his ministry resigned and a new ministry of the Dail was elected on January 10, 1922. Shortly thereafter, at a joint meeting of the trustees and the ministers of the Dail, it was agreed that the funds of the Dail should be kept in the names of the three trustees. Pursuant to the provisions of the treaty a meeting of the members elected to sit in the *Parliament of Southern Ireland* was held on January 14, 1922, the treaty was approved and a provisional government set up. The Second Dail met for the last time on June 8, 1922.

An election of members to a Parliament to which the provisional government should be responsible, as provided for in the treaty, was duly called and was held in June, 1922. This body, thus elected, constituted the provisional Parliament. This Parliament convened on September 9, 1922, and on the thirteenth of the month attempted to appoint the Rev. Michael Fogarty, Richard Mulcahy and Richard Hayes trustees for the funds of the former Dails, intending to oust the defendants De Valera and O'Mara as trustees. The power of the provisional government to oust these two defendants is questioned in this action.

The British Parliament on March 31, 1922, passed the Irish Free State Agreement Act, thus ratifying and enacting into law said agreement.[10] The act provided that the articles of agreement should have the force of law as from the date of the passing of the act. The act further provided that within four months the Parliament of Southern Ireland should be dissolved and that steps should be taken for the holding of an election to the provisional Parliament from the constituencies which would have been entitled to elect members to the Parliament of Southern Ireland, and the members so elected were to constitute the House of Parliament to which the provisional government should be responsible. The British government, on April 1, 1922, pursuant to the treaty agreement, by an order in council, provided for the transfer of functions in connection with the administration of public services in Southern Ireland theretofore performed by the existing *British* government departments and offices to the provisional government constituted under the treaty. The Constitution of the Irish Free State was adopted by that government on October 25, 1922, and on December fifth of the

[10] 12 & 13 Geo. V. c. 4.

same year the British Parliament enacted the Irish Free State Constitution Act, thus creating plaintiff, the Irish Free State, which is now a government consisting of the King, an Irish Parliament called the "Oireachtas," consisting of an upper house, the Seanad Eireann, and a lower house, the Dail Eireann, and a ministry called the executive council.[11] On December 6, 1922, the Constitution of the Irish Free State was declared to be in operation by a proclamation by the King made pursuant to the Irish Free State Constitution Act.

It is manifest from the foregoing that the object or the purpose for which the moneys were subscribed by the so-called bondholders, that is, the establishment of a Republic of Ireland free and independent of any allegiance to Great Britain, was never accomplished, and it follows, therefore, that if it were not for the claim of the plaintiffs the said subscribers would be entitled to a return in proportion to the amounts of their subscriptions of the funds and property within the jurisdiction of this court.[12] Manifestly, the trustees would not have any legal title to the funds, holding such funds merely as such.

It is, therefore, necessary to consider the propositions advanced by the plaintiffs' counsel to support their claim of title.

Plaintiffs' first contention is that the Irish Free State is the successor of the original *de facto* government which raised the money. As hereinbefore shown, and held in this opinion, the so-called Irish Republic never existed as a *de facto* government.

Plaintiffs next contend that (a) if the *de facto* status has not been established then the Irish Free State is the successor of the revolutionary group which raised the money; (b) the Irish Free State is also in fact the continuation of the very Dail Eireann which raised the money and to which the trustees admitted they were responsible.

With these contentions this court cannot agree. The De Valera group, organized as the Dail Eireann, were engaged in a revolt against the only lawful government existing in Ireland, which was the government of Great Britain and Ireland formed under the act of 1800, as modified by the Government of Ireland Act of 1920. This was the *de jure* government existing in the territory of Ireland up to the time of the formation of the Irish Free State.

England did not crush this rebellion or revolution with military force, but set up, with the consent of the governed, a *new* government to take the place of the *existing* government in Ireland. This consent, so far as Southern Ireland was concerned, consisted of the approval of the treaty *by the duly constituted Parliament for Southern Ireland* as provided for by that instrument. The treaty absolutely ignored the Second Dail and, as before stated, the approval by that body was wholly voluntary

[11] 13 Geo. V. c. 1.

[12] But *cf.* Kennett v. Chambers, 14 How. 38, *supra*, 802.

and without any legal effect. This government of the Irish Free State was, therefore, set up by the English government with the consent of the people of Southern Ireland.

As the government of Great Britain and Ireland was the only existing government in Ireland, with a revolt on its hands in the form of the Dail Eireann organization, how can it be said that the new government set up by England succeeded the revolt and not the legal existing government? Such a conclusion would be an assertion that the new government succeeded an unsuccessful rebellious organization and not the existing government of Ireland.

In the case of The King of the Two Sicilies v. Willcox (1 Sim. N. S. 301) the court said: "Every government, in its dealings with others, necessarily partakes, in many respects, of the character of a corporation. It must, of necessity, be treated as a body having perpetual succession." In short, when a revolt succeeds so far as to become a *de facto* government which displaces a *de jure* government, this change merely affects the character of the government, but does not interrupt its perpetual succession. If, therefore, the Dail Eireann had succeeded in displacing the *de jure* government of Great Britain and Ireland and had become a *de facto* government, while the nature of the government of Ireland would have changed, such change would not have interrupted the perpetual succession of the government. The *de facto* government would merely have succeeded the *de jure* government previously existing, and the Irish Free State would have succeeded the *de facto* government, thus preserving the continuity of the government of Ireland. As the Dail Eireann did not succeed in establishing a *de facto* government, it, therefore, did not displace the existing *de jure* government. It follows, therefore, that the Irish Free State succeeded the only government in existence in Ireland at the time it came into being, to wit, the *de jure* government of Great Britain and Ireland.

The plaintiff Irish Free State has not shown that it has a title paramount to the funds in question, and as it did not succeed the revolutionary organization, but merely the *de jure* government in Ireland, it has shown no derivative title to the funds in question. The complaint must, therefore, be dismissed unless this court is bound by the judgment in the so-called Irish action, hereinafter referred to. . . .

Plaintiffs finally assert that the questions of successorship of the Irish Free State to the Dail Eireann and to the title to the funds in suit are matters of Irish law; that under the law as determined in the so-called Irish action plaintiffs are entitled to the property, and that the matter is *res adjudicata* as between the plaintiffs and the defendant trustees.

As a matter of fact the defendant bondholders in this action were not parties to the action in the Irish Free State courts, and the judgment of that court is not *res adjudicata* in this action, as to such bondholders, at

least. This court is, therefore, at liberty to determine the questions involved in this action. While the judgment in the Irish action may not be *res adjudicata*, nevertheless on questions such as are involved in this action the opinions and judgment of the Irish court are entitled to the highest respect and should be followed, unless this court finds itself unable to agree with the results arrived at in the opinions of the court.

The action in question, instituted in the High Court of Justice of Saorstat Eireann, or the Irish Free State, was an action between the three trustees, which the Irish Free State attempted to appoint, of the funds in question and the fiscal officers of that sovereignty, and the defendant trustees in this action, to wit, Eamonn De Valera and Stephen M. O'Mara.[13] The action was brought to recover the sum of $10,000 of the funds of the Dail Eireann which were within the jurisdiction of the court; also for an accounting of all other moneys or property received by the defendants from any source. The justice in the court in which the action was brought states that it had not been shown to him that the action before him referred to or dealt with the same funds which were to be dealt with by the New York Supreme Court. . . .

The following quotation from the opinion of Mr. Justice Fitz-Gibbon is the basis of the decision of the Irish High Court: "In my opinion, upon the signing of the articles of agreement for a treaty with the delegates of the revolutionary Dail the ratification of the action of its delegates by that assembly and the consequent establishment of the provisional government and the *de jure* and *de facto* government of the Irish Free State that government became absolutely entitled to all the property and assets of the revolutionary government upon which as a foundation it has been established."

This court has hereinbefore disagreed with this conclusion upon the ground that the Irish Free State did not succeed the revolutionary Dail, but succeeded the *de jure* government of Great Britain and Ireland, which was the existing government of Ireland.

After discussing several English cases the court makes the following conclusion, with which this court agrees: "These cases established the proposition that if the British government had been completely successful in crushing the insurrectionary movement in Ireland it could have claimed and recovered the funds now in question as the successor of the revolutionary government which had collected them."

In the opinion of this court the only government that had any claim of title whatsoever to these funds in the United States was the British government, because the Dail was in revolt against that government, and in none of the documents submitted to this court has there been shown any transfer of title whatsoever of any such claim by the British government to the plaintiff Irish Free State.

[13] **Fogarty v. O'Donoghue** [1926] Ir. Rep. 531.

The conclusion of the court follows immediately after the language just quoted: "How much more, then, is the government which succeeded to that of the Second Dail by the express vote of the latter in approving of the treaty with Great Britain and by the suffrages of the electorate of the Saorstat Eireann entitled as the lawful successor of the Second Dail."

For the reasons stated this court disagrees with this conclusion. . . .

[In an omitted part of the opinion the court reviewed United States v. McRae, L. R. 8 Eq. 69; King of the Two Sicilies v. Willcox, 1 Sim. (N. S.) 301; United States v. Prioleau, 2 H. & M. 559; Republic of Peru v. Dreyfus Bros. & Co., 38 Ch. D. 348; State of Yucatan v. Argumedo, 92 Misc. 547.]

Another consideration to be borne in mind is that the Irish Free State is the government of only the southern part of Ireland. If this government were entitled to claim these funds, the existing independent government of Northern Ireland would have an equally valid claim.

As the plaintiff Irish Free State succeeded the *de jure* government of Great Britain and Ireland, and not the revolutionary organization known as Dail Eireann, said plaintiff has no title either paramount or derivative to the funds in question, and the complaint must, therefore, be dismissed. Even if this conclusion be incorrect the complaint must be dismissed upon the authority of the McRae case, for said plaintiff claims by paramount title and not by derivative title offering to adopt the contracts.[14]

The defendant trustees have no title as owners of the funds in question, and their demand that they be left in possession of the same must, therefore, be denied. No good purpose could result from leaving them in possession of the trustees, for the reason that the Irish Republic was never formed and the terms of the subscription, *i. e.*, the issuance of bonds of the Irish Republic, cannot be complied with.

With the complaint dismissed on the ground that the plaintiff Irish Free State has not title to the funds in question, and as the government of Great Britain and Ireland has made no claim to the funds, the only parties entitled to the possession of the money are the original subscribers, and the two bondholder committees in their answers have set up counterclaims demanding judgment for the funds. The demand of the Noonan

[14] "One of the witnesses in the case at bar, Mr. Kennedy, Attorney-General of the plaintiff Irish Free State, testified that the McRae case is the law of Ireland. It follows, therefore, even if the Irish Republic had established itself as a *de facto* government, that under the law of Ireland, as well as upon the authority of this decision, the complaint herein would have to be dismissed, because plaintiff claims by paramount title, which it does not possess, and refuses to claim by derivative title, that is, refuses to adopt the contracts between the subscribers and the so-called Irish Republic relating to the loans, and issue bonds therefor." 129 Misc. 551, 567. But *quaere* as to the effect of illegality, Kennett v. Chambers, 14 How. 38, *supra*, 802.

Committee that the funds be awarded to the Irish Free State upon condition that that government issue bonds to the full extent of the original subscriptions cannot, in view of the foregoing opinion, be granted.

As the purpose or object for which the funds in question were advanced has become impossible of fulfillment (Thomas v. Hartshorne, 45 N. J. Eq. 215), the relief demanded by the Hearn Committee should be granted to the extent that a judgment be entered decreeing that these defendants and all other subscribers to the two loans in the United States are entitled to receive, in proportion to their subscriptions, the proceeds of the money and securities in question, together with accumulated interest, after payment of all proper charges and disbursements taxed or allowed by the court.[15]

Claims against Hawaii

United States. Opinion of Attorney-General Griggs. 1899.

22 *Opinions of Attorneys General* 583.

[The following opinion was in response to a request from the Secretary of State. Part of the opinion is omitted.]

Your letter of the 3d instant, with its inclosures, brings to my attention certain claims against Hawaii arising prior to annexation—some in favor of citizens or subjects of foreign States and others in favor of citizens of the United States—which have been presented to the State Department and allowance thereof asked against this Government as the successor to the sovereignty of Hawaii; and suggests the questions whether these claims were extinguished by the act of annexation or, under the terms of said act and principles of international law, have become, so far as valid against Hawaii, just and legal claims against the United States; and if so, whether the Department of State must entertain and adjust them diplomatically or may refer them to the Court of Claims for findings of facts and conclusions of law.

Upon these facts and questions you request to be advised whether this Government became responsible for such valid claims against Hawaii, and whether you may not properly refer all of them to the Court of Claims, as suggested.

In reply, I have the honor to advise you that the general doctrine of international law founded upon obvious principles of justice is, that in case of annexation of a state or cession of territory, the substituted sovereignty assumes the debts and obligations of the absorbed state or territory—it takes the burdens with the benefits. Mr. Adams, when Secretary of State, expressed the principle thus, extending it even to the case of acquisition by conquest:

[15] See 21 Am Jour. Int. L. 747, 753.

"The conqueror who reduces a nation to his subjection receives it subject to all its engagements and duties toward others, the fulfillment of which then becomes his own duty." (1 Whart. Int. Law Dig., sec. 5.)

The subject is discussed by Mr. Hall (International Law, 4th Ed., pp. 104, 105) and in Rivier (*Principes du Droit des Gens*, I, pp. 70–72, note, and authorities and instances cited).

No fair exception to this rule can be perceived, unless expressly provided for by treaty stipulations or the instrument of cession, when the absorbed territory becomes an integral part of the acquiring state, and is altogether merged in it, as in the ordinary case of transfer of a contiguous territory to a monarchy, in which, although municipal lines of division into departments or provinces may run, the sovereignty extends everywhere alike and leaves only a circumscribed field for local autonomy. The General Government administers everywhere equally, performs the local as well as the general functions of the nation, and virtually absorbs the new territory on these terms. Where the federal idea obtains, this is not so. It is only necessary to indicate by reference to our own scheme of government the notion of sovereign States and responsible Territorial administrations making their own local laws through representative assemblies, entering into contracts, possessing separate revenues and treasury, liable for their engagements and obligations, and exercising through the whole domain of local autonomy the powers of a distinct government. Nor is the attribute of sovereignty to be regarded as the sole test throughout the whole situation of the nature of the relation to the General Government or the rest of the world. If there is a distinct and independent civilized government, potent and capable within its territorial limits, conducted by a separate executive, not acting as the mere representative by appointment of the distant central administration, I perceive no reason to doubt that such government rather than the central authority should respond out of its separate assets to any valid claims upon it, whether accruing in the past, presently accruing, or to accrue in the future. It does not matter what is the exact nature or extent of the connection between the principal state and the dependent possession so long as the latter possesses its own organized government and is not a mere unorganized dependency. The foreign colonial systems have long recognized the distinction between possessions which are the subject of executive rather than legislative administration and control—that is, which are directed and ruled by the executive responsible to the constitutional parliament or assembly—and those which are autonomous.

There is nothing in the Hawaiian resolution of annexation which gives the negative to this theory. On the contrary, the power to continue the existing government and its continuation in fact are an assumption of the views here stated; as a logical consequence of which, although

the doubt as to the exact nature of Congressional action may impose a not unreasonable delay upon the Hawaiian authorities in the consideration and settlement of pending claims, such claims if valid (being apparently, as indicated in the memorandum accompanying your letter, the claims mentioned on pages 111 *et seq.* of the Hawaiian report, Senate Doc. No. 116, third session Fifty-fifth Congress), and similar claims which may arise hereafter should properly be presented to and be considered and paid by the Hawaiian government. And the dilemma by which, under the separated governmental entities, the Federal authority is not liable for the demand, and the State authority has no international relations, and therefore escapes a perfect obligation, is apparent rather than real. The historic complaint as to this situation is not in reality well founded, and in the forum of nations the just liabilities to claimants and obligations to civilization of a State of this Union have been for the most part met by the State or recognized by the United States in its sovereign grace. But the legal liability is that of the inferior member of the federation rather than of the federation itself.

Take the case of Texas as an example, in which, finally, part of the proceeds of a grant of land to the United States and a pledge of the customs duties locally collected were applied to the discharge of the funded debt of the State. The United States resisted responsibility on the theory here advanced, and the foreign contention was based upon the ground that the specific transfer of assets for the purpose raised the national liability, and this contention was accompanied by an express disclaimer that the annexation of itself imposed the responsibility on the substituted and absorbing power.[16] Of course, Texas, while

[16] The joint resolution of March 1, 1845, for the annexation of Texas to the United States provided that "Said State, when admitted into the Union, after ceding to the United States, all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence belonging to said Republic of Texas, shall retain all the public funds, debts, taxes, and dues of every kind, which may belong to or be due and owing said republic; and shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State may direct; but in no event are said debts and liabilities to become a charge upon the Government of the United States." 5 U. S. Stat. L. 797. "Afterwards, the United States took portions of those public lands, agreeing to pay therefor ten millions of dollars, half to be retained until the holders of the bonds of Texas, for which her customs duties were pledged, should release their claims. By a later act, the United States reserved three-quarters of the sum, to be paid *pro ratâ* among the bondholders, on their releasing their claims. Some of these bondholders were British subjects; and the claims of one (James Holford) were submitted to the mixed commission established under the convention of Feb. 8, 1853." WHEATON, Dana's 8th ed., §30, n. 18. "The British and the United States Commissioners gave opposite opinions, and the umpire—a highly respected American citizen, but not a legal expert, Mr. Joshua Bates—pronounced that

losing its nationality, retained its corporate existence as a State of the Union, and I have here endeavored to point out that the crucial test is the separated and autonomous government and not the attribute of sovereignty.

It is beyond question that a claim on foreign behalf against a State or Territory of the Union would be presented through, rather than to, the State Department; that is, it would be presented to the local and not to the Federal Government, and would be finally adjusted and recognized or denied by the former, although the Federal Government is the international representative, and in various ways, short of coercion of a State—as unnecessary, ordinarily, as it is impossible—admits a certain international liability. So, I conceive, the separate colonial government of a European monarchy would settle and pay just foreign claims against itself, although they would be presented through the foreign office of the home Government. In no respect, save a temporary delay in the process of adjustment, am I able to see that the situation as to Hawaii differs from that just stated, and I am hence of the opinion that the function of the State Department with relation to such foreign claims is to receive them through diplomatic channels, and transmit them to the government of Hawaii for adjustment. As to such claims on behalf of citizens of the United States, there is nothing to prevent the claimants from presenting the same at once to the Hawaiian authorities, or taking such other steps by proceedings in court as the municipal laws of Hawaii, preserved for the most part by the resolution, may allow. And an application to Congress is open on behalf of both classes of claimants. . . .

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the 'commission cannot entertain the claim, it being for transactions with the independent republic of Texas prior to its admission as a state of the United States.' It does not clearly appear whether this meant that the United States were not liable or that for some reason the claim was not within the scope of the commission, but Dana has recorded his opinion in favour of the liability." WESTLAKE, 2d ed., I, 78.

"It certainly would not be satisfactory to say that the United States discharges its obligation to the creditors of Texas, to whom her customs were pledged, by paying only the amount of the customs received. The United States determines what those duties shall be, in reference to the interests and policy of the whole republic. The condition of Texas is changed by her annexation. The new government has a large control over the material resources of the inhabitants, in the way of internal revenues, excise, or direct taxation, in its demands on the services of the people, and in the debts it can impose; in fact, the entire public system of Texas has passed into other hands, and no such state of things any longer exists as that to which the creditor looked. It may be better or worse, but it is not the same; and, if the duties laid by the United States and collected in Texan ports did not in fact pay the debts, it would be unjust for the United States to limit the payment of the creditor to them. The truth is, by the annexation the United States changed the nature of the thing pledged, and is bound generally to do equity to the creditor." WHEATON, Dana's 8th ed., *loc. cit.*

The subject goes off then, so far as I am properly concerned, on the view that all the claims against Hawaii embraced in your query should be presented to the government of Hawaii according to the respective methods appropriate to their character, as indicated herein.[17]

Postmaster-General v. Taute

South Africa. Supreme Court of the Transvaal. 1905.

Transvaal Law Reports [1905] *T. S.* 582.

Four actions for provisional sentence on bonds executed in favour of the late Government of the Transvaal. The facts appear from the judgment.

[The arguments of counsel are omitted.]

Innes, C. J.: This is an application for provisional sentence on a mortgage bond passed by the defendant in favour of the Postmaster-General of the South African Republic. The bond was for £750 with interest at 6 per cent., payable half-yearly in advance. The date of execution was the 6th December, 1895. The conditions were that the capital was due on 5th December, 1896; but that if not demanded or paid then, the liability was to be taken as indefinitely extended, subject to three months' written notice on either side. And, if the interest was not paid when due, the bond-holder was to have the right forthwith to call up the full amount of the bond without notice.

The summons alleges that the defendant has been in default with the payment of interest from the 1st June, 1902; and it claims the entire debt on that ground. It further states that, as a fact, no interest has been paid since 6th December, 1899, and the sum of £111, 16s. 5d. with interest thereon is demanded under the provisions of Ordinance 42 of 1902.

The affidavit filed traverses none of the allegations contained in the summons, the only defence put forward being that the Government of the Republic was indebted to the defendant in a sum of £1820, which it is contended should be set off against, and should be taken as extinguishing, the claim now made by the plaintiff. The documents relied upon by Taute, as establishing the debt due to him by the late Government, consist of memoranda signed by various officials, acknowledging

[17] *Cf.* Cuban Concessions, 22 Op. Atty. Gen. 384.

As regards the public debt of Hawaii, the annexation resolution stipulated as follows: "The public debt of the Republic of Hawaii, lawfully existing at the date of the passage of this joint resolution, including the amounts due to depositors in the Hawaiian Postal Savings Bank, is hereby assumed by the Government of the United States; but the liability of the United States in this regard shall in no case exceed four million dollars. So long, however, as the existing Government and the present commercial relations of the Hawaiian Islands are continued as hereinbefore provided said Government shall continue to pay the interest on said debt." 30 U. S. Stat. L. 750, 751.

indebtedness in respect of stock and supplies requisitioned for the use of the State during the war. All these documents bear dates subsequent to the 1st September, 1900. The question is whether all or any of the amounts referred to can be set off against the plaintiff's claim.

When at the conclusion of a war one of the combatant States is absorbed by the other, the conqueror becomes, by right of conquest, the successor to all the public property, corporeal and incorporeal, of the vanquished. That result follows so soon as a conquest is complete. In the present instance the conquest has been perfected by annexation; and the principle to which I have referred is one which certainly cannot be questioned in the courts of the annexing State. The debt sued upon was due to the late Government, it has become the property of the present one, and the Postmaster-General is the appropriate officer to represent the Crown in any steps taken to enforce it.

But the conquering State cannot be sued, in its own courts, in respect of contractual obligations alleged to have been incurred by its adversary. Because the annexation is an act of State, carried out by the supreme authority of the conquering country, and neither the act itself nor its legal consequences can be called in question in the courts of that country. Those courts have no power to adjudicate upon it, and they are bound to recognise it. It is therefore impossible for them to declare that, as a result of annexation, any contractual obligations have been transferred from the one Government to the other. No doubt it is just and right that in many cases such obligations should be recognised. And if a conquering State were recklessly to repudiate all the liabilities of the country which it had absorbed, such conduct might lead to international complications, and would certainly be reprobated by civilised public opinion. Hence wholesale repudiation is never likely to occur, and conquering Governments will in practice largely hold themselves bound by the commitments of their predecessors. But though such an attitude may be adopted, for reasons of policy or from a sense of moral obligation, no country can be compelled to adopt it by the decree of its own courts. Even if the recognition of contractual obligations formed the subject of treaty agreement between the belligerents, the conqueror could not be sued upon his promises in his own courts. Honour and policy would induce him to observe his engagements; but municipal law would have no voice in the matter. As the conscience of mankind improves, the tendency will doubtless be to take an ever widening view of the obligations which a conquering State ought to recognise; but liabilities incurred by a vanquished nation to its own subjects, in the prosecution of warlike operations against the conqueror, will probably be among the last to commend themselves to the latter as entitled to recognition.

A consideration of these principles shows that no action could be brought by Taute against the plaintiff, to enforce payments of the

amounts figuring upon the requisition papers which he has filed, even assuming that it would have been competent for him to sue the late Government—a point upon which it is unnecessary to express an opinion. But that does not dispose of the defence upon which he relies. By our law set-off is equivalent to payment, and extinguishes the debt to which it applies, as effectually, and to the same extent. And though the defendant cannot now sue upon his claims, there is nothing to prevent him from showing, if he can, that they have had the effect of neutralising the debt which he is being called upon to pay. If he had paid part of the capital in cash before the present Government acquired any right to the bond, then there would have been so much the less for it to succeed to. And if he can establish the operation of the doctrine of set-off, as between the bond which he owed the late Government and the debts which it owed him, then, of course, the amount of the bond would be automatically reduced or extinguished as from the date when the set-off came into operation. But to prove a discharge of the bond debt, in whole or in part, before it was acquired by the present Government, he must prove that the set-off on which he relies took effect during the lifetime of the late Government; no set-off could operate against it after it had ceased to exist. Now we have already decided that this Court cannot recognise the existence of the late Republic or its Administration after the 1st September, 1900; and there is nothing to add to the remarks made upon that point in van Deventer v. Hancke and Mossop ([1903] T. S. 401).[18] It follows that, if the defendant wishes to make good his case, he must show that his claims against the late Government existed in a liquidated form before the 1st September, 1900. An examination of the documents filed shows that the transactions to which they refer all took place after that date. And the defence therefore fails. Provisional sentence must be granted as prayed, and the property mortgaged must be declared executable.

Solomon and Curlewis, J.J., concurred.

West Rand Central Gold Mining Company, Limited, v. The King

Great Britain. High Court of Justice; King's Bench Division. 1905.

Law Reports [1905] 2 *King's Bench Division* 391.

Petition of right by the West Rand Central Gold Mining Company, Limited. . . .

[The statement of the case, the arguments of counsel, and part of the opinion are omitted. The facts are stated sufficiently in the opinion.]

The judgment of the Court (Lord Alverstone C. J., Wills and Kennedy JJ.) was read by

[18] *Supra*, 311.

Lord Alverstone C. J. In this case the Attorney-General, on behalf of the Crown, demurred to a petition of right presented in the month of June, 1904, by the West Rand Central Gold Mining Company, Limited. The petition of right alleged that two parcels of gold, amounting in all to the value of 3804*l.*, had been seized by officials of the South African Republic—1104*l.* on October 2 in course of transit from Johannesburg to Cape Town, and 2700*l.* on October 9, taken from the bank premises of the petitioners. No further statement was made in the petition of the circumstances under which, or the right by which, the Government of the Transvaal Republic claimed to seize the gold; but it was stated in paragraph 6, "That the gold was in each case taken possession of by, and on behalf of, and for the purposes of, the then existing Government of the said Republic, and that the said Government, by the laws of the said Republic, was under a liability to return the said gold, or its value, to your suppliants. None of the said gold has been returned to your suppliants, nor did the said Government make any payment in respect thereof." The petition then alleged that a state of war commenced at 5 p.m. on October 11, 1899, that the forces of the late Queen conquered the Republic, and that by a Proclamation of September 1, 1900, the whole of the territories of the Republic were annexed to, and became part of, Her Majesty's dominions, and that the Government of the Republic ceased to exist. The petition then averred that by reason of the conquest and annexation Her Majesty succeeded to the sovereignty of the Transvaal Republic, and become entitled to its property; and that the obligation which vested in the Government was binding upon His present Majesty the King. . . .

Lord Robert Cecil argued that all contractual obligations incurred by a conquered State, before war actually breaks out, pass upon annexation to the conqueror, no matter what was their nature, character, origin, or history. He could not indeed do otherwise, for it is clear that if any distinction is to be made it must be made upon grounds which, without depriving the original liability of its character of a legal obligation against the vanquished State, make it inexpedient for the conquering State to adopt that liability as against itself; in other words, upon ethical grounds, into which enter considerations of propriety, magnanimity, wisdom, public duty, in short, of policy, in the broadest and widest sense of the word. It is equally clear that these are matters with which municipal Courts have nothing to do. They exist for the purpose of determining and enforcing legal obligations, not for the purpose of dividing them into classes, and saying that some of them, although legally binding, ought not to be enforced. The broad proposition which thus formed the basis of Lord Robert Cecil's argument almost answers itself, for there must have been, in all times, contracts made by States before conquest such as no conqueror would ever think of carrying out. Some illustrations

will occur in the course of our subsequent remarks. For the moment we will pursue Lord Robert's argument into further detail. His main proposition was divided into three heads. First, that, by international law, the Sovereign of a conquering State is liable for the obligations of the conquered; secondly, that international law forms part of the law of England; and, thirdly, that rights and obligations, which were binding upon the conquered State, must be protected and can be enforced by the municipal Courts of the conquering State . . . .

[In support of his first proposition Lord Robert Cecil had cited passages from various writers on international law. An omitted part of the opinion, in which the court commented upon the value of this class of authority, is printed *supra*, 62.]

Before, however, dealing with the specific passages in the writings of jurists upon which the suppliants rely, we desire to consider the proposition, that by international law the conquering country is bound to fulfil the obligations of the conquered, upon principle; and upon principle we think it cannot be sustained. When making peace the conquering Sovereign can make any conditions he thinks fit respecting the financial obligations of the conquered country, and it is entirely at his option to what extent he will adopt them. It is a case in which the only law is that of military force. This, indeed, was not disputed by counsel for the suppliants; but it was suggested that although the Sovereign when making peace may limit the obligations to be taken over, if he does not do so they are all taken over, and no subsequent limitation can be put upon them. What possible reason can be assigned for such a distinction? Much inquiry may be necessary before it can be ascertained under what circumstances the liabilities were incurred, and what debts should *in foro conscientiæ* be assumed. There must also be many contractual liabilities of the conquered State of the very existence of which the superior Power can know nothing, and as to which persons having claims upon the nation about to be vanquished would, if the doctrine contended for were correct, have every temptation to concealment—others, again, which no man in his senses would think of taking over. A case was put in argument which very well might occur. A country has issued obligations to such an amount as wholly to destroy the national credit, and the war, which ends in annexation of the country by another Power, may have been brought about by the very state of insolvency to which the conquered country has been reduced by its own misconduct. Can any valid reason be suggested why the country which has made war and succeeded should take upon itself the liability to pay out of its own resources the debts of the insolvent State, and what difference can it make that in the instrument of annexation or cessation of hostilities matters of this kind are not provided for? We can well understand that, if by public proclamation or by convention the con-

quering country has promised something that is inconsistent with the repudiation of particular liabilities, good faith should prevent such repudiation. We can see no reason at all why silence should be supposed to be equivalent to a promise of universal novation of existing contracts with the Government of the conquered State. It was suggested that a distinction might be drawn between obligations incurred for the purpose of waging war with the conquering country and those incurred for general State expenditure. What municipal tribunal could determine, according to the laws of evidence to be observed by that tribunal, how particular sums had been expended, whether borrowed before or during the war? It was this and cognate difficulties which compelled Lord Robert Cecil ultimately to concede that he must contend that the obligation was absolute to take over all debts and contractual obligations incurred before war had been actually declared.

Turning now to the text-writers, we may observe that the proposition we have put forward that the conqueror may impose what terms he thinks fit in respect of the obligations of the conquered territory, and that he alone must be the judge in such a matter, is clearly recognised by Grotius: see "War and Peace," book iii. chap. 8, s. 4, and the Notes to Barbeyrac's edition of 1724, vol. ii. p. 632. For the assertion that a line is to be drawn at the moment of annexation, and that the conquering Sovereign has no right at any later stage to say what obligations he will or will not assume, we venture to think that there is no authority whatever. A doctrine was at one time urged by some of the older writers that to the extent of the assets taken over by the conqueror he ought to satisfy the debts of the conquered State. It is, in our opinion, a mere expression of the ethical views of the writers; but the proposition now contended for is a vast extension even of that doctrine. It has been urged that in numerous cases, both of peace and of cession of territories, special provision has been made for the discharge of obligations by the country accepting the cession or getting the upper hand in war; but, as we have already pointed out, conditions the result of express mutual consent between two nations afford no support to the argument that obligations not expressly provided for are to follow the course, by no means uniform, taken by such treaties. See as to this, s. 27 of the 4th edition of Hall's International Law, and the opinion of Lord Clarendon there cited. Lord Robert Cecil cited a passage from Mr. Hall's book, 4th ed. p. 105, in which he states that the annexing Power is liable for the whole of the debts of the State annexed. It cannot, however, be intended as an exhaustive or unqualified statement of the practice of nations, whatever may have been the opinion of the writer as to what should be done in such cases. It is not, in our opinion, directed to the particular subject now under discussion. The earlier parts of the same chapter contain passages inconsistent with any such view. We would

call attention particularly to s. 27 on pp. 98 and 99 of the 4th edition, where the question as to the extent to which obligations do not pass is discussed, and the passage on pp. 101 and 102, referring to the discussion between England and the United States in 1854, in which Lord Clarendon's contention that Mexico did not inherit the obligations or rights of Spain is approved of by Mr. Hall. In the same way the passage from Halleck, s. 25 of chap. 34 (Sir Sherston Baker's edition of 1878), cited by Lord Robert Cecil, cannot be construed as meaning to lay down any such general proposition. It is cited from a chapter in which other sections contain passages inconsistent with the view that the legal obligation to fulfil all contracts passed to the conquering State. The particular section is in fact directed to the obligations of the conquering or annexing State upon the rights of private property of the individual—the point which formed the subject of discussion in the American cases upon which the suppliants relied and with which we shall deal later on. The passage from Wheaton (Atlay's ed. p. 46, s. 30) shews that the writer was only expressing an opinion respecting the duty of a succeeding State with regard to public debts, and, as the note to the passage shews, it is really based upon the fact that many treaties have dealt with such obligations in different ways We have already pointed out how little value particular stipulations in treaties possess as evidence of that which may be called international common law. We have not had the opportunity of referring to the edition of Calvo, cited by Lord Robert Cecil, but the sections of the 8th book of the edition published in 1872 contain a discussion as to the circumstances under which certain obligations should be undertaken by the conquering State. The distinction between the obligations of the successor with regard to the private property of individuals on the one hand, and the debts of the conquered State on the other, is clearly pointed out, and paragraphs 1005 and 1010 are quite inconsistent with any recognition by the author of the proposition contended for by the suppliants. The same observations apply to Heffter, another work upon which reliance was placed. As regards Max Huber's work on State Succession, published in 1898, there is no doubt, as appears from Mr. Westlake's recent book on international law, published last year, and from other criticisms, that Huber does attempt to press the duty of a succeeding or conquering State to recognise the obligations of its predecessor to a greater extent than previous writers on international law, but the extracts cited by the Attorney-General in his reply and other passages in Huber's book shew that even his opinion falls far short of the proposition for which the suppliants contend. But whatever may be the view taken of the opinions of these writers, they are, in our judgment, inconsistent with the law as recognised for many years in the English Courts; and it is sufficient for us to cite the language of Lord Mansfield in Campbell v. Hall [1 Cowp. 204, 209] in a passage

the authority of which has, so far as we know, never been called in question: "It is left by the Constitution to the King's authority to grant or refuse a capitulation. . . . If he receives the inhabitants under his protection and grants them their property he has a power to fix such terms and conditions as he thinks proper. He is entrusted with making the treaty of peace; he may yield up the conquest or retain it upon what terms he pleases. These powers no man ever disputed, neither has it hitherto been controverted that the King might change part or the whole of the law or political form of government of a conquered dominion." And so, much earlier, in the year 1722 (2nd Peere Williams, p. 75), it is said by the Master of the Rolls to have been determined by the Lords of the Privy Council that "where the King of England conquers a country it is a different consideration, for there the conqueror by saving the lives of the people conquered gains a right and property in such people, in consequence of which he may impose upon them what laws he pleases." References were made to many cases of cession of territory not produced by conquest, and the frequent assumption in such cases of the liabilities of the territory ceded by the State accepting the cession was referred to. They may be dismissed in a sentence. The considerations which applied to peaceable cession raise such different questions from those which apply to conquest that it would answer no useful purpose to discuss them in detail. . . .

[An omitted part of the opinion, in which the court commented upon Lord Robert Cecil's second proposition, is printed *supra*, 63.]

We pass now to consider the third proposition upon which the success of the suppliants in this case must depend—namely, that the claims of the suppliants based upon the alleged principle that the conquering State is bound by the obligations of the conquered can be enforced by petition of right. It is the consideration of this part of the case which brings out in the strongest relief the difficulties which exist in the way of the suppliants. It is not denied on the suppliants' behalf that the conquering State can make whatever bargain it pleases with the vanquished; and a further concession was made that there may be classes of obligations that it could not be reasonably contended that the conquering State would by annexation take upon itself, as, for instance, obligations to repay money used for the purposes of the war. We asked more than once during the course of the argument by what rule, either of law or equity, which could be applied in municipal Courts could those Courts decide as to the obligations which ought or ought not to be discharged by the conquering State. To refer again to the instance given in the commencement of this judgment—the obligation incurred by the conquered State by which their credit has been ruined may have been contracted for insufficient consideration or under circumstances which would make it perfectly right from every point of view

for the conquering State to repudiate it in whole or in part. No answer was, or could be, given. Upon this part of the case there is a series of authorities from the year 1793 down to the present time holding that matters which fall properly to be determined by the Crown by treaty or as an act of State are not subject to the jurisdiction of the municipal Courts, and that rights supposed to be acquired thereunder cannot be enforced by such Courts. It is quite unnecessary to refer in detail to them all. . . .

[In an omitted part of the opinion the court referred to Nabob of the Carnatic v. East India Co., 1 Ves. Jr. 371, 2 Ves. Jr. 56; Cook v. Sprigg [1899] A. C. 572; Secretary of State for India v. Kamachee, 13 Moo. P. C. 22; Doss v. Secretary of State for India, 19 Eq. 509; Rustomjee v. Reg., 1 Q. B. D. 487, 2 Q. B. D. 69; United States v. Percheman, 7 Pet. 51; Mitchell v. United States, 9 Pet. 711; Smith v. United States, 10 Pet. 326; Strother v. Lucas, 12 Pet. 410; United States v. Prioleau, 2 H. & M. 559; United States v. McRae, 8 Eq. 69; Republic of Peru v. Peruvian Guano Co., 36 Ch. D. 489; Republic of Peru v. Dreyfus, 38 Ch. D. 348.]

. . . We are of opinion, for the reasons given, that no right on the part of the suppliants is disclosed by the petition which can be enforced as against His Majesty in this or in any municipal Court; and we therefore allow the demurrer, with costs.

Judgment for the Crown.[19]

[19] "Coming now to the question whether there are exceptions to the rule that a successor state is liable for the obligations of its predecessor, it would seem difficult to hold the conqueror liable, whether with or without benefit of inventory, for a loan which an extinguished state had contracted for the purpose of the war. Those who lend money to a state during a war, or even before its outbreak when it is notoriously imminent, may be considered to have made themselves voluntary enemies of the other state, and can no more expect consideration on the failure of the side which they have espoused than a neutral ship which has entered the enemy's service can expect to avoid condemnation if captured. . . . But different considerations apply to the obligations which a state has contracted for the purpose of a war, either by requisitions or the destruction of property not involving the consent of those towards whom the obligation of indemnifying them arises, or by contracts in which the consent of the contractors is involved, but in the way of business and not so as to implicate them as voluntary parties to the struggle. If the state is extinguished, it is not generally thought that there is anything to take such obligations as these out of the rule of the successor's liability." WESTLAKE, 2d ed., I, 78–9.

The treaties of peace, 1919–23, provided that states to which territory of the defeated powers was to be transferred should assume in each instance a proportional share of the pre-war debt of the ceding state. See Treaty of Versailles, June 28, 1919, art. 254, 13 Am. Jour. Int. L. Suppl., 151, 280; Treaty of St. Germain, Sept. 10, 1919, art. 203, 14 *ibid.* 1, 84; Treaty of Neuilly, Nov. 27, 1919, art. 141, 14 *ibid.* 185, 233; Treaty of Trianon, June 4, 1920, art. 186, 15 *ibid.* 1, 66; Treaty of Lausanne, July 24, 1923, art. 46, 18 *ibid.* 1, 16.

See APPLETON, Des Effets des Annexions de Territoires sur les Dettes de l'État Démembré ou Annexé; MOORE, Dig. Int. L. I, 339; SACK, Les Effets des Transfor-

Case of Spanish Railway Concessions

United States. Opinion of Attorney-General Griggs. 1900

23 *Opinions of Attorneys General* 181.

[The following opinion was in response to a request from the Secretary of War. The facts were as follows. In 1887 Spain had granted a ninety-nine year concession to build and operate a railroad in the Philippine Islands from Manila to Dagupan. A royal decree of April 9, 1885, guaranteed the concessionaire an interest return of eight per cent per annum on the invested capital, the Spanish government reserving the right to recoup itself as to two-thirds of the subvention from local funds of the provinces through which the railroad was to be constructed. Various special conditions were stipulated with respect to construction, operation, and services to the government. The original concessionaire assigned to the Manila Railway Company, Limited, an English corporation, and the company built and operated the road pursuant to the concession. After the cession of the Philippines to the United States in 1898, the company preferred a claim against the United States to be paid quarterly subventions according to the terms of the contract.]

[The above statement of the case is substituted for the statement of facts in the opinion. Part of the opinion is omitted.]

It is apparent that this contract was recognized as one of utility to the Government of Spain, and one of benefit to the provinces in the island of Luzon, through which the road was to pass. Ultimately, as we may infer from the royal decree of April 9, 1885, those provinces were to bear two-thirds of the expense of the guaranty. The whole guaranty was to be paid from the Philippine treasury; but I do not understand that to mean that it was to be paid wholly from moneys belonging to the local funds of the Philippines, but ultimately, to the extent of one-third, from the royal or peninsular funds in the Philippine treasury, or at all events as in part a subsidy recognized by the general policy of Spain as chargeable to herself. . . .

The contract of concession has not been fully executed, but was, in some respects, to remain executory for eighty-seven years. It was a contract between the Spanish Government and the railroad company. The promises were made by the one to the other. I am of opinion that an identical contract between the United States and the company was not created by the ratifications of the treaty of Paris, and does not exist.

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mations des États sur leurs Dettes Publiques et autres Obligations Financières; Schmidt, Der Uebergang der Staatsschulden bei Gebietsabtretungen; Sibley, 'Story of the Manilla Ransom,'' 7 Jour. Soc. Comp. Leg., 3d series, 17, 22.

We need not inquire whether the contract would now survive had the Philippine government or the provincial deputations, regarded as autonomous or even as merely part of the Royal Government, made it, and had the benefits of it been wholly received by the provinces or archipelago. For the contract was made in Spain, and partly for her own benefit. It was the indivisible personal contract of Spain and of the concessionaire.

It seems to be the consensus of opinion among authorities on International law, that, upon the separation of part of a country from the sovereignty over it, debts created for the benefit of the departing portion of the country go with it as charges upon its government. (Hall's International Law (4th ed.), p. 98; Rivier, *Droit des Gens*, tome 1, pp. 70, 72; Calvo, *Le Droit Inter.*, t. 1, sec. 101; t. 4, sec. 2487; Phillimore's Inter. Law (2d ed.), vol. 1, pt. 2, secs. 136, 137; The Tarquin, Moore on Arbitration, vol. 5, p. 4617; Lawrence's Wheaton's Inter. Law, pp. 53, 54; Wharton's International Law Digest, sec. 5; Anglo-Saxon Review, June, 1899, Mr. Reed's article concerning the Philippine debt, etc.; Dana's Wheaton's Inter. Law, sec. 30, note; Glenn's International Law, sec. 28; Field's International Code, secs. 24, 26; Gardner's Institutes of Inter. Law, p. 52; Senate Doc. 62, Fifty-fifth Congress, third session, pt. 1, p. 500.)

Various bases are given for an obligation of a locality and its new government. The chief one is that a benefit goes with its attached burden. Another is the legal right of the original sovereign to bind the locality to pay any debt, even if not for local benefit. (Bluntschli, *Droit International*, sec. 59.) A third is the possession by the new government of the funds or revenues out of which the debt was to be paid. This obviously happens in the case of a revolutionary government getting control of the whole national territory. Still another is the fact that the creditor was lawfully induced to rely, and did rely, upon funds which are now in the possession of the new government. And as for the binding or mortgaging of the locality, it is not to be understood that more is meant, or now commonly practiced, than for a sovereign to agree that certain local objects or revenues should be bound. The creditor is not, as formerly, given a city or province in mortgage, with a right of sovereign jurisdiction. (Heffter, *Droit International*, sec. 71.)

. . .

As already suggested, all the promises of every contract entered into by the former government of a province wrested from it by victory in war do not transfer themselves to the new government, in defiance of the natural proposition that a man can not be bound by a stranger's promises. But benefits may be received by a province as well in pursuance of a personal contract of the sovereign partly for his own benefit as otherwise. They are none the less benefits received and retained

by the province, and if the burden of the contract itself does not go with them, the burden of an obligation to do equity toward the contractor who has supplied them, does go with them. . . .

The concessions here in question are executory contracts, not concerning the public domain owned by Spain, but containing many personal obligations of Spain and of other parties. Spain is regarded by the law of nations as having a personality of her own distinct from that of the power which has succeeded her in control of the ceded territory, and I am not aware of any authority for saying that such personal obligations, either on the part of the Government of Spain or the other contracting parties, become binding as contractual obligations upon a government which made no such promises, or upon the individual towards a government to which he made no such promises. Hall says (International Law, sec. 27):

"With rights which have been acquired, and obligations which have been contracted, by the old state as personal rights and obligations the new state has nothing to do. . . . The new state, on the other hand, is an entirely fresh being. It neither is, nor does it represent, the person with whom other states have contracted; they may have no reason for giving it the advantages which have been accorded to the person with whom the contract was made, and it would be unjust to saddle it with liabilities which it would not have accepted on its own account."

The fact that in certain treaties of cession contracts, regularly entered into for objects of public interest specially concerning the ceded territory, are taken over by the new sovereignty, can not be accepted as proving that without treaties all such contracts become obligatory upon the acquiring sovereignty. The stipulations of treaties are sometimes confirmatory of the law of nations, sometimes different from it. Presumably they should be regarded as not identical with it, since nations may well be presumed not to make unnecessary stipulations, or fail to obey the law of nations. . . .

As I have suggested, these concessions, made by a military monarchy for cables and railroads through its colonies, were by no means entered into without regard to the benefit and conveniences of the central government as sovereign over the colonies. They were, and this appears upon their face, concerning instruments with which the monarchy was to govern more easily and conveniently the subject colonies, for the general benefit of Spain as well as their own.

To regard them as exclusively for local benefit would, therefore, be to ignore obvious facts. . . .

It may well be that the treaties in question, some of which speak of "contracts for objects of public interest, especially concerning the ceded territory," intended to include only contracts for objects which were, or were supposed to be, or were liberally treated as being, local objects, and

not contracts for combined local and imperial objects. Probably neither a debt, nor even an executory contract of a city for gas works or of a province for irrigation works or railroads of purely provincial interest, can justly be repudiated, upon a change of imperial sovereignty, whether made by the people of the city or province or by imperial agents authorized to act for either. On the other hand, to charge the ceded province with contracts or debts for imperial objects, such as those concerning the relations between the central government and the locality, can not be justified by the mere fact that the contract concerns also local objects.

But it may be said that contracts of this kind may properly be charged to the new sovereignty, which will be interested in the imperial objects and own the province. The old machinery for holding and ruling the province can serve as well the new as the old sovereignty, and, therefore, the law requires the former to fulfill the contract made by the latter.

Such a principle might, perhaps, be conceded if it were a fact that the relations between the new sovereignty and the province and the uses to be made by the new sovereignty of the province were, or could be presumed to be, identical with the preexisting relations and uses. But a presumption of the kind must be rested upon a great preponderance of probabilities, and no such preponderance exists. Geographically, politically, commercially, everyway, a province or piece of territory will probably have different relations with the new and the old sovereignty.

. . .

Nor should we, in inquiring whether the nations have consented to a rule of law to the effect that contracts made by the old sovereignty for local and imperial objects shall be obligatory as such upon the new sovereignty, forget the extraordinary effects which must flow from such a law. What is there that may not be contracted for? What imaginable stipulations may not be made? To agree in a treaty to be bound by actual, known contracts, and to assent to a law about contracts in general are two different things. Could nations commit themselves to anything more embarrassing and unsafe than a legal obligation to carry out specifically any promises whatsoever that may be made by others in any contracts for imperial and local objects? It seems to me not, and that whoever asserts that nations have by common consent established such a law must furnish abundant and indisputable authority, whereas, as Hall says (sec. 217), "this subject is one upon which writers on international law are generally unsatisfactory."

Servitudes or easements, completely granted or established upon the ceded territory for the benefit of a foreign nation, have been supposed to diminish by so much the title of the owner of the province, so that when he cedes it he cedes it subject to the servitudes. On the other hand, it may be that the owner of the province may acquire from a foreign

power a servitude over foreign territory for the benefit of the province, in such a way that it would become appendant or appurtenant to the province and go with it into whosesoever hands the province might be transferred. This seems to be the meaning of Hall (International Law, 4th ed., p. 98) in speaking of the navigation and regulation of a river. In such a case the obligation runs with the land, and may be regarded as other than a mere personal obligation. But this is no reason for treating personal obligations, stipulated in an executory contract, as not personal obligations, simply because they may have some relation to a particular ceded locality.

I am unable to regard these contracts of concession, with their manifold personal stipulations, as other than what they purport to be; and the difference between them and servitudes, diminishing the title of the owner prior to the cession or appurtenant to the province ceded . . . seems to me to be an obvious one. These contracts are contracts. They are whole things with interdependent parts and reciprocal personal promises. We can not change their nature by calling them by other names, or repeating the word "local" in connection with them. As such personal contracts their promises bind those who made them. Any obligation of others in connection with their subject-matter is something different from the contract obligation, and may or may not coincide with the terms of the specific promises.

When we look into the present instance we find the large capital upon which the subsidy was calculated has long since been invested by the railway company; the provinces of the Philippines have undoubtedly received, and they retain and will retain, the chief benefit from the railroad; the revenues out of which that part of the benefit was to be paid for are now in the hands of their new government; the creditor was induced, very properly, to look to those revenues for that purpose. . . . From these considerations it seems to me to follow that, although the contract as such has departed with Spain, there is a general equitable obligation upon the provinces to make some fair arrangement with the company as to the two-thirds benefit, and that they can not justly take advantage of the disappearance of Spain to retain what she procured for them, on the credit of their funds, and deny all liability for the price.

Whether, based exclusively upon the reception (for the future and so far as geographical, political, and other differences will permit a benefit to continue) of the benefit of the railroad, the United States has incurred any liability affecting one-third or any such portion of the original indebtedness, it is unnecessary to consider, since, if so, it will be for Congress to deal with it.

So much in answer to your question as to what obligations, if any, exist under said concession, either against the revenues of the Philippine Islands or those of the United States.

You ask, if any such obligations do exist, what action can legally be taken in recognition and settlement thereof, by the Executive department of the United States, or by the military government of those islands.

It seems to me that the non-action of Congress has confirmed to the President the responsibility and authority to continue the military government he has set up in the Philippines, as the only government, for the present and for an uncertain time, of a peopled country whose future permanent status is undetermined. (Treaty of Paris, Article IX; opinion Attorney-General, July 22, 1898 (22 Opin., 150), concerning Hawaii). Under such circumstances I am of opinion that the President is not without authority to settle a preexisting accrued indebtedness of the kind herein explained, if he has good reason to believe that the settlement can not wisely and justly be left to await action by the future government.

It is represented in the papers submitted to me that the large deficiencies in the receipts of the railroad company, occasioned by the disturbed state of affairs, etc., threatens its bankruptcy. If so, this is a fact which may be considered in determining the propriety of present action.

You desire to know what particular action can be taken. I am of opinion that the President has authority, if he thinks it necessary, to apply the local revenues of the provinces through which this road extends to the discharge of their equitable liability, based upon so much of the concessionary agreement as has been already executed, the amount of which liability he has authority to determine, in view of all the facts and circumstances. And what he can do the military government can do with his consent.[20]

[20] See also Spanish Telegraph Concessions, 23 Op. Atty. Gen. 195; Spanish Railway and Telegraph Concessions, 23 *ibid.* 451. "The principle that concessions bind the receiving state when granted for the sole benefit of the *locus* ceded, but not otherwise, seems therefore to be supported by precedents drawn from the actual practice of the United States. These precedents seem to establish that if the concession was granted substantially for the benefit of the territory ceded, the receiving state is legally bound. If it was granted substantially for the benefit of the ceding state, the receiving state clearly is not bound. If the benefit adheres partly to one and partly to the other, the receiving state is not bound legally upon the contract or concession; but although it is not bound upon the contract, it may be liable upon the theory of unjust enrichment, or, as the Continental lawyers would say, of 'unmerited acquisition of benefits,' for the benefit actually received." Sayre, in 12 Am. Jour. Int. L. 705, 716.

Cf. Alsop Claim, Chile and United States, 5 Am. Jour. Int. L. 1079; Eastern Extension, Australasia and China Telegraph Co. v. United States, 46 Ct. Cl. 646, 48 Ct. Cl. 33; 12 Am. Jour. Int. L. 705, 715 n. 21.

See Fuller, "Are Franchises Affected by Change of Sovereignty?" 3 Col. L. Rev. 241; Gidel, Des Effets de l'Annexion sur les Concessions; Moore, Dig. Int. L., I, 385; Sayre, "Change of Sovereignty and Concessions," 12 Am. Jour. Int. L. 705.

Hawaiian Claims

Great Britain and the United States. Mixed Claims Commission. 1925.

American and British Claims Arbitration under the Special Agreement Concluded August 18, 1910, *Nielsen's Report, page* 160.

Arbitrators: Alfred Nerincx, Sir Charles Fitzpatrick, Roscoe Pound.

[The names of counsel and part of the opinion are omitted.]

Decision given November 10, 1925.

These are claims for wrongful imprisonment, detention in prison, enforced leaving of the country, and other indignities, claimed to have been inflicted upon British subjects by the authorities of the Hawaiian Republic prior to annexation by the United States. . . .

It is contended on behalf of Great Britain that the Brown Case [Nielsen's Report, 162, 187] is to be distinguished because in that case the South African Republic had come to an end through conquest, while in these cases there was a voluntary cession by the Hawaiian Republic as shown (so it is said) by the recitals of the Joint Resolution of Annexation. We are unable to accept the distinction contended for. In the first place, it assumes a general principle of succession to liability for delict, to which the case of succession of one state to another through conquest would be an exception. We think there is no such principle. It was denied in the Brown Case and has never been contended for to any such extent. The general statements of writers, with respect to succession to obligations, have reference to changes of form of government, where the identity of the legal unit remains, to liability to observe treaties of the extinct state, to contractual liabilities, or at most to quasi-contractual liabilities. Even here, there is much controversy. The analogy of universal succession in private law, which is much relied on by those who argue for a large measure of succession to liability for obligations of the extinct state, even if admitted (and the aptness of the analogy is disputed), would make against succession to liability for delicts. Nor do we see any valid reason for distinguishing termination of a legal unit of International Law through conquest from termination by any other mode of merging in, or swallowing up by, some other legal unit. In either case the legal unit which did the wrong no longer exists, and legal liability for the wrong has been extinguished with it.

We decide that these claims must be rejected.[21]

[21] See also Case of Robert E. Brown, G. B. U. S. Cl. Com'n., 162, 187; Hurst, "State Succession in Matters of Tort," B. Y. B. Int. L. (1924) 163.

Claim of the Netherlands to Most Favored Nation Privileges

The Netherlands and the United States. 1873.

Papers Relating to the Foreign Relations of the United States (1873) 714–727.

[The following article was incorporated in the Treaty of Amity and Commerce concluded Oct. 8, 1782, between "their High Mightinesses the States General of the United Netherlands" and the United States. See 8 U. S. Stat. L. 32.]

Art. 2. The subjects of the said States General of the United Netherlands, shall pay in the ports, havens, roads, countries, islands, cities or places, of the United States of America, or any of them, no other nor greater duties or imposts, of whatever nature or denomination they may be, than those which the nations the most favoured, are or shall be obliged to pay; and they shall enjoy all the rights, liberties, priviledges, immunities, and exemptions in trade, navigation and commerce, which the said nations do or shall enjoy, whether in passing from one port to another, in the said states, or in going from any of those ports to any foreign port of the world, or from any foreign port of the world to any of those ports.

[On Jan. 29, 1873, Westenberg, Minister of the Netherlands, addressed the United States Department of State in part as follows. See U. S. For. Rel. (1873) 714.]

The Government of the United States some time since, as your excellency is aware, granted, by treaty, exemption from tonnage dues in American ports to Belgian steamers plying directly between the ports of the two countries; and, recently, the same exemption has been granted to the steamers of the North German Lloyd line, which sail directly between the ports of the United States and the city of Bremen.

In view of the privileges with which the Government of the United States has favored these two lines, which sail, respectively, under the Belgian and under the German flag, I take the liberty to address your excellency, with the request that the same favor may be granted to the steamers of the Dutch line between Rotterdam and New York.

In support of my request, I take the liberty to call the attention of your excellency to Article II, of the treaty of October 8, 1782, between the Netherlands and the United States, one of the first treaties of friendship and commerce concluded by the United States, whereby the privileges granted to the most favored nations are secured to subjects of the Netherlands in the United States, in the most explicit terms and in all respects, particularly in matters similar to the one in question.

The Dutch line, in favor of which I address your excellency, has been established for a short time, and makes direct and regular trips between

Rotterdam and New York, at present with two steamers, the Rotterdam and the Maas; it should, therefore, be classed in the same category with the steamers of the Belgian line and those of the North German Lloyd.

[Correspondence with respect to the claim advanced by the Netherlands was concluded by a dispatch from Secretary Fish to Minister Westenberg of April 9, 1873, in part as follows. See U. S. For. Rel. (1873) 720, 723.]

The power with which the United States contracted these relations is described in the treaty as "their High Mightinesses the States-General of the United Netherlands." In a circular letter from their high mightinesses, addressed to the States of the United Provinces, dated the 10th of February, 1793, they describe themselves as "a pacific republic," and their principal magistrate is styled by them "the Stadtholder of the United Netherlands, of which he is not the sovereign, but an illustrious personage, attached to this republic by eminent dignities, with which he is invested under the sovereignty of the States of the provinces, the union of which represents the sovereignty of the confederation."

Hostilities between the United Provinces and France broke out in 1793, and continued with varying fortunes until December, 1795, when the Stadtholder abandoned the country. Another form of republican government was established over what was substantially the same territory, which was styled at first the Republic of the United Provinces and afterward the Batavian Republic. The revolutionary government came into complete possession of political power, so far as related to foreign powers, and was recognized by many of the other powers, among whom were the United States. It was recognized by Great Britain in the treaty of Amiens, to which it was a party.

Subsequently this republic became a monarchy, with a Bonaparte as king, and this monarchy in a few years disappeared in its turn, and the whole territory of the old seven United Provinces was incorporated into the French Empire, and disappeared as a separate nationality.

On the abdication of the Emperor Napoleon the allies entered into a secret treaty at Paris, in which it was agreed that the establishment of a just balance of power in Europe required that Holland should be so constituted as to be enabled to support her independence, and that therefore the countries comprised between the sea, the frontiers of France and the Meuse, should be given up forever to Holland.

In the following year this secret article was carried into effect in the congress at Vienna. The sixty-fifth article of the general treaty of all the powers and the first article of the particular treaty respecting the Netherlands, alike provide that the old United Provinces of the Netherlands and the former Belgic provinces, and certain other countries therein designated, should form, under the sovereignty of the house of Orange, the kingdom of the Netherlands. In conformity with their practice to

recognize *de facto* governments, the United States recognized this political change and entered into diplomatic relations with this new government.

During these frequent political changes, and mainly during the last two years of the reign of Louis Bonaparte, several vessels of the United States and their cargoes were seized and condemned or confiscated in the ports which had before then formed the territorial domain of their high mightinesses the States-General. When peace was restored, the United States, who had not been parties to the dismemberment or to the re-organization of continental Europe, made application to the government of the house of Orange for compensation for the injuries which their citizens had suffered in this way. The instructions to make these representations were dated the 9th of May, 1815, before the din of war had ceased.

A long discussion ensued, conducted in Holland, and extending from 1815 to 1820. . . .

Finding the government of the Netherlands firm in denying the continuing force of the treaty of 1782, the then president directed instructions to be sent to the minister of the United States, at the Hague, not to press the claims further. They were dropped and most of them were subsequently, in conformity with the suggestions of the Dutch government, presented for payment by France under the treaty of 1832, and were allowed and paid. And thus the opinions of the Dutch government respecting the treaty of 1782, as officially conveyed to Mr. Monroe by Mr. Changuion in 1815, were finally concurred in by the United States, and the question disposed of, as it was supposed, forever.

The United States found less difficulty in accepting the Dutch views in regard to the dissolution of the old body-politic, which was in existence in 1782, as they found the new body-politic differing from the former one in territory, in name, and in form of government. In place of the republic of the United Provinces, they found the monarchy of the Netherlands; in place of the united territories of the high mightinesses, they found the domains nearly doubled by the addition of Brabant and Flanders and part of Germany; in place of a homogeneous people, with united historic associations, they found a political body, avowedly created by the great powers of Europe out of elements that did not exist in a national organization before 1815, for the purpose of preserving a fictitious balance of power. When they found this new body-politic denying (and persisting in the denial) that it was the same body-politic which had existed under another form in the Batavian Republic, and in the Bonaparte kingdom of Holland, the United States accepted this view.

In the opinion of the President, this correspondence between Mr. Monroe and Mr. Changuion, taken in connection with the subsequent action of the Dutch government in denying that the treaty had any

valid operative force during the long period of eighteen years, when its existence would have been of advantage to the United States, and also in connection with the acquiescence of the Government of the United States in that action, and its submission of the rejected claims for compensation from France, places beyond doubt the fact that the treaty of 1782, for a period of over fifty years, has been mutually regarded as no longer in force.[22]

Terlinden v. Ames

United States. Supreme Court. 1902.

184 *United States Reports* 270.

[The statement of the case, the names of counsel, and part of the opinion are omitted. The facts are stated sufficiently in the opinion.]

Mr. Chief Justice Fuller . . . delivered the opinion of the court.

The treaty of June 16, 1852, between the United States and the Kingdom of Prussia, and other States of the Germanic Confederation included in or which might accede to that convention, provided that the parties thereto should upon requisition "deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or assault with intent to commit murder, or arson, or robbery, or forgery, or the utterance of forged papers, or the fabrication or circulation of counterfeit money, whether coin or paper money, or the embezzlement of public moneys, committed within the jurisdiction of either party, shall seek an asylum, or shall be found within the territories of the other." 10 Stat. 964, 966.

Pursuant to §5270 of the Revised Statutes, (and the acts from which that section was brought forward,) complaint was duly made before a commissioner appointed and authorized by the District Court of the United States for the Northern District of Illinois to hear applications for extradition and to issue warrants therefor, charging Terlinden with having as a subject of the Kingdom of Prussia, and within the jurisdiction of that Kingdom, committed the crimes of forgery, counterfeiting and

[22] "The obligation of a treaty, as distinguished from rights already conveyed or transferred under it, comes to an end upon the extinguishment of one of the contracting parties with the consequent loss of power to perform. . . . The principle that a treaty between two parties is not annulled by an inconsistent subsequent treaty between one of them and a third party does not have full application in such cases." Crandall, Treaties, 2d ed., 425. See U. S. For. Rel. (1875) 479; *ibid.* (1896) 123, 125; *ibid.* (1910) 681, 682. The resolution providing for the annexation of the Hawaiian Islands to the United States stipulated as follows: "The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations." 30 U. S. Stat. L. 750.

the utterance of forged instruments, and with being a fugitive from the justice of said kingdom. . . .

The commissioner issued his warrant and Terlinden was apprehended, whereupon and before the commissioner had entered upon the hearing, Terlinden petitioned and obtained from the District Court the writ of *habeas corpus* under consideration. . . .

In this case the writ of *habeas corpus* was issued before the examination by the commissioner had been entered upon, and his jurisdiction was the only question raised. If he had jurisdiction, the District Court could not interfere, and he had jurisdiction if there was a treaty and the commission of extraditable offences was charged. . . .

This brings us to the real question, namely, the denial of the existence of a treaty of extradition between the United States and the Kingdom of Prussia, or the German Empire. In these proceedings the application was made by the official representative of both the Empire and the Kingdom of Prussia, but was based on the extradition treaty of 1852. The contention is that, as the result of the formation of the German Empire, this treaty had been terminated by operation of law.

Treaties are of different kinds and terminable in different ways. The fifth article of this treaty provided, in substance, that it should continue in force until 1858, and thereafter until the end of a twelve months' notice by one of the parties of the intention to terminate it. No such notice has ever been given, and extradition has been frequently awarded under it during the entire intervening time.

Undoubtedly treaties may be terminated by the absorption of Powers into other Nationalities and the loss of separate existence, as in the case of Hanover and Nassau, which became by conquest incorporated into the Kingdom of Prussia in 1866. Cessation of independent existence rendered the execution of treaties impossible. But where sovereignty in that respect is not extinguished, and the power to execute remains unimpaired, outstanding treaties cannot be regarded as avoided because of impossibility of performance.

This treaty was entered into by His Majesty the King of Prussia in his own name and in the names of eighteen other States of the Germanic Confederation, including the Kingdom of Saxony and the free city of Frankfort, and was acceded to by six other States, including the Kingdom of Würtemburg, and the free Hanseatic city of Bremen, but not including the Hanseatic free cities of Hamburg and Lubeck. The war between Prussia and Austria in 1866 resulted in the extinction of the Germanic Confederation and the absorption of Hanover, Hesse Cassel, Nassau and the free city of Frankfort, by Prussia.

The North German Union was then created under the *praesidium* of the Crown of Prussia, and our minister to Berlin, George Bancroft, thereupon recognized officially not only the Prussian Parliament, but

also the Parliament of the North German United States, and the collective German Customs and Commerce Union, upon the ground that by the paramount constitution of the North German United States, the King of Prussia, to whom he was accredited, was at the head of those several organizations or institutions; and his action was entirely approved by this Government. Messages and Documents, Dep. of State, 1867–8, Part I, p. 601; Dip. Correspondence, Secretary Seward to Mr. Bancroft, Dec. 9, 1867.

February 22, 1868, a treaty relative to naturalization was concluded between the United States and His Majesty, the King of Prussia, on behalf of the North German Confederation, the third article of which read as follows: "The convention for the mutual delivery of criminals, fugitives from justice, in certain cases, concluded between the United States on the one part and Prussia and other States of Germany on the other part, the sixteenth day of June, one thousand eight hundred and fifty-two, is hereby extended to all the States of the North German Confederation." 15 Stat. 615. This recognized the treaty as still in force, and brought the Republics of Lubeck and Hamburg within its scope. Treaties were also made in that year between the United States and the Kingdoms of Bavaria and Würtemburg, concerning naturalization, which contained the provision that the previous conventions between them and the United States in respect of fugitives from justice should remain in force without change.

Then came the adoption of the Constitution of the German Empire. It found the King of Prussia, the chief executive of the North German Union, endowed with power to carry into effect its international obligations, and those of his kingdom, and it perpetuated and confirmed that situation. The official promulgation of that Constitution recited that it was adopted instead of the Constitution of the North German Union, and its preamble declared that "His Majesty the King of Prussia, in the name of the North German Union, His Majesty the King of Bavaria, His Majesty the King of Würtemburg, His Highness the Grand Duke of Baden, and His Royal Highness the Grand Duke of Hesse and by Rhine for those parts of the Grand Duchy of Hesse which are situated south of the Main, conclude an eternal alliance for the protection of the territory of the Confederation, and of the laws of the same, as well as for the promotion of the welfare of the German people." As we have heretofore seen, the laws of the Empire were to take precedence of those of the individual States, and it was vested with the power of general legislation in respect of crimes.

Article 11 read "The King of Prussia shall be the president of the Confederation, and shall have the title of German Emperor. The Emperor shall represent the Empire among nations, declare war, and conclude peace in the name of the same; enter into alliances and other

conventions with foreign countries, accredit ambassadors, and receive them. . . . So far as treaties with foreign countries refer to matters which, according to Article IV, are to be regulated by the legislature of the Empire, the consent of the Federal Council shall be required for their ratification, and the approval of the Diet shall be necessary to render them valid."

It is contended that the words in the preamble translated "an eternal alliance" should read "an eternal union," but this is not material, for admitting that the Constitution created a composite State instead of a system of confederated states, and even that it was called a confederated Empire rather to save the *amour propre* of some of its component parts than otherwise, it does not necessarily follow that the Kingdom of Prussia lost its identity as such, or that treaties theretofore entered into by it could not be performed either in the name of its King or that of the Emperor. We do not find in this constitution any provision which in itself operated to abrogate existing treaties or to affect the status of the Kingdom of Prussia in that regard. Nor is there anything in the record to indicate that outstanding treaty obligations have been disregarded since its adoption. So far from that being so, those obligations have been faithfully observed.

And without considering whether extinguished treaties can be renewed by tacit consent under our Constitution, we think that on the question whether this treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance. During the period from 1871 to the present day, extradition from this country to Germany, and from Germany to this country, has been frequently granted under the treaty, which has thus been repeatedly recognized by both governments as in force. Moore's Report on Extradition with Returns of all Cases, 1890.

In 1889, in response to a request for information on international extradition as practiced by the German Government, the Imperial Foreign Office transmitted to our chargé at Berlin a memorial on the subject, in the note accompanying which it was said: "The questions referred to, in so far as they could not be uniformly answered for all the confederated German States, have been answered in that document as relating to the case of applications for extradition addressed to the Empire or Prussia." It was stated in the memorial, among other things:

"In so far as by laws and treaties of the Empire relating to the extradition of criminals, provisions which bind all the States of the union have not been made, those States are not hindered from independently regulating extradition by agreements with foreign States, or by laws enacted for their own territory.

"Of conventions, some of an earlier, some of a later period, for the extradition of criminals, entered into by individual States of the union

with various foreign States, there exist a number, and in particular such with France, the Netherlands, Austria-Hungary, and Russia. With the United States of America, also, extradition is regulated by various treaties, as, besides the treaty of June 16, 1852, which applies to all of the States of the former North German Union, and also to Hesse, south of the Main, and to Würtemburg, there exist separate treaties with Bavaria and Baden, of September 12, 1853, and January 30, 1857, respectively." Moore's Report, 93, 94.

Thus it appears that the German Government has officially recognized, and continues to recognize, the treaty of June 16, 1852, as still in force, as well as similar treaties with other members of the Empire, so far as the latter has not taken specific action to the contrary or in lieu thereof. And see Laband, *Das Staatsrecht des Deutschen Reiches*, (1894), 122, 123, 124, 142.

It is out of the question that a citizen of one of the German states, charged with being a fugitive from its justice, should be permitted to call on the courts of this country to adjudicate the correctness of the conclusions of the Empire as to its powers and the powers of its members, and especially as the Executive Department of our Government has accepted these conclusions and proceeded accordingly.

The same is true as respects many other treaties of serious moment, with Prussia, and with particular States of the Empire, and it would be singular, indeed, if after the lapse of years of performance of their stipulations, these treaties must be held to have terminated because of the inability to perform during all that time of one of the parties.

In the notes accompanying the State Department's compilation of Treaties and Conventions between the United States and other Powers, published in 1889, Mr. J. C. Bancroft Davis treats of the subject thus:

"The establishment of the German Empire in 1871, and the complex relations of its component parts to each other and to the Empire, necessarily give rise to questions as to the treaties entered into with the North German Confederation and with many of the States composing the Empire. It cannot be said that any fixed rules have been established.

"Where a State has lost its separate existence, as in the case of Hanover and Nassau, no questions can arise.

"Where no new treaty has been negotiated with the Empire, the treaties with the various States which have preserved a separate existence have been resorted to.

"The question of the existence of the extradition treaty with Bavaria was presented to the United States District Court, on the application of a person accused of forgery committed in Bavaria, to be discharged on *habeas corpus*, who was in custody after the issue of a mandate, at the request of the minister of Germany. The court held that the treaty was admitted by both governments to be in existence.

"Such a question is, after all, purely a political one."

The case there referred to is that of In re Thomas, 12 Blatch. 370, in which the continuance of the extradition treaty with Bavaria was called in question, and Mr. Justice Blatchford, then District Judge, said:

"It is further contended, on the part of Thomas, that the convention with Bavaria was abrogated by the absorption of Bavaria into the German Empire. An examination of the provisions of the Constitution of the German Empire does not disclose anything which indicates that then existing treaties between the several States composing the confederation called the German Empire, and foreign countries, were annulled, or to be considered as abrogated.

"Indeed, it is difficult to see how such a treaty as that between Bavaria and the United States can be abrogated by the action of Bavaria alone, without the consent of the United States. Where a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being, in such case, not absolutely void, but voidable, at the election of the injured party, who may waive or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to a rupture. 1 Kent's Com. 174. In the present case the mandate issued by the Government of the United States shows that the convention in question is regarded as in force both by the United States and by the German Empire, represented by its envoys, and by Bavaria, represented by the same envoy. The application of the foreign government was made through the proper diplomatic representative of the German Empire and of Bavaria, and the complaint before the commissioner was made by the proper consular authority representing the German Empire and also representing Bavaria."

We concur in the view that the question whether power remains in a foreign State to carry out its treaty obligations is in its nature political and not judicial, and that the courts ought not to interfere with the conclusions of the political department in that regard. . . .

If it be assumed in the case before us, and the papers presented on the motion for a stay advise us that such is the fact, that the commissioner, on hearing, deemed the evidence sufficient to sustain the charges, and certified his findings and the testimony to the Secretary of State, and a warrant for the surrender of Terlinden on the proper requisition was duly issued, it cannot be successfully contended that the courts could properly intervene on the ground that the treaty under which both governments had proceeded, had terminated by reason of the adoption of the constitution of the German Empire, notwithstanding the judgment of both governments to the contrary.

The decisions of the Executive Department in matters of extradition, within its own sphere, and in accordance with the Constitution, are not

open to judicial revision, and it results that where proceedings for extradition, regularly and constitutionally taken under the acts of Congress, are pending, they cannot be put an end to by writs of *habeas corpus*.

The District Court was right, and its final order is

Affirmed.[23]

Mr. Justice Harlan did not hear the argument and took no part in the decision of the case.

In re Taylor

United States. District Court, District of Massachusetts. 1902.

118 *Federal Reporter* 196.

Petition for Writ of *Habeas Corpus*.

[The names of counsel and part of the opinion are omitted.]

Lowell, District Judge. The petitioner for *habeas corpus* was arrested and held by the United States commissioner for extradition to Great Britain. The complaint on which he was arrested alleges that the offense was committed "between October 1, 1899, and February 1, 1900, at Johannesburg, within the jurisdiction of his Britannic majesty." At the time in question, Johannesburg was in the physical and political control of the South African Republic, and Lord Roberts' proclamation annexing the territories of that republic to Great Britain had not been issued. By order of the court, the United States district attorney was informed of the pendency of these proceedings, and it is understood that he has sought instructions from the department of justice. He has not addressed this court either in support of or in opposition to the issuance of the writ. . . .

[An omitted part of the opinion is printed *supra*, 85.]

Counsel for the British consul contends that the petitioner should be extradited even if at the time when the offense was committed the place of its commission was outside British territory. He contends that it is sufficient if the place where the offense was committed is within British territory at the time when extradition is sought. That the president and senate would have authority to make a treaty with this

[23] See Crandall, Treaties, 2d ed., 431–3; 15 Harv. L. Rev. 847. "If a state, after incorporation into another, while losing its international personality still retains a territorial identity with full power of action over the subject-matter of a treaty previously concluded, the other contracting party may reasonably insist upon a recognition by the new or acquiring state of the continuing obligation of the treaty, so far as consistent with the new order of things. The continuance of the obligation under such circumstances would however result from the subsequent recognition or mutual agreements of the parties, rather than through state succession." Crandall, *op. cit.*, 431.

intent is not doubted, but the court has to consider, not what might have been done, but what is the meaning of the words used in the treaty, *viz.*, "committed within the jurisdiction of" either party. That Great Britain has jurisdiction to punish the petitioner, if it can lay hands on him, is not doubted. Ordinarily an act is not said to be committed within the jurisdiction of A. unless the place where the act was committed was at the time of its commission within the jurisdiction of A. That this interpretation of the treaty of 1889 would lead in some instances to the escape of criminals cannot be denied. There was no treaty between the United States and the South African Republic when this offense was alleged to have been committed. Before annexation the petitioner could not have been extradited, and so the annexation, even if it has not assisted justice, has not hindered it. But counsel for the British consul asks if the United States could not in 1899 ask for the extradition from England of a person alleged to have committed a crime in Porto Rico before 1898. Before the annexation of Porto Rico, Spain could have obtained extradition in the case supposed; is the criminal to escape altogether because the place where the offense was committed has changed its political status? This court is informed by the department of state that there appears to have been no case in which the United States, since the annexation of Porto Rico and the Philippines, has sought or obtained from any government the extradition of a person charged with having committed a crime in Porto Rico or the Philippines before the annexation of those islands. The absence of an attempt at extradition does not prove much, but in the absence of authority to the contrary, in the absence of legislative or executive interpretation, in the absence of intervention by the department of justice, as representing the executive, in this particular case, the words "committed within the jurisdiction" must receive their natural interpretation, and cannot be held to include acts committed in a place which has been annexed to Great Britain since the act was committed.

Writ to issue.[24]

[24] "A state formed by separation from another, whether the personality of the original state still exists or is completely lost by disintegration, succeeds to such treaty burdens of the parent state as are permanent and attached to the territory embraced in the new state." CRANDALL, Treaties, 2d ed., 434. "That a state never loses any of its rights, nor is discharged from any of its obligations, by a change in the form of its civil government, is one of the fundamental principles of international law. It applies, by analogy, to cases such as the one before us, where one part of a nation separates itself from the other. It is evident that on the creation of a new state, by a division of territory, that new state has a sovereign right to enter into new treaties and engagements with other nations; but until it actually does, the treaties by which it was bound as a part of the whole state will remain binding on the new state and its subjects." HASSAUREK, Commissioner, in The Mechanic, Moore, Int. Arb., III, 3221, 3223.

SECTION 3. EFFECT OF SUCCESSION UPON THE LOCAL LAW

MEMORANDUM

Great Britain. High Court of Chancery. 1722.

2 *Peere Williams Reports* 75.

Memorandum, 9th of August 1722. it was said by the Master of the Rolls to have been determined by the Lords of the privy council, upon an appeal to the King in council from the foreign plantations,

1st, That if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so, wherever they go, they carry their laws with them, and therefore such new found country is to be governed by the laws of England; tho' after such country is inhabited by the English, acts of parliament made in England, without naming the foreign plantations, will not bind them; for which reason, it has been determined that the statute of frauds and perjuries, which requires three witnesses, and that these should subscribe in the testator's presence, in the case of a devise of land, does not bind Barbadoes; but that,

2dly, Where the King of England conquers a country, it is a different consideration: for there the conqueror, by saving the lives of the people conquered, gains a right and property in such people; in consequence of which he may impose upon them what laws he pleases. But,

3dly, Until such laws given by the conquering prince, the laws and customs of the conquered country shall hold place; unless where these are contrary to our religion, or enact any thing that is *malum in se*, or are silent; for in all such cases the laws of the conquering country shall prevail.[25]

MCKENNON V. WINN

United States. Supreme Court of Oklahoma Territory. 1893.

1 *Oklahoma Reports* 327.

Appeal from the District Court of Oklahoma County, Hon. John G. Clark, Judge. . . .

[The names of counsel and part of the opinion are omitted.]

The opinion of the court was delivered by,

BURFORD, J.: The appellant filed his complaint in the court below to enforce the specific performance of a contract for the conveyance of real estate situated in Oklahoma City, Oklahoma county, Oklahoma Territory.

A demurrer was filed to the complaint, alleging as grounds:

[25] See Blankard v. Galdy, 2 Salk. 411.

"First. That the court has no jurisdiction of the person of defendant, or the subject of the action.

"Second. That the complaint does not state facts sufficient to constitute a cause of action."

The demurrer was sustained, to which the appellant excepted and brings the case to this court by appeal. . . .

The second ground for demurrer presents two questions:

First. Can a parol contract for the conveyance of real estate or an interest therein, made after the settlement of this country, and prior to the adoption of our organic act, be enforced?

Second. Is a contract for the conveyance of real estate, entered into before title is acquired from the United States, and to be executed after title is acquired, void as against public policy?

The first proposition seems to be settled by the adjudicated cases and text writers in favor of the appellant.

"Every contract, on whatever subject, may be in oral words which will have the same effect as if written, except when some positive rule of the common or statutory law has provided otherwise." (Bishop on Contracts, S. 153; Mallory v. Gillette, 21 N. Y. 412; Wyman v. Goodrich, 26 Wis. 21; Green v. Brookins, 23 Mich. 48; White v. Maynard, 111 Mass. 250.)

By the common law prior to the enactment of the statute of frauds, 29th Charles the Second, chap. 3, A. D. 1676, contracts for the sale of real estate, or an interest therein, were not required to be in writing. (Bishop on Contracts, S. 1231, 4 Kent Com. 450.)

The English speaking people brought the common law to America with them in the first settlement of the colonies and it has prevailed in all the states and territories, modified by legislative acts, local conditions, and such of the English statutes adopted prior to the settlement of our colonies as were of general application and suited to our conditions, except in some portions where the French or civil law prevailed.

At the time of the settlement and discovery of America the statute of frauds had not been adopted and has only become the law of the United States, or of our several states and territories, by legislative enactment. This leads us to the inquiry, "Did the common law prevail in the Territory in April, 1889?"

It is contended that prior to the settlement of Oklahoma, and until the same was superseded by statutory laws, the code Napoleon, or civil law prevailed.

Whatever may have been the laws of the country now known as Oklahoma, they ceased to operate in the region originally comprising the Indian Territory when the Territory ceased to be a part of the Territory of Louisiana and the laws of the Territory of Indiana and the Territory of Missouri, which may have once prevailed in said region, became inoper-

ative in and ceased to have any force or effect in the Indian Territory when that Territory ceased to be a part of said Territories. (St. Louis & San Francisco R. R. Co. v. O'Laughlin, C. C. A. 49 Fed. Rep. 440.)

There was no law in the Indian Territory regulating the making of contracts at the time of the approval of the Act of Congress establishing a United States district court in said Territory by the Act of March 1, 1889. (25 U. S. statutes, 783.)

Congress, with the assent of the Indians, created the court for the whole of the Indian Territory, which included Oklahoma, and conferred on it jurisdiction in all civil cases between citizens of the United States who are residents of the Territory, or between citizens of the United States or of any state or territory, and any citizen of, or person residing or found in the Indian Territory. It gave the court authority and imposed upon it the duty to apply the established rules and principals of the common law to the adjudication of those cases of which it was given Jurisdiction. (Pyeatt v. Powell, C. C. A. 51 Fed. Rep. 551.)

But if it be held that the establishment of a United States court in the Indian Territory did not put the common law in force in said Territory except in so far as was necessary to execute the powers of said court, and for the adjudication of such cases as actually went into that forum, then there was no law in Oklahoma at the date of its settlement regulating the making of contracts.

If this should be conceded, then it necessarily follows on principle that when people from all parts of the United States on the 22d day of April, 1889, settled the country known as Oklahoma, built cities, towns and villages, and began to carry on trade and commerce in all its various branches, they brought into Oklahoma with them the established principles and rules of the common law as recognized and promulgated by the American courts, and as it existed when imported into this country by our early settlers and unmodified by American or English statutes.

So that in any event, the common law prevailed in Oklahoma at the time the contract between the appellant and appellee was entered into, and as at common law contracts for the sale and conveyance of real estate were not required to be in writing, the contract mentioned in the complaint may be enforced unless void for other reasons. . . .

[In an omitted part of the opinion the court considered the remaining question presented by the second ground for demurrer and concluded that the contract was not void as against public policy.]

The cause is remanded to the court below with instruction to overrule the demurrer and for further proceedings in accordance with this opinion.

All the Justices concurring.[26]

[26] See Commonwealth v. Chapman, 13 Metc. (Mass.) 68; First National Bank v. Kinner, 1 Utah 100; Barnett v. Barnett, 9 N. Mex. 205. *Cf.* Mortimer v. New York Elevated Railroad Co., 6 N. Y. Suppl. 898.

THE ADVOCATE-GENERAL OF BENGAL ON BEHALF OF HER MAJESTY, APPELLANT, v. RANEE SURNOMOYE DOSSEE, RESPONDENT

Great Britain. Judicial Committee of the Privy Council. 1863.

2 *Moore's Privy Council Cases, New Series*, 22.

The question in this case was, whether the interest of a Hindoo, a British subject, in a fund which was standing to the credit of an account in a cause in the Supreme Court at Calcutta, had been forfeited to the Crown, by reason of his having committed suicide in Calcutta, and found *felo de se* by a Coroner's jury there.

The question was raised by a petition presented by the Advocate-General of Bengal, on behalf of Her Majesty, for a transfer of this fund to the Crown, on the ground of such alleged forfeiture. . . .

[The rest of the statement of the case, the arguments of counsel, and part of the opinion are omitted.]

The consideration of the case was adjourned, and their Lordships' judgment was now delivered by

THE RIGHT HON. LORD KINGSDOWN:

The question in this case arises on the claim of the Crown to a portion of the personal estate of Rajah Kistonauth Roy, who destroyed himself in Calcutta on the 31st of October, 1844, and was found by inquisition to have been *felo de se.*

We understand that the Rajah had a residence in Calcutta, though his Raj, or Zemindary, was at some distance from that city. He was a Hindoo both by birth and religion. . . .

At what time then, and in what manner, did the forfeiture attached by the law of England to the personal property of persons committing suicide in that country, become extended to a Hindoo committing the same act in Calcutta?

The sum of the Appellant's argument was this:—that the English Criminal law was applicable to Natives as well as Europeans within Calcutta, at the time when the death of the Rajah took place, and the sovereignty of the English Crown was at that time established; that the English settlers when they first went out to the East Indies in the reign of Queen Elizabeth took with them the whole law of England, both Civil and Criminal, unless so far as it was inapplicable to them in their new condition; that the law of *felo de se* was a part of the Criminal law of England which was not inapplicable to them in their new condition, and that it, therefore, became part of the law of the country.

Where Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only the laws, but the sovereignty of their own State; and those who live amongst them and become

members of their community become also partakers of, and subject to the same laws.

But this was not the nature of the first settlement made in India—it was a settlement made by a few foreigners for the purpose of trade in a very populous and highly civilized country, under the government of a powerful Mahomedan ruler, with whose sovereignty the English Crown never attempted nor pretended to interfere for some centuries afterwards.

If the settlement had been made in a Christian country of Europe, the settlers would have become subject to the laws of the country in which they settled. It is true that in India they retained their own laws for their own government within the Factories, which they were permitted by the ruling powers of India to establish; but this was not on the ground of general international law, or because the Crown of England or the laws of England had any proper authority in India, but upon the principles explained by Lord Stowell in a very celebrated and beautiful passage of his judgment in the case of "The Indian Chief" (3 Rob. Adm. Rep. 28).

The laws and usages of Eastern countries where Christianity does not prevail are so at variance with all the principles, feelings, and habits of European Christians that they have usually been allowed by the indulgence or weakness of the Potentates of those countries to retain the use of their own laws, and their Factories have for many purposes been treated as part of the territory of the Sovereign from whose dominions they come. But the permission to use their own laws by European settlers does not extend those laws to Natives within the same limits, who remain to all intents and purposes subjects of their own Sovereign, and to whom European laws and usages are as little suited as the laws of the Mahomedans and Hindoos are suited to Europeans. These principles are too clear to require any authority to support them, but they are recognized in the judgment to which we have above referred.

But, if the English laws were not applicable to Hindoos on the first settlement of the country, how could the subsequent acquisition of the rights of sovereignty by the English Crown make any alteration? It might enable the Crown by express enactment to alter the laws of the country, but until so altered the laws remained unchanged. The question, therefore, and the sole question in this case is, whether by express enactment the English law of *felo de se*, including the forfeiture attached to it, had been extended in the year 1844 to Hindoos destroying themselves in Calcutta.

. . . The English law, Civil and Criminal, has been usually considered to have been made applicable to Natives, within the limits of Calcutta, in the year 1726, by the Charter, 13th Geo. I. Neither that nor the subsequent Charters expressly declare that the English law shall be so

applied, but it seems to have been held to be the necessary consequence of the provisions contained in them.

But none of these Charters contained any forms applicable to the punishment, by forfeiture or otherwise, of the crime of self-murder, and with respect to other offences to which the Charters did extend, the application of the criminal law of England to Natives not Christians, to Mahomedans and Hindoos, has been treated as subject to qualifications without which the execution of the law would have been attended with intolerable injustice and cruelty.

To apply the law which punishes the marrying a second wife whilst the first is living, to a people amongst whom polygamy is a recognized institution, would have been monstrous, and accordingly it has not been so applied.

In like manner, the law, which in England most justly punishes as a heinous offence, the carnal knowledge of a female under ten years of age, cannot with any propriety be applied to a country where puberty commences at a much earlier age, and where females are not unfrequently married at the age of ten years.

Accordingly, in the case referred to in the argument, the law was held not to apply.

Is the law of forfeiture for suicide one which can be considered properly applicable to Hindoos and Mahomedans?

The grounds on which suicide is treated in England as an offence against the law, and punished by forfeiture of the offender's goods and chattels to the King, are stated more fully in the case of Hales v. Petit, in Plowden's Reports, p. 261, than in any other book which we have met with. It is there stated, that it is an offence against nature, against God, and against the King. Against nature, because against the instinct of self-preservation; against God, because against the commandment, "Thou shalt not kill," and a *felo de se* kills his own soul; against the King, in that thereby he loses a subject.

Can these considerations extend to native Indians, not Christians, not recognizing the authority of the Decalogue, and owing at the time when this law is supposed to have been introduced no allegiance to the King of Great Britain?

The nature of the punishment also is very little applicable to such persons. A part of it is, that the body of the offender should be deprived of the rites of Christian burial in consecrated ground. The forfeiture extends to chattels real and personal, but not to real estates; these distinctions, at least in the sense in which they are understood in England, not being known or intelligible to Hindoos and Mahomedans.

Self-destruction, though treated by the law of England as Murder, and spoken of in the case to which we have referred in Plowden as the worst of all Murders, is really, as it affects society, and in a moral and

religious point of view, of a character very different not only from all other Murders, but from all other Felonies. These distinctions are pointed out with great force and clearness in the notes attached to the Indian Code, as originally prepared by Lord Macaulay and the other Commissioners. The truth is, that the act is one which in countries not influenced by the doctrines of Christianity has been regarded as deriving its moral character altogether from the circumstances in which it is committed:—sometimes as blameable, sometimes as justifiable, sometimes as meritorious, or even an act of positive duty.

In this light suicide seems to have been viewed by the founders of the Hindoo Code, who condemn it in ordinary cases as forbidden by their religion; but in others, as in the well-known instances of Suttee and self-immolation under the car of Juggernaut, treat it as an act of great religious merit.

We think, therefore, the law under consideration inapplicable to Hindoos, and if it had been introduced by the Charters in question with respect to Europeans, we should think that Hindoos would have been excepted from its operation. But that it was not so introduced appears to us to be shown by the admirable judgment of Sir Barnes Peacock in this case; and if it were not so introduced, then as regards Natives, it never had any existence.

It would not necessarily follow that, therefore, it never had existed as regards Europeans. That question would depend upon this, whether, when the original settlers, under the protection of their own Sovereign, were governed by their own laws, those laws included the one now under consideration; whether an offence of this description was an offence against the King's peace, for which he was entitled to claim forfeiture; whether the Factory could for this purpose be considered as within his jurisdiction. In that case it might be that the subsequent appointment of Coroners by the Act of the 33rd Geo. III. would render effectual a right previously existing, but for the recovery of which no adequate remedy had been previously provided.

We are not quite sure whether the Court below intended to determine this point or not. Much of the reasoning in the judgment is applicable to Europeans as well as to Natives, but the Chief Justice in his judgment says:—"At present we have merely to consider the question, so far as it relates to the goods and chattels of a Native who wilfully and intentionally destroys himself, and who cannot in strictness be called a *felo de se;* and we now proceed to deal with that question, and with that question alone."

The point so decided we think perfectly clear, and it is not necessary to go further. . . .

We have no doubt that it is our duty in this case, humbly to advise Her Majesty to dismiss the appeal, with costs.

PANAMA RAILROAD COMPANY v. BOSSE

United States. Supreme Court. 1919.

249 *United States Reports* 41.

The case is stated in the opinion.

[The names of counsel and part of the opinion are omitted.]

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for personal injuries and consequent suffering alleged to have been caused, on July 3, 1916, by the Railroad Company's chauffeur's negligent driving of a motor omnibus at an excessive rate of speed in a crowded thoroughfare in the Canal Zone. The suit was brought in the District Court of the Canal Zone. The defendant, the plaintiff in error, demurred to the declaration generally, and also demurred specifically to that part that claimed damages for pain. The demurrer was overruled and there was a trial, at which, after the evidence was in, the defendant requested the Court to direct a verdict in its favor and, failing that, to instruct the jury that the plaintiff could not recover for physical pain. The instructions were refused, the jury found a verdict for the plaintiff and the judgment was affirmed by the Circuit Court of Appeals. 239 Fed. Rep. 303. 152 C. C. A. 291. Followed in Panama R. R. Co. v. Toppin, 250 Fed. Rep. 989.

The main question in the case is whether the liability of master for servant familiar to the common law can be applied to this accident arising in the Canal Zone. Subordinate to that is the one already indicated, whether there can be a recovery for physical pain. There is some slight attempt also to argue that the defendant's negligence was not the immediate cause of the injury, but as that depended upon the view that the jury might take of the facts and as there was evidence justifying the verdict, we shall confine ourselves to the two above-mentioned questions of law.

By the Act of Congress of April 28, 1904, c. 1758, §2, 33 Stat. 429, temporary powers of government over the Canal Zone were vested in such persons and were to be exercised in such manner as the President should direct. An executive order of the President addressed to the Secretary of War on May 9, 1904, directed that the power of the Isthmian Commission should be exercised under the Secretary's direction. The order contained this passage, "The laws of the land, with which the inhabitants are familiar, and which were in force on February 26, 1904, will continue in force in the canal zone . . . until altered or annulled by the said commission;" with power to the Commission to legislate, subject to approval by the Secretary. This was construed to keep in force the Civil Code of the Republic of Panama, which was translated into English and published by the Isthmian Canal Commission in 1905.

By the Act of Congress of August 24, 1912, c. 390, §2, 37 Stat. 560, 561, "All laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide." On these facts it is argued that the defendant's liability is governed by the Civil Code alone as it would be construed in countries where the civil law prevails and that so construed the code does not sanction the application of the rule *respondeat superior* to the present case.

But there are other facts to be taken into account before a decision can be reached. On December 5, 1912, acting under the authority of the before-mentioned Act of August 24, 1912, §3, the President declared all the land within the limits of the Canal Zone to be necessary for the construction &c. of the Panama Canal and directed the Chairman of the Isthmian Commission to take possession of it, with provisions for the extinguishment of all adverse claims and titles. It is admitted by the plaintiff in error that the Canal Zone at the present time is peopled only by the enployees of the Canal, the Panama Railroad, and the steamship lines and oil companies permitted to do business in the Zone under license. If it be true that the Civil Code would have been construed to exclude the defendant's liability in the present case if the Zone had remained within the jurisdiction of Colombia it does not follow that the liability is no greater as things stand now. The President's order continuing the law then in force was merely the embodiment of the rule that a change of sovereignty does not put an end to existing private law, and the ratification of that order by the Act of August 24, 1912, no more fastened upon the Zone a specific interpretation of the former Civil Code than does a statute adopting the common law fasten upon a territory a specific doctrine of the English Courts. Wear v. Kansas, 245 U. S. 154, 157. Probably the general ratification did no more than to supply any power that by accident might have been wanting. Honolulu Rapid Transit & Land Co. v. Wilder, 211 U. S. 137, 142. In the matter of personal relations and duties of the kind now before us the supposed interpretation would not be a law with which the present "inhabitants are familiar," in the language of the President's order, but on the contrary an exotic imposition of a rule opposed to the common understanding of men. For whatever may be thought of the unqualified principle that a master must answer for the torts of his servant committed within the scope of his employment, probably there are few rules of the common law so familiar to all, educated and uneducated alike.

As early as 1910 the Supreme Court of the Canal Zone announced that it would look to the common law in the construction of the Colombia statutes, Kung Ching Chong v. Wing Chong, 2 Canal Zone Sup. Ct.

Rep. 25, 30; and following that announcement, in January, 1913, held that "at least so far as the empresarios of railroads are concerned" the liability of master for servant would be maintained in the Zone to the same extent as recognized by the common law. Fitzpatrick v. Panama R. R. Co., *id.*, 111, 121, 128. The principle certainly was not overthrown by the Act of 1912. It is not necessary to dwell upon the drift toward the common-law doctrine noticeable in some civil-law jurisdictions at least, or to consider how far we should go if the language of the Civil Code were clearer than it is. It is enough that the language is not necessarily inconsistent with the common-law rule. By Art. 2341, in the before-mentioned translation, "He who shall have been guilty of an offense or fault, which has caused another damage, is obliged to repair it, without prejudice to the principal penalty which the law imposes" . . . By Art. 2347, "Every person is liable not only for his own acts for the purpose of the indemnity of damage, but also for the acts of those who may be under his care," illustrating by the cases of father, tutor, husband, &c. By Art. 2349, "Masters shall be responsible for the damage caused by their domestics or servants, on the occasion of a service rendered by the latter to the former; but they shall not be responsible if it be proved or appear that on such occasion the domestics or servants conducted themselves in an improper manner, which the masters had no means to foresee or prevent by the employment of ordinary care and the competent authority; in such case all responsibility for the damage shall fall upon said domestics or servants." The qualification in this last article may be taken to refer to acts outside the scope of the employment. It cannot refer to all torts, for that would empty the first part of meaning. A master must be taken to foresee that sooner or later a servant driving a motor will be likely to have a collision, which a jury may hold to have been due to his negligence, whatever care has been used in the employment of the man.

We are satisfied that it would be a sacrifice of substance to form if we should reverse a decision, the principle of which has been accepted by all the judges accustomed to deal with the locality, in deference to the possibility that a different interpretation might have been reached if the Civil Code had continued to regulate a native population and to be construed by native courts. It may be that they would not have distinguished between a negligent act done in the performance of the master's business and a malicious one in which the servant went outside of the scope of that for which he was employed. But we are by no means sure that they would not have decided as we decide. At all events we are of opinion that the ruling was correct. . . .

In view of our conclusion upon the main point but little need be said with regard to allowing pain to be considered in fixing the damages. It cannot be said with certainty that the Supreme Court of the Zone

was wrong in holding that under the Civil Code damages ought to be allowed for physical pain. Fitzpatrick v. Panama R. R. Co., 2 Canal Zone Sup. Ct. Rep. 111, 129, 130; McKenzie v. McClintic-Marshall Construction Co., *id.*, 181, 182. Physical pain being a substantial and appreciable part of the wrong done, allowed for in the customary compensation which the people of the Zone have been awarded in their native courts, it properly was allowed here.

Judgment affirmed.

THE PHILIPPINE SUGAR ESTATES DEVELOPMENT COMPANY (LIMITED) v. THE UNITED STATES

United States. Court of Claims. 1904.

39 *Court of Claims Reports* 225.

The following are the facts of the case as found by the court:

I. The claimant was duly incorporated at Manila, in the Philippine Islands, on the 29th day of January, 1900 . . .

II. It is, and has been since its incorporation, the legal owner of various parcels of real estate in different parts of the Philippine Islands, conveyed to it by one Richard Henry Andrews, among which are the premises for the occupation of which compensation is sought in this action.

III. The authorities of the United States have since the 1st of August, 1899, occupied and used certain parcels of the real estate owned by the claimant . . .

IV. No compensation or rental has been paid to the claimant for the use and occupation of such property. . . .

[Part of the statement of the case, the arguments of counsel, and part of the opinion are omitted.]

HOWRY, J., delivered the opinion of the court:

This is an action for recovery of rent for the use and occupation of certain buildings and a tramway in the Philippine Islands. The amount claimed by the amended petition is $110,000.

The property was owned by the order of Dominican friars, who made a contract for its sale to one Richard Henry Andrews, a British subject, now deceased. Andrews acquired title August 8, 1898, and transferred his interest to the company incorporated as the plaintiff. The authorities of the United States came into the possession of the premises after the insurgents (who had previously taken forcible possession), and occupied and used the parcels set forth in the findings. No compensation or rental has been paid for the use, but at no time has any claim of title or equity been asserted by the United States. Claims

for rent of the property were recognized as just, but doubts as to the true ownership having been suggested by various military and civil officers of the Government, compensation has been withheld until the doubt as to the title could be determined. . . .

[In an omitted part of the opinion the court considered, *inter alia*, the character of the claimant corporation and concluded that it was a domestic corporation notwithstanding the alienage of some of its incorporators.]

A more serious question is presented in considering the competency of the local authorities to create the plaintiff a corporation. If that authority did not exist, then plaintiff acquired no legal existence and has none now.

The company was organized under the Spanish law claimed by plaintiff to be in force in the Philippine Islands after the treaty of Paris. Articles incorporating plaintiff were executed in January, 1900, and were duly recorded in the Mercantile Registry of Manila soon thereafter. The treaty which ceded the islands to the United States was signed December 10, 1898, and ratified the following April. During this time Manila was under the military control of the United States, and the municipal law of the place was administered and enforced by the military government, except as modified by the military authorities. When the treaty ceding the islands was ratified the sovereignty of the United States became absolute. Translations of the laws then in force in the ceded territory were published and issued by authority of the Secretary of War. This included the civil code and the code of commerce, which regulated rights of property and prescribed rules for commercial transactions and embraced the rules under which commercial associations are formed and regulated. The translation recited that the code of commerce was in force. (Division of Customs and Insular Affairs, October, 1899.) Some changes were subsequently made (laws of Philippine Commission, 1901), as, for example, the repeal of a chapter of the code (p. 132), but no changes affecting the methods of incorporating companies had been made at the time of the incorporation of this association.

If, at the time of the cession of the archipelago, only such laws were continued in force as did not involve a sovereign grant—the right to any kind of a charter under local regulations being included—as contended by the defendants upon the eminent authority of the late civil governor of the ceded territory, then the laws granting corporate rights became entirely inoperative after the cession and a check was immediately and indefinitely put upon the formation of partnerships, general and limited, the organization of joint stock companies and associations of different kinds incident to the commercial and industrial life of the ceded country and as necessary there as in other parts of the world.

The general rule of international law in regard to all conquered or ceded territory is that the old laws continue until repealed by the proper authorities. (Woolsey's Int. Law, sec. 161.)

In conquered or ceded countries that have already laws of their own, the king may alter and change those laws; but till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, and in the case of an infidel country. (1 Blackstone, 107, Lewis's ed.) . . .

In Am. Ins. Co. v. Canter (1 Pet., 511), while discussing the effect of the cession of territory by treaty, Chief Justice Marshall said:

"On such transfer of territory it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the States."

In matters relating to the collection of revenue, however, the case of Cross v. Harrison (16 How., 164) established the rule that duties collected under the tariff laws of the United States between February 2, 1848, the date of the treaty of peace between the United States and Mexico, and November 13, 1849, when a revenue collector was appointed in California by the President, according to act of Congress passed March 3, 1845, were lawfully collected. The substantial effect of this case was to declare that the revenue laws of the United States became applicable. This case related to a public right. . . .

But the doctrine declared in Am. Ins. Co. v. Canter that the municipal laws intended for the protection of private rights and designed to secure the peaceful use and enjoyment of private property, or affecting the possession and transfer of such property, continued in force until altered or repealed by direct action of the new sovereignty, has been followed in United States v. Percheman, 7 Pet., 51; Delassus v. United States, 9 Pet., 117; United States v. Power, 11 How., 570; Leitensdorfer v. Webb, 20 How., 176; Palmer v. Low, 98 U. S., 15, and Chic. R. I. & P. R. R. v. McGlinn, 114 U. S., 542.

Special privileges, grants, or franchises flowing from the grace and pleasure of the sovereign in favor of some one particular person or body distinguished from the general body of the inhabitants are the things forbidden. It needs no reference to international law to say that any exercise of authority by the ceding sovereignty, after cession, could not have force with reference to such things as grants of land, or the bestowal of special franchises, such as the construction of roads, the keeping of

ferries, and the erection of bridges with the right to collect toll upon them. These are grants by the authority of the State as particular privileges which look to the promotion and protection of the public good. But the municipal laws promulgated during the time the ceding authority existed and which are generally recognized as necessary to the peace and good order of the community remained in full force and effect. Any other rule would hold in abeyance civil functions with respect to the use, enjoyment, and transfer of private property that would lead to results harmful to the inhabitants of the ceded territory and injurious to the best interests and authority of the new sovereign as well. This is something that has not been tolerated in modern times.

During the military occupation, and while a state of war yet existed between the two countries, the United States expressly recognized the continuance of the municipal laws of the conquered territory. The military occupancy, though absolute and supreme, operated only upon the political conditions of the people without affecting private rights of person and property. Under these municipal laws partnerships were formed and joint-stock associations organized, and the ordinary and commercial transactions of the country proceeded, as nearly alike as the changed conditions would admit, as before. And after peace was declared the authority of the United States was directed to be exerted for the security of the persons and property of the people of the islands and for the confirmation of all their private rights and relations. The municipal laws of the territories in respect to these private rights and property were to be considered as continuing in force, to be administered by the ordinary tribunals as far as practicable. (Presidents' Messages, 10 Richardson, 209, 220.)

This action of the Government merely emphasized the distinction existing between the municipal law, which regulated and protected the relations of the many, and the power of the sovereign, which only could grant franchises and special privileges to the few. . . .

The things prohibited were grants or concessions of public or corporate rights or franchises for the construction of public or quasi public works, such as railroads, tramways, telegraph and telephone lines, waterworks, gas works, electric-light lines, etc. (Executive order of December 22, 1898, *id.*, 221.)

Independent of all these considerations plaintiff was a *de facto* association with the right of possession and the right to give lawful discharge for the use and occupation of its property. Governor Taft recognized this, going so far as to say that plaintiff could probably hold title, or, in any event, payment to it would be a complete defense to any claim made by the Dominican friars, because their dealings with the corporation would be held to estop them from denying its corporate existence. (Off. Letter to the Maj. Gen., Com. Div. of the Philippines, March 16, 1903.)

We are unable to see why plaintiff's collection of the rent due to it as an association would not be a lawful acquittance of any claim against the occupants of the property. The incorporation was compatible with the new order of things. The association was given life by the same municipal law that was authorized to create either a general or a limited partnership. This law we have seen was neither abrogated nor impaired by the change of government. No other person or association of persons could rightfully claim the rental value, and payment to this company does not put the Government in danger of paying twice. . . .

Even if a state of insurrection had existed at the place of incorporation the validity of certain judicial acts (which would include the incorporation of this association under the municipal law) would be valid. The force of acts not hostile in their purpose or method of enforcement to the authority of the National Government and not impairing the rights of citizens appears in Horn v. Lockhart (17 Wall., 580). The line between valid acts such as those governing the course of descents and regulating the conveyance and transfer of property, and invalid acts proceeding from an unlawful government against the authority of the rightful sovereign, was clearly drawn in Home Ins. v. United States (8 C. Cls. R., 449), which was affirmed by the Supreme Court in an opinion by Mr. Justice Strong, published in 10 C. Cls. R., 145. The analogy of these cases to that at bar is close enough to establish with greater reason the rule that the internal concerns of the new inhabitants were not paralyzed by the transition from one government to another, nor suspended until the authority taking over the ceded territory ordained something to take the place of the established local law. This accords with the enlightened practice of civilized nations to recognize existing laws to the extent that the military and civil authority of the conquering nation shall not operate to disorganize society or discontinue civil government with respect to the purely domestic affairs of the people of new acquisitions.[27]

The proof does not establish the amount set forth in the amended petition. The testimony was taken with reference to the amount claimed by the original cause of action in Mexican silver dollars, to wit, $73,425; but the Spanish-Filipino peso, which was not quite so valuable as the Mexican dollar in its silver weight, had become the currency of the islands before hostilities between Spain and the United States, and the amount of the judgment must be the value of this local currency in lawful coin of the United States. We find this value to be $31,939.87, for which judgment will be entered for plaintiff.[28]

WELDON, J., was not present when this case was argued and took no part in its decision.

[27] See Parker v. Wood, 1 Dall. 436, 438; Keene v. McDonough, 8 Pet. 308. *Cf.* Harcourt v. Gaillard, 12 Wh. 523; Davis v. Police Jury of Concordia, 9 How. 279.

[28] See PENNANT, "International Status of Modern Companies," 28 L. Mag. & Rev., 5th series, 161.

VILAS v. CITY OF MANILA. TRIGAS v. SAME. AGUADO v. SAME

United States. Supreme Court. 1911.

220 *United States Reports* 345.

The facts, which involve the liability of the present city of Manila in the Philippine Islands for claims against the city of Manila as it existed prior to the cession under the treaty of 1898, are stated in the opinion.

[The arguments of counsel and part of the opinion are omitted.]

MR. JUSTICE LURTON delivered the opinion of the court.

The plaintiffs in error, who were plaintiffs below, are creditors of the city of Manila as it existed before the cession of the Philippine Islands to the United States by the treaty of Paris, December 10, 1898. Upon the theory that the city under its present charter from the government of the Philippine Islands is the same juristic person and liable upon the obligations of the old city, these actions were brought against it. The Supreme Court of the Philippine Islands denied relief, holding that the present municipality is a totally different corporate entity, and in no way liable for the debts of the Spanish municipality.

The fundamental question is whether, notwithstanding the cession of the Philippine Islands to the United States, followed by a reincorporation of the city, the present municipality is liable for the obligations of the city incurred prior to the cession to the United States. . . .

The city as now incorporated has succeeded to all of the property rights of the old city and to the right to enforce all of its causes of action. There is identity of purpose between the Spanish and American charters and substantial identity of municipal powers. The area and the inhabitants incorporated are substantially the same. But for the change of sovereignty which has occurred under the treaty of Paris, the question of the liability of the city under its new charter for the debts of the old city would seem to be of easy solution. The principal question would therefore seem to be the legal consequence of the cession referred to upon the property rights and civil obligations of the city incurred before the cession. And so the question was made to turn in the court below upon the consequence of a change in sovereignty and a reincorporation of the city by the substituted sovereignty. . . .

The historical continuity of a municipality embracing the inhabitants of the territory now occupied by the city of Manila is impressive. Before the conquest of the Philippine Islands by Spain, Manila existed. The Spaniards found on the spot now occupied a populous and fortified community of Moros. In 1571 they occupied what was then and is now known as Manila, and established it as a municipal corporation. In 1574 there was conferred upon it the title of "Illustrious and ever

loyal city of Manila." From time to time there occurred amendments, and, on January 19, 1894, there was a reorganization of the city government under a royal decree of that date. Under that charter there was power to incur debts for municipal purposes and power to sue and be sued. The obligations here in suit were incurred under the charter referred to, and are obviously obligations strictly within the provision of the municipal power. To pay judgments upon such debts it was the duty of the Ayuntamiento of Manila, which was the corporate name of the old city, to make provision in its budget.

The contention that the liability of the city upon such obligations was destroyed by a mere change of sovereignty is obviously one which is without a shadow of moral force, and, if true, must result from settled principles of rigid law. While the contracts from which the claims in suit resulted were in progress, war between the United States and Spain ensued. On August 13, 1898, the city was occupied by the forces of this Government and its affairs conducted by military authority. On July 31, 1901, the present incorporating act was passed, and the city since that time has been an autonomous municipality. The charter in force is act 183 of the Philippine Commission and now may be found as chapters 68 to 75 of the Compiled Acts of the Philippine Commission. . . .

The charter contains no reference to the obligations or contracts of the old city.

If we understand the argument against the liability here asserted, it proceeds mainly upon the theory that inasmuch as the predecessor of the present city, the Ayuntamiento of Manila, was a corporate entity created by the Spanish government, when the sovereignty of Spain in the islands was terminated by the treaty of cession, if not by the capitulation of August 13, 1908 [1898?], the municipality *ipso facto* disappeared for all purposes. This conclusion is reached upon the supposed analogy to the doctrine of principal and agent, the death of the principal ending the agency. So complete is the supposed death and annihilation of a municipal entity by extinction of sovereignty of the creating State that it was said in one of the opinions below that all of the public property of Manila passed to the United States, "for a consideration, which was paid," and that the United States was therefore justified in creating an absolutely new municipality and endowing it with all of the assets of the defunct city, free from any obligation to the creditors of that city. And so the matter was dismissed in the Trigas Case by the Court of First Instance, by the suggestion that "the plaintiff may have a claim against the crown of Spain, which has received from the United States payment for that done by the plaintiff."

We are unable to agree with the argument. It loses sight of the dual character of municipal corporations. They exercise powers which are governmental and powers which are of a private or business character.

In the one character a municipal corporation is a governmental subdivision, and for that purpose exercises by delegation a part of the sovereignty of the State. In the other character it is a mere legal entity or juristic person. In the latter character it stands for the community in the administration of local affairs wholly beyond the sphere of the public purposes for which its governmental powers are conferred.

The distinction is observed in South Carolina v. United States, 199 U. S. 437, 461, where Lloyd v. Mayor of New York, 5 N. Y. 369, 374, and Western Savings Society v. Philadelphia, 31 Pa. St. 175, are cited and approved. . . .

See also Dillon Mun. Corp. 66, 4th ed.; City of Petersburg v. Applegarth's Administrator, 26 Gratt. 321, 343; and Oliver v. Worcester, 102 Massachusetts, 489.

In view of the dual character of municipal corporations there is no public reason for presuming their total dissolution as a mere consequence of military occupation or territorial cession. The suspension of such governmental functions as are obviously incompatible with the new political relations thus brought about may be presumed. But no such implication may be reasonably indulged beyond that result.

Such a conclusion is in harmony with the settled principles of public law as declared by this and other courts and expounded by the text books upon the laws of war and international law. Taylor International Public Law, §578.

That there is a total abrogation of the former political relations of the inhabitants of the ceded region is obvious. That all laws theretofore in force which are in conflict with the political character, constitution or institutions of the substituted sovereign lose their force, is also plain. Alvarez v. United States, 216 U. S. 167. But it is equally settled in the same public law that that great body of municipal law which regulates private and domestic rights continues in force until abrogated or changed by the new ruler. In Chicago, Rock Island & Pacific Railway Co. v. McGlinn, 114 U. S. 542, 546, it was said:

"It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign. By the cession public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative

power—and the latter is involved in the former—to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general, that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed."

The above language was quoted with approval in Downes v. Bidwell, 182 U. S. 244, 298.

That the United States might, by virtue of its situation under a treaty ceding full title, have utterly extinguished every municipality which it found in existence in the Philippine Islands may be conceded. That it did so in view of the practice of nations to the contrary is not to be presumed and can only be established by cogent evidence.

That during military occupation the affairs of the city were in a large part administered by officials put in place by military order did not operate to dissolve the corporation or relieve it from liability upon obligations incurred before the occupation nor those created for municipal purposes by the administrators of its affairs while its old officials were displaced. New Orleans v. Steamship Co., 20 Wall. 387, 394. During that occupation and military administration the business of the city was carried on as usual. Taxes were assessed and taxes collected and expended for local purposes, and many of the officials carrying on the government were those found in office when the city was occupied. The continuity of the corporate city was not inconsistent with military occupation or the constitution or institutions of the occupying power. This is made evident by the occurrences at the time of capitulation. Thus the articles of capitulation concluded in these words: "This city, its inhabitants . . . and its private property of all descriptions are placed under the special safeguard of the faith and honor of the American Army." This was quoted in President McKinley's instructions of April 7, 1900, to the Philippine Commission, and touching this he said: "I believe that this pledge has been faithfully kept." And the commission was directed to labor for the full performance of this obligation. This instruction was in line with and in fulfillment of the eighth article of the treaty of Paris of December 10, 1898. Under the third article of that treaty the archipelago known as the Philippine Islands was ceded to the United States, the latter agreeing to pay to Spain the sum of twenty million dollars. Under the first paragraph of the eighth article

Spain relinquished to the United States "all buildings, wharves, barracks, forts, structures, public highways and other immovable property which, in conformity with law, belong to the public domain, and as such belong to the crown of Spain." It is under this clause, in connection with the clause agreeing to pay to Spain twenty million dollars for the cession of the Philippine group, that the contention that all of the public rights of the city of Manila were acquired by the United States, which country was therefore justified, as absolute owner, in granting the property rights so acquired to what is called the "absolutely new corporation," created thereafter. But the qualifying words touching property rights relinquished by Spain limit the relinquishment to "property which, in conformity with law, belongs to the public domain, and as such belongs to the crown of Spain." It did not affect property which did not, in "conformity with law, belong to the crown of Spain." That it was not intended to apply to property which, "in conformity with law," belonged to the city of Manila as a municipal corporation is clear. This is demonstrated by the second paragraph of the same article, which reads: And it is hereby declared that the relinquishment or cession, as the case may be, to which the preceding paragraph refers, cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments . . . having legal capacity to acquire and possess property in the aforesaid territory renounced or ceded, or of private individuals. . . . " Thus the property and property rights of municipal corporations were protected and safeguarded precisely as were the property and property rights of individuals.

That the cession did not operate as an extinction or dissolution of corporations is herein recognized, for the stipulation against impairment of their property rights has this plain significance.

The conclusion we reach that the legal entity survived both the military occupation and the cession which followed finds support in the cases which hold that the Pueblos of San Francisco and Los Angeles, which existed as municipal organizations prior to the cession of California by Mexico, continued to exist with their community and property rights intact. Cohas v. Raisin, 3 California, 443; Hart v. Burnett, 15 California, 530; Townsend v. Greeley, 5 Wall. 326; Merryman v. Bourne, 9 Wall. 592, 602; More v. Steinbach, 127 U. S. 70; Los Angeles Milling Co. v. Los Angeles, 217 U. S. 217.

Was corporate identity and corporate liability extinguished as a necessary legal result of the new charter granted in 1901 by the Philippine Commission? The inhabitants of the old city are the incorporators of the new. There is substantially identity of area. There are some changes in the form of government and some changes in corporate powers and methods of administration. The new corporation is endowed

with all of the property and property rights of the old. It has the same power to sue and be sued which the former corporation had. There is not the slightest suggestion that the new corporation shall not succeed to the contracts and obligations of the old corporation. Laying out of view any question of the constitutional guarantee against impairment of the obligation of contracts, there is, in the absence of express legislative declaration of a contrary purpose, no reason for supposing that the reincorporation of an old municipality is intended to permit an escape from the obligations of the old, to whose property and rights it has succeeded. The juristic identity of the corporation has been in no wise affected, and, in law, the present city is in every legal sense the successor of the old. As such it is entitled to the property and property rights of the predecessor corporation, and is, in law, subject to all of its liabilities. Broughton v. Pensacola, 93 U. S. 266; Mount Pleasant v. Beckwith, 100 U. S. 520; Mobile v. Watson, 116 U. S. 289; Shapleigh v. San Angelo, 167 U. S. 646, 655; O'Connor v. Memphis, 6 Lea, 730; Colchester v. Seaber, 3 Burrows, 1866, 1870, in which case, when a municipality became disabled to act and obtained a new charter, in an action upon an obligation of the old corporation, there was judgment for the creditor, Lord Mansfield saying:

"Many corporations, for want of legal magistrates, have lost their activity, and obtained new charters. Maidstone, Radnor, Carmartben, and many more are in the same case with Colchester. And yet it has never been disputed but that the new charters revive and give activity to the old corporation; except, perhaps, in that case in Levinz, where the corporation had a new name; and even there the court made no doubt. Where the question has arisen upon any remarkable metamorphosis, it has always been determined that they remain the same, as to debts and 'rights.'"

Morris & Cummings v. State, 63 Texas, 728, 730.

In Shapleigh v. San Angelo, *supra*, this court said in a similar case:

"The State's plenary power over its municipal corporations to change their organization, to modify their method of internal government, or to abolish them altogether, is not restricted by contracts entered into by the municipality with its creditors or with private parties. An absolute repeal of a municipal charter is therefore effectual so far as it abolishes the old corporate organization; but when the same or substantially the same inhabitants are erected into a new corporation, whether with extended or restricted territorial limits, such new corporation is treated as in law the successor of the old one, entitled to its property rights, and subject to its liabilities." . . .

Our conclusion is that the decree in the Aguado case must be reversed and the case remanded, with direction to render judgment and such other relief as may seem in conformity with law. The judgments in the

Trigas and Vilas cases will be reversed and the cases remanded with direction to overrule the respective demurrers, and for such other action as may be consistent with law, and consistent with this opinion.[29]

SECTION 4. EFFECT OF SUCCESSION UPON PRIVATE RIGHTS

Chief Justice Marshall, in United States v. Percheman

United States. Supreme Court. 1833.

7 *Peters' Reports* 51, 86–88.

Florida was a colony of Spain, the acquisition of which by the United States was extremely desirable. It was ceded by a treaty concluded between the two powers at Washington, on the 22d day of February 1819.

The second article contains the cession, and enumerates its objects. The eighth contains stipulations respecting the titles to lands in the ceded territory.

It may not be unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved: but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change. It would have remained the same as under the ancient sovereign. The language of the second article conforms to this general principle. "His catholic majesty cedes to the United States in full property and sovereignty, all the territories which belong to him situated to the eastward of the Mississippi, by the name of East and West Florida." A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The king cedes that only which belonged to him. Lands he had previously granted, were not his to cede. Neither party could so understand the cession. Neither party could consider itself

[29] On the effect of transfer of territory upon the nationality of inhabitants, see Advisory Opinion on Collective Naturalization, 68 Me. 589, *supra*, 257; Tobin v. Walkinshaw, McAllister 186, *supra*, 258; United States v. Repentigny, 5 Wall. 211, *infra*, 990.

as attempting a wrong to individuals, condemned by the practice of the whole civilized world. The cession of a territory by its name from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property. If this could be doubted, the doubt would be removed by the particular enumeration which follows. "The adjacent islands dependent on said provinces, all public lots and squares, vacant lands, public edifices, fortifications, barracks and other buildings which are not private property, archives and documents which relate directly to the property and sovereignty of the said provinces, are included in this article."[30]

This special enumeration could not have been made, had the first clause of the article been supposed to pass not only the objects thus enumerated, but private property also. The grant of buildings could not have been limited by the words "which are not private property," had private property been included in the cession of the territory.

This state of things ought to be kept in view when we construe the eighth article of the treaty, and the acts which have been passed by congress for the ascertainment and adjustment of titles acquired under the Spanish government.[31]

United States v. Repentigny

United States. Supreme Court. 1866.

5 *Wallace's Reports* 211.

Appeal by the United States from a decree of the District Court of the United States decreeing to the representatives of the Chevalier de Repentigny and of Captain Louis De Bonne, a large tract of land at the Saut de St. Marie, under a grant from the French government, in the year 1751. . . .

[The statement of the case, the arguments of counsel, and part of the opinion are omitted. The facts are stated sufficiently in the opinion.]

Mr. Justice Nelson delivered the opinion of the court.

The bill in this case was filed in the court below to recover possession of a large tract of land of six leagues square, fronting on the River St. Marie, at the Saut, which connects the waters of Lake Superior with those of Lake Huron, in the State of Michigan. The grant of the land was made on the 18th October, 1750, by the governor and intendant-general of Canada (then called New France), to Louis De Bonne, a

[30] 8 U. S. Stat. L. 252, 254.

[31] See Townsend v. Greeley, 5 Wall. 326; Merryman v. Bourne, 9 Wall. 592.

captain of infantry, and Count Repentigny, an ensign, in the French army. The complainants derive title under them. It was confirmed by the King of France the next year, on the 24th June, 1751.

The grant was to De Bonne and Repentigny, their heirs and assigns, "in perpetuity by title of feof and seigniory," with all the customary rights belonging to that species of estate. Repentigny went into possession about the date of the grant, at the Saut, having about the same time received an appointment to command the military post established there. He constructed a small stockade fort, and made some improvements in connection with it, such as the clearing of a few acres of land and the erection of huts for the people with him, and continued thus engaged till 1754. When war broke out between France and England he was called away into active military service of the government, and never afterwards returned. De Bonne never took personal possession, or possession of any other character, except that derived from the transient occupation of his co-tenant.

The bill was filed on the 9th January, 1861, one hundred and ten years since the date of the grant.

We will now refer to the act of Congress, passed April 19th, 1860, under which the bill was filed.

It provides that the legal representatives of the original grantees may present their petition to the District Court of the State of Michigan, setting forth the nature of their claim to certain lands at the Saut St. Marie, under an alleged grant in 1750, with evidence in support of it, and praying that the validity of the title may be inquired into, and the court is authorized to examine the same; and, in adjudicating upon the validity as against the United States, to be governed by the law of nations and of the country from which the title was derived, and also by the principles, so far as they are applicable, which are recognized in the act of Congress of the 26th May, 1824. This act, which was passed to enable claimants to lands situate within the State of Missouri to try their titles before the United States District Court, directed that the claims should be heard and determined in conformity with the principles of justice, and according to the laws and ordinances of the government under which the titles originated; also, according to the law of nations and the stipulations of treaties.

This act of 1860, which authorizes the institution of these proceedings, was passed in pursuance of petitions to Congress by the representatives of the original grantees. The first notice to this government of any claim to the lands on their behalf was in the year 1825 or 1826, some seventy-five years after the date of the grant. Since then the subject has, from time to time, been brought to the attention of Congress, and finally disposed of by the passage of the act in question. The act, as we have seen, refers the claimants to the judiciary for relief, and

prescribes the principles which shall govern it in hearing and adjudicating upon the case. They are—

1. The law of nations.
2. The laws of the country from which the title was derived.
3. The principles of justice.
4. The stipulations of treaties.

In the light of these principles, we shall proceed to an examination of the claim; and, first, as to the claim of the representatives of Repentigny. He was a native of Canada, and a captain in the French army at the close of the war, which terminated in the surrender of that province to the British forces, in 1760. His family was among the earliest emigrants to the country after possession had been taken by the King of France, and held high and influential positions in the government. Soon after the execution of the definitive treaty of peace of 1763, the Governor of Canada opened a correspondence with Repentigny to induce him to remain in the province, and become a subject of Great Britain, promising him protection and advancement in his profession. He was then about thirty-eight years of age. But he declined all the advances made to him, and soon after left the country, by order of his superior officer, to take a command on the Island of Newfoundland, where the Indians were disturbing the settlers, and spent the rest of his life in the military service of France, having risen to the rank of Major-General and Governor of Senegal, on the Island of Goree, and its dependencies. He died in 1786, leaving a son, Gaspard, an officer in the French naval service, from whom the present claimants descended, and who reside in the Island of Guadaloupe. The preliminary treaty of the 3d November, 1762, at the surrender of Canada, provided in the second article, in behalf of his Britannic majesty, that the French inhabitants, or others who would have been subjects of the Most Christian King, in Canada, may retire in all safety and freedom, wherever they please, and may sell their estates, provided it be to his Britannic majesty's subjects, and transport their effects, as well as their persons, without being restrained in their emigration, under any pretence whatsoever, except debts or criminal prosecutions,—the term limited for this emigration being the space of eighteen months, to be computed from the day of the ratification of the definitive treaty. The definitive treaty of the 10th February of 1763 contained a similar article.

The articles of capitulation at Montreal, dated 8th September, 1760, when the Canadas were given up to the British forces, secured to the inhabitants their property movable and immovable; and the proclamation of the king, under date of 7th October, 1763, pledged to his loving subjects of Canada his paternal care for the security of the liberty and property of those who are, or should become, inhabitants thereof. These pledges, both before and after the treaty, were but the recognition of

the modern usages of civilized nations which have acquired the force of law, even in the case of an absolute and unqualified conquest of the enemy's country. But the rule is limited, as in the pledge of the king, in his proclamation to the inhabitants of the conquered territory, to those who remain and become the subjects or citizens of the victorious sovereign,—those who, in the language of Chief Justice Marshall, change their allegiance, and where the relations to their ancient sovereign are dissolved. Speaking of the cession of Florida, he observed: "Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change." [United States v. Percheman, 7 Pet. 51, 87.]

Another rule of public law, kindred to this one is, that the conqueror who has obtained permanent possession of the enemy's country has the right to forbid the departure of his new subjects or citizens from it, and, to exercise his sovereign authority over them. Hence the stipulation in the capitulation and treaties of cession providing for the emigration of those inhabitants who desire to adhere to their ancient allegiance, usually fixing a limited period within which to leave the country, and frequently extending to them the privilege, in the mean time, of selling their property, collecting their debts, and carrying with them their effects.

Now, in view of these principles, it is apparent that Repentigny, having refused to continue an inhabitant of Canada, and to become a subject of Great Britain, but, on the contrary, elected to adhere in his allegiance to his native sovereign, and to continue in his service, deprived himself of any protection or security of his property, except so far as it was secured by the treaty. That protection, as we have seen, was limited to the privilege of sale or sales to British subjects, and to carry with him his effects, at any time within eighteen months from its ratification. Whatever property was left unsold was abandoned to the conqueror. Repentigny acted upon this view of his rights. . . .

Repentigny was a gentleman of education and high intelligence. He rose to the rank of general in the army, and aspired to that of Marshall of France; was Governor of Senegal and its dependencies, and, as is obvious from his correspondence with his government, comprehended fully the principles of public law which forfeited all his property left unsold at the time he retired from Canada, under the provisions of the treaty.

He died in 1786, twenty-three years after the date of the treaty; and, during all this time, not only set up no claim to this seigniory, but, on the contrary, repeatedly, as we have seen, urged the patriotic sacrifice of it to his government, as a merit for her favorable consideration of himself and family. And we may add that his only son, an officer in

the French navy, and who died in 1808, at the age of fifty-five, also never set up any claim or right to it to this government, and the first notice she had of it, so far as the record discloses, was in 1824 or 1825, from the descendants of this son residing in the Island Guadaloupe, and who are the complainants in the suit. . . .

[In an omitted part of the opinion the court considered and rejected the claim of the representatives of De Bonne.]

Upon the whole we are quite satisfied that, consistent with the principles, in the light of which we are directed by the act of Congress to examine into the validity of this title, the complainants have failed to establish it. We have felt justified in applying to the case these principles with reasonable strictness and particularity, as it is nearly, if not wholly, destitute of merit.

Decree of the court below reversed, and case remanded with directions to

Dismiss the bill.

Case of the River Plata Water Power Concession

United States. Opinion of Attorney-General Griggs. 1899.

22 *Opinions of Attorneys General* 546.

[The following opinion was in response to a request from the Secretary of War.]

I am in receipt of your communication of July 20, 1899, forwarding to me the application of Ramon Valdez y Cobian for a concession of the right to use the water power of the River Plata, in Porto Rico, together with accompanying papers. You request my opinion as to whether your Department has authority to approve or disapprove of the concession which the applicant seeks and desires to use.

By the papers submitted, it appears that under Spanish law, which prevailed in Porto Rico prior to the going into effect of the treaty of Paris, by which the island was ceded to the United States, the Crown of Spain was the owner, for public use, of the proprietary rights of the natural beds or channels of rivers, both navigable and unnavigable, to the extent covered by the waters in their ordinary greatest swells. The Spanish law of waters applicable to Porto Rico provided in article 218, page 52, as follows:

"In navigable streams, and those which are not navigable, it is within the power of the governor of the province to grant authority for the erection of mills or other industrial establishments, or any buildings situated near the banks to which the necessary water is conducted by canal, this water afterwards being returned to the stream. In no case

shall this authority be granted prejudicially, either to the navigation of the stream or to existing industries. To obtain the authority it is an indispensable requisite that whoever solicits it shall be the owner of the ground on which the building is to be erected or shall be thereto authorized by the owner thereof."

My opinion is based upon the assumption that these statements as to the law of waters that prevailed in Porto Rico prior to the cession of the island are correct. This may fairly be assumed, because the application of Señor Valdez purports to be made in compliance with the provisions of the Spanish law, article 218, above cited.

The River Plata is not a navigable stream. In the brief of counsel for the applicant a distinction is sought to be made between those waters of rivers which belong, by the law of Spain, to the State or Crown and those which belong to the public of Porto Rico. For practical purposes, in the disposition of this case, I can see no difference. Whatever property or property rights belonged to the Crown of Spain or to the indefinite body known as "the public of Porto Rico" were, by the treaty of Paris, transferred to and became the property of the United States of America.

It is well-settled law, and only needs to be stated to be understood, that when public property is ceded by one nation to another its disposition and control are thereafter regulated and governed, not by the laws of the ceding nation, but by the laws of the new owner. If, therefore, any substantial act remains to be done, resting in the grace, favor, or discretion of the Government to secure to an applicant or alleged concessionary a franchise or right in public property thus ceded by one nation to another, such additional action must be obtained in accordance with the laws of the present and not of the former owner. If at the time the treaty of Paris took effect the applicant had a completed and vested right to the use of the waters of the River Plata, that right will be respected by the United States. If, however, his right had not been completed by the action or assent of the Crown authorities of Spain, then his right is not vested but inchoate, and can not be made vested by the completion of those requisites prescribed by Spanish law.

The general rule in respect to vested private rights in cases of change of sovereignty is stated in Ely's Administrator v. United States (171 U. S., 220, 223):

"In harmony with the rules of international law, as well as with the terms of the treaties, upon cession the change of sovereignty should work no change in respect to rights and titles; that which was good before should be good after; that which the law enforced before should be enforcible after the cession."

The converse of the latter proposition is undoubtedly true, namely, that which the law before the cession would not enforce will not be enforcible, as a matter of right, after the cession.

Distinctions have been made in all laws passed by Congress for settling legal and equitable titles to lands in Spanish territory ceded to the United States under former treaties, between perfect or complete grants, fully executed, and inchoate incomplete grants, where a right has been sought to be acquired under or by color of local law or authority, but needed some act of the Government to be done to complete it. (United States v. Arredondo, 6 Peters, 691, 717. See also Ainsa v. United States, 161 U. S. 208, 233; United States v. Santa Fe, 165 U. S., 675, 714.)

Those laws of the former government which have for their object a certain governmental public policy, of which character are laws for the disposition of the public domain and the granting of quasi public franchises, rights, and privileges to private individuals or corporations, ceased to have any force or effect after the sovereignty of the former government ceased. (Harcourt v. Gailliard, 12 Wheaton, 523.)

If in the granting of a right or privilege the sovereign has retained an iota of authority which may affect its untrammeled exercise and enjoyment, the right is not of the nature of an absolute one, but wholly of an inchoate and imperfect quality. As to inchoate, imperfect, incomplete, and equitable rights, the succeeding sovereign is the absolute dictator. They can not be exercised against his sovereignty, but only by his grace, and his affirmative exercise is necessary to the validity of the concession.

It appears from the papers submitted in the case that the applicant had not obtained authority from the governor of the province for the use of the river Plata which he desires to make. He had only complied with the preliminary requisites (whether all of them or not I am unable to say), which, under Spanish dominion, would have qualified him to apply to the governor of the province for a grant of authority for the erection of the proposed works. Before such authority was granted the power of the Spanish governor and the efficiency of the Spanish laws were terminated, so far as public property in the island is concerned.

The question, therefore, is whether the War Department or the executive department of the Government of the United States, represented by the President, now has power to grant to the applicant the use of this public stream which he desires. In my opinion it has not.

By the Constitution the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States is vested in Congress. Congress has conferred no authority of this nature upon the Executive, and in the absence of such power conferred by Congress the President can no more dispose of this particular portion of the public property of the United States than he can dispose of the public grounds, buildings, and other property ceded by Spain to the United States.

In the report made to you by your law officer upon this subject I find it stated that inasmuch as this application was filed October 4, 1898, in accordance with the Spanish law providing for such concessions, if this law was in force in that locality on that date this application, when duly filed, segregates this portion of the Plata River from the public domain, and the effect of the filing of the application, by analogy, is similar to that produced by a homestead entry or preemption right, filed in accordance with law, upon the public domain in the United States. I am unable to agree with this view of the case. The citation from the Spanish law of waters above made indicates clearly that the granting of such a concession, even after all the preliminaries are complied with, is a matter of discretion, resting in the judgment of the governor of the province, who was the royal representative. The article quoted uses this language: "It is within the power of the governor of the province to grant authority, etc. In no case shall this authority be granted prejudicially, either to the navigation of the stream or to existing industries." Clearly the grant of the concession under Spanish law rested in the discretion of the governor, and could not be asserted, upon compliance with preliminaries, as a right.

What I have said is not intended as a decision upon the question as to whether the applicant has or has not any equitable rights which will entitle him hereafter to the favorable action of Congress, either by special or general legislative action. In dealing with inchoate and incomplete claims, especially to land, where the rights of the claimants were not fully vested, but were such as are usually denominated "equitable," it has been the custom of Congress to provide special tribunals of a judicial character to ascertain and determine both the legal and equitable rights of the claimants. So far as I know, the exercise of such powers has never been intrusted to the Executive Departments.[32]

Settlers of German Origin in the Territory Ceded by Germany to Poland

Germany and Poland. Permanent Court of International Justice. 1923.

Publications of the Permanent Court of International Justice, Series B, Advisory Opinion No. 6.

Third Session.

Present: MM. Loder, President; Weiss, Vice-President; Lord Finlay, MM. Nyholm, Moore, de Bustamente, Altamira, Oda, Anzilotti, Huber, Judges; M. Wang, Deputy-Judge.

[32] See also Porto Rican Tramway Concessions, 22 Op. Atty. Gen. 551; Alsop Claim, Chile and United States, 5 Am. Jour. Int. L. 1079. *Cf.* Matadero Canal Concession, Magoon, Reports, 571, 579.

Advisory Opinion No. 6.

[Part of the opinion is omitted.]

The Council of the League of Nations on February 3rd, 1923, adopted the following Resolution:

The Council of the League of Nations having been apprised of certain questions regarding the following facts:

(a) a number of colonists who were formerly German nationals, and who are now domiciled in Polish territory previously belonging to Germany, have acquired Polish nationality, particularly in virtue of Article 91 of the Treaty of Versailles.[33] They are occupying their holdings under contracts (*Rentengutsverträge*) which although concluded with the German Colonization Commission prior to the Armistice of November 11th, 1918, did not receive an "*Auflassung*" before that date. The Polish Government regards itself as the legitimate owner of these holdings under Article 256 of the Treaty of Versailles,[34] and considers itself entitled to cancel the above contracts. In consequence, the Polish authorities have taken certain measures in regard to these colonists by which the latter will be expelled from the holdings which they occupy;

(b) the Polish authorities will not recognize leases conceded before November 11th, 1918, by the German Government to German nationals who have now become Polish subjects. These are leases over German State properties which have subsequently been transferred to the Polish State in virtue of the Treaty of Versailles, in particular of Article 256,

Requests the Permanent Court of International Justice to give an advisory opinion on the following questions:

(1) Do the points referred to in (a) and (b) above involve international obligations of the kind contemplated by the Treaty between the United States of America, the British Empire, France, Italy, Japan and Poland, signed at Versailles on June 28th, 1919, and do these points come within the competence of the League of Nations as defined in that Treaty?[35]

(2) Should the first question be answered in the affirmative, the Council requests the Court to give an advisory opinion on the question whether the position adopted by the Polish Government, and referred to in (a) and (b) above, is in conformity with its international obligations. . . .

In conformity with Article 73 of the Rules of Court, notice of the request for an advisory opinion was given to the Members of the League of Nations, through the Secretary-General of the League, and to the States mentioned in the Annex to the Covenant. Furthermore, the

[33] 13 Am. Jour. Int. L. Suppl. 151, 200.

[34] 13 Am. Jour. Int. L. Suppl. 151, 281.

[35] See art. 12, 13 Am. Jour. Int. L. Suppl. 423, 429.

Registrar of the Court was directed to notify the German Government of the request.

Together with the request were transmitted a certain number of documents. Further documents were obtained from the Secretariat of the League of Nations at the request of the President of the Court. Furthermore, the Court had before it a certain number of documents transmitted to it on behalf of the Polish and of the German Governments respectively.[36]

The Court also heard, at the request of the Polish Government, the statements of its representatives, Count Rostworowski, Professor at the University of Cracow, and Sir Ernest Pollock, formerly Attorney-General of Great Britain. It likewise heard M. Schiffer, former Minister of Justice of the Reich, appointed by the German Government as its representative for the purpose of giving explanations supplementary to those contained in the documents.

By the Treaty of Peace between the Allied and Associated Powers and Germany, which was signed at Versailles on June 28th, 1919, and which came into force on January 10th, 1920, Germany, in conformity with the action already taken by the Allied and Associated Powers, recognized the complete independence of Poland and renounced in her favour all right and title over certain territory which is described in Article 87 and which includes the territory in which the question now before the Court has arisen.

Article 256 of the Treaty contains the following provision.

"Powers to which German territory is ceded shall acquire all property and possessions situated therein belonging to the German Empire or to the German States, and the value of such acquisitions shall be fixed by the Reparation Commission, and paid by the State acquiring the territory to the Reparation Commission for the credit of the German Government on account of the sums due for reparation.

"For the purposes of this Article the property and possessions of the German Empire and States shall be deemed to include all the property of the Crown, the Empire or the States, and the private property of the former German Emperor and other Royal personages." . . .

[In an omitted part of the opinion the court set forth the law of Poland of July 14, 1920, in execution of which the Polish government had proceeded to oust occupants of German origin in the territory affected.]

These occupants are to be divided into two classes: first, those holding under contracts known as *Rentengutsverträge*, entered into with the Prussian State acting through the Settlement Commission for West Prussia and Posen; and second, those holding under contracts known

[36] Lists of the documents transmitted to the Court are printed in P. C. I. J. Publ., Series B, Adv. Op. No. 6, pp. 9–13 note.

as *Pachtverträge* similarly entered into. Under the *Rentengutsverträge* the lands were made over to the settler in perpetuity against payment of a fixed rental, subject to a right of withdrawal and of repurchase on the part of the State on certain conditions stated in the contract; under the *Pachtverträge* the lands were leased to the settlers for a term of years. These contracts were made under certain laws passed by Prussia. The first of these laws which is dated April 26th, 1886, is entitled "A Law concerning the Promotion of German Settlements in the Provinces of West Prussia and Posen." Money was placed at the disposal of the Prussian Government "for the purpose of strengthening, by means of settling German peasants and workmen, the German element in the provinces of West Prussia and Posen against efforts to Polonize the provinces." With the money thus appropriated lands were purchased by the Prussian State and delivered to the settlers. . . .

Under the Council's Resolution, the case before the Court relates only to two classes of settlers; first, those holding under *Rentengutsverträge*, concluded prior to November 11th, 1918, where there was no *Auflassung* before that date; and secondly, those holding under leases (*Pachtverträge*) contracted before November 11th, 1918, for which *Rentengutsverträge* were substituted after that date. . . .

[In an omitted part of the opinion the court reviewed the circumstances in which the controversy had been brought to the attention of the Council.]

The questions that have been discussed before the Court fall under two general heads: First, that of the competency of the League of Nations to take cognizance of the matter; and secondly, that of the right of the settlers to continue to hold and cultivate the lands which they occupy. . . .

[In an omitted part of the opinion the court considered and sustained the competency of the League of Nations to take cognizance of the controversy under the Minorities Treaty. The court considered also the question whether and to what extent the date of the Armistice, Nov. 11, 1918, affected the validity of the contracts under consideration.]

The second question before the Court relates to certain measures taken by Poland affecting certain contracts entered into by the settlers with the Prussian Government. Before proceeding to answer this question it should be observed that German law is still in force in the territories ceded by Germany to Poland, and that reference to German law is necessary in the examination of the nature and extent of the rights and obligations arising under these contracts. The Court, however, will not discuss distinctions and exceptions which are not necessary for the present case.

As regards the *Rentengutsverträge* mentioned in point (a) of the question, they are both in form and in substance a special kind of contract

of sale. Specimens of such contracts are before the Court. The contract states that the holder acquires the land as owner; he is described throughout the instrument as a purchaser and he enters into possession of the land upon the conclusion of the contract and the payment of a fixed sum. The chief characteristics which distinguish these *Rentengutsverträge* from ordinary contracts of sale are:

(1) part of the purchase price is paid before taking possession of the land and the remainder is to be paid thereafter in the form of a fixed rent, which may be redeemed on conditions stated in the contract; and

(2) under the special and general conditions (*Bedingungen*), which form part of the contract, certain obligations are imposed upon the purchaser and certain rights are reserved to the Prussian State, including in certain specified cases the right of withdrawal and the right of re-purchase. But except as otherwise provided in these special and general conditions, the ordinary rules governing contracts of sale apply to the *Rentengutsverträge.*

Under German law the transfer of ownership of land is subject to specific provisions. A contract of sale, for instance, even followed by entry into possession on the part of the purchaser, is not sufficient in itself to vest the legal ownership (*Eigentum*) in the purchaser. To effect a transfer of such ownership, *Auflassung* and entry in the land registry are necessary. The *Auflassung* consists in declarations of transfer of ownership made at the same time by both parties before the land Registry Office (Article 873 and 925 of the German Civil Code). It follows that holders under *Rentengutsverträge* where there was no *Auflassung* before November 11th, 1918—had not acquired legal ownership of the lands prior to such date. But it by no means follows that they had not acquired a right to the land.

It has been contended that, before *Auflassung*, the rights of the holders, if any, are only inchoate or imperfect rights which are not enforceable at law. The Court is unable to share this view.

An examination of the *Rentengutsvertrag* shows that it amounts to a valid and enforceable contract for the ownership of the land. . . .

The special conditions contain the following provisions: The purchaser is to make a cash payment on account. The rent is specified. The piece of land is to be handed over on the payment on account being made. If the payment on account is not made, the State may withdraw from the contract. The rights of the purchaser may not be assigned except with the sanction of the State.

It is unnecessary to refer to the other special conditions.

It is obvious that there is nothing in any of the Special Conditions that prevents the purchaser from having a right to the land on the terms of the contract.

The General Conditions require examination.

In the form of contract furnished to the Court by the Secretary-General of the League of Nations paragraph 1 provides that the purchaser is, within a year, to make an "efficient economic settlement" (*Leistungsfähige wirtschaftliche Ansiedlung*) on the land, and adds "the State shall judge whether this duty has been carried out."

Paragraph 2 gives the State the right to withdraw from the contract if the purchaser does not begin to cultivate within six months and complete the cultivation within two years; also in the event of certain specified breaches of contract by the purchaser, and further, if the right of the purchaser against the State is seized by a creditor (*Wenn der Anspruch des Käufers gegen den Staat auf Uebertragung des Eigentums an der Stelle von einem Gläubiger gepfändet wird*).

Under paragraph 3, the land is to be conveyed (*aufgelassen*) after the purchaser has fulfilled to the satisfaction of the State his obligations under the preceding paragraphs, and the State has provided the necessary documents for the land register.

This clause cannot be read as giving the State an arbitrary right to refuse the *Auflassung* if the conditions of the contract have in fact been fulfilled by the purchaser. In such a case the *Auflassung* may be enforced by proceedings at law, and even if there were any difficulty about compelling the Government to execute the conveyance, there would be no right on the part of the Government to evict from the land the purchaser in possession who had complied with his contract.

It is obvious that in the ordinary course the State would execute the conveyance if the terms had been fulfilled by the purchaser, and that, as the State would not in such case have any right to evict, it would have nothing to gain by postponing the *Auflassung*.

Paragraph 6 makes provision against partial alienations of the land, and also against alienation of the whole except to persons approved by the State.

Paragraph 7 provides that the purchaser should himself reside on the property and conduct the husbandry. The third clause of this Condition provides that permission for a change of possession or ownership will be refused by the State after the expiration of twelve years from the handing over of the land only if it appears that the change may render doubtful the attainment of the purpose of the Law of 1886.

Some argument was addressed to the Court on behalf of the Polish Government on the subject of Conditions 6 and 7, but these appear to have no material bearing upon the case, and the same observation must be made with regard to the right of repurchase reserved to the State in certain eventualities by paragraph 9 of the General Conditions.

Paragraph 11 contains the following condition:

Mit der Uebergabe erlangt der Käufer das Recht, die Stelle als Niessbraucher zu nutzen.

"with the handing over the purchaser acquires the right of using the place as a usufructuary." Under German law the usufructuary is protected in his possession and in the enjoyment of the fruits of the thing. Under other forms of contracts presented to the Court, in which the purchaser is not mentioned as a "usufructuary," he acquires, as soon as the possession has been transferred to him, a right to hold the land as if it were his own (*Eigenbesitz*).

There is nothing else in the *Rentengutsvertrag* which calls for notice. It appears to the Court to be clear that the purchaser had rights to the land even before *Auflassung*. He gave valuable consideration in money and in cultivation for the acquisition of this interest, and it was an interest recognised by law and which might be safeguarded by legal proceedings. The purchaser acquired a *jus ad rem*, and after *Auflassung* had a *jus in re*.

The fact that there was a political purpose behind the colonisation scheme cannot affect the private rights acquired under the law, and indeed it is self-evident that no scheme of colonisation of this nature could possibly succeed unless the settlers had security in the property for which they had paid in money and in kind. . . .

The fact that, in the present case, one of the contracting parties is the State does not affect the legal situation, because under German law, the State, in its relations under private law, is subject to the ordinary rules of private law and can sue and be sued before the Courts (Article 4 of the Introductory Act (*Einführungsgesetz*) to the German Code of Civil Procedure). The claim which the purchaser of a *Rentengut* has against the State for transfer of ownership is incidentally recognised by Clause 1, No. 5 of paragraph 2 of the General Conditions. Nor is the State, in the opinion of the Court, at liberty arbitrarily to deny this claim. Article 157 of the German Civil Code provides that "contracts shall be interpreted according to the requirements of good faith, ordinary usage being taken into consideration." This provision is applicable to all kinds of contracts and resort to the Courts is always open unless expressly excluded.

Having examined the nature and extent of the rights arising under the *Rentengutsverträge*, and especially with regard to the time before *Auflassung*, the Court must next consider what, if any, are the effects upon these contracts of the change of sovereignty and of the ownership of State property in the territories concerned.

The representative of Poland made the following statement with regard to those *Rentengutsverträge* where *Auflassung* had taken place before November 11th, 1918;

"The category of colonists not liable to expulsion under the Law of July 14th, 1920, comprises 17,240 colonists, holding 262,942 acres of land, under *Rentengutsverträge* completed by *Auflassung* and registration of title in the Land Registers, both having been granted by the

Prussian Government before November 11th, 1918. These colonists are all of German race and language. The Law of July 14th, 1920, does not apply to these Colonists. Their title to the land is recognised as valid by the Polish Government subject to the terms of the *Rentengutsverträge.*"

This recognition of title implies the admission that, after *Auflassung*, legal ownership was vested in the holder of the *Rentengut*, so that the ownership of Prussia having ceased to exist, such ownership could not pass to Poland under Article 256 of the Peace Treaty.

In the case of *Rentengutsverträge*, where no *Auflassung* had taken place, and where the Prussian State appeared still in the land register as owner, Poland, under Article 1 of the Law of July 14th, 1920, proceeded to the substitution in the land register of the Polish Treasury for the Prussian State as owner.

It has been shown that under the *Rentengutsverträge* the purchaser has, even before *Auflassung*, vested rights enforceable as against the vendor. The principal question with which the Court is now confronted is the following: The sovereignty and the ownership of State property having changed, is the settler who had concluded a *Rentengutsverträge* with the Prussian State entitled to claim from the Polish Government as the new owner the execution of the contract, including the completion of the transfer by *Auflassung?*

Three views have been suggested.

The first is that the contracts are of a "personal" nature and exist only as between the original parties, *i.e.* the Prussian State and the holder of the lands, so that the obligations of the former cannot be considered as having passed to Poland. The reasons why this hypothesis is not acceptable may be found both in what has been said as to the legal nature of the rights of the holder under the *Rentengutsverträge* and in what is now to be said concerning the effect of a change of sovereignty on private rights.

Equally unacceptable is the second view, that the *Rentengutsverträge* have automatically fallen to the ground in consequence of the cession of territory. Private rights acquired under existing law do not cease on a change of sovereignty. No one denies that the German Civil Law, both substantive and adjective, has continued without interruption to operate in the territory in question. It can hardly be maintained that, although the law survives, private rights acquired under it have perished. Such a contention is based on no principle and would be contrary to an almost universal opinion and practice.

There remains the third view that private rights are to be respected by the new territorial sovereign.

The general question whether and under what circumstances a State may modify or cancel private rights by its sovereign legislative power, requires no consideration here.

The Court is here dealing with private rights under specific provisions of law and of treaty, and it suffices for the purposes of the present opinion to say that even those who contest the existence in international law of a general principle of State succession do not go so far as to maintain that private rights including those acquired from the State as the owner of the property are invalid as against a successor in sovereignty.

By the Minorities Treaty Poland has agreed that all Polish nationals shall enjoy the same civil and political rights and the same treatment and security in law as well as in fact. The action taken by the Polish authorities under the Law of July 14th, 1920, and particularly under Article 5 is undoubtedly a virtual annulment of the rights which the settlers acquired under their contracts and therefore an infraction of the obligation concerning their civil rights. It is contrary to the principle of equality in that it subjects the settlers to a discriminating and injurious treatment to which other citizens holding contracts of sale or lease are not subject. . . .

[In an omitted part of the opinion the court considered the effect of other provisions of the Treaty of Versailles and also the effect of certain of the contract clauses.]

Point (b) in question 2 relates to leases (*Pachtverträge*) concluded prior to November 11th, 1918. This point, according to the Resolution of the Council of April 18th, 1923, transmitted to the Court by the Secretary-General of the League of Nations on April 28th, "refers exclusively to the case of a special category of colonist farmers, namely those who occupy holdings in virtue of leases contracted before the Armistice and still unexpired, and who subsequently obtained after the Armistice amortization contracts (*Rentengutsverträge*) for these holdings."

Under the *Pachtvertrag* the place is handed over to the occupant, at first without buildings, which so far as is necessary the State undertakes to provide; but the settler is obliged to make a cash deposit (1) for the security of the State, and (2) for the acquisition of an inventory, and he is also required to pay a percentage on the cost of the buildings as security for their upkeep. The rent is payable (1) for the land, and (2) for the use of the buildings. The settler's wife, when signing the lease jointly with him, is liable as an individual debter. The lessee is required to keep a stock of cattle of a certain value. He is obliged to hand back any part of the land which may prove to be required "for the fulfilment of the private law obligations of the State". On the termination of the lease he is entitled to a conditional compensation; and the fact is particularly to be noticed that, by an express clause in the lease, the event of his taking over the place under a "*Rentengutsvertrag*" either during or at the end of the lease, is dealt with, and the following conditions are provided: (1) the security for the lease and

the security for upkeep of the buildings are credited as cash on the purchase-money for the buildings, (2) an allowance of two years' rent is credited as cash on account of the purchase of the buildings, and (3) an extension of time is given for the payment of the balance of the purchase-money of the buildings, for which balance a mortgage is also executed.

The right of the lessee is enforceable at law even against third parties. Article 571 of the German Civil Code provides that "where the land subject to a lease is, after delivery to the lessee, transferred by the lessor to a third party, the acquirer, during the period of his ownership, takes the place of the lessor in the rights and obligations arising under the lease."

What has heretofore been said in refutation of the argument that the *Rentengutsverträge* need not be recognised by Poland because of the "personal" character of the rights, the "political" nature of the contracts and the disproportion of the rent to the value of the land, applies equally to the argument against the recognition of the *Pachtverträge* and need not be repeated.

It is evident that under the "*Pachtverträge*" a certain security of tenure is assured, subject necessarily to the performance of the conditions of the tenure. The holder becomes personally attached to the land, with a reasonable expectancy of permanent occupancy, and it becomes his home, for the preservation of which he gives his labour, as well as a part of what he produces. The State proprietor on the other hand finds its compensation in the cultivation, development and productivity of the land, which is thus made to contribute to the wealth and prosperity of the State.

For the reasons stated, the Court is of opinion that the *Pachtverträge* were not affected by the transfer of sovereignty, and that they remain in force unless they have expired or have been legally superseded by *Rentengutsverträge*.

If the holder of a *Pachtvertrag* realised, by the fruits of his industry, enough to enable him to undertake the expenditure incumbent upon the holder of a *Rentengutsvertrag*, it was very usual for him to exchange the *Pachtvertrag* for a *Rentengutsvertrag*, with its permanency of tenure. This possibility is contemplated by the terms of the *Pachtvertrag* itself. The question submitted to the Court relates to the rights of those holders of *Pachtverträge* who had given their *Pachtverträge* in exchange for *Rentengutsverträge*. The Polish Government has taken up the position that this put an end to the *Pachtvertrag*, but that the *Rentgengutsvertrag*, in consideration of which the *Pachtvertrag* was surrendered, is void. It is impossible to support such a contention. If the *Rentengutsvertrag* were held to be void, in all fairness the purchaser would be entitled to have his *Pachtvertrag* restored to him. But, in the view of the Court,

the *Rentengutsvertrag* was good. It is not obnoxious to any of the objections which have been urged as already stated in this opinion. The exchange of the *Pachtvertrag* for the *Rentengutsvertrag* was a reasonable and proper operation in the ordinary course of management of land.

Point (b) of the second question as explained by the Council inquires whether the position taken by Poland to the effect that *Rentengutsverträge* granted after November 18th, 1918, to holders of *Pachtverträge* are invalid, is in conformity which [with?] her obligations. The Court is of opinion that the position of the Polish Government is not justified. As the Prussian State retained and continued to exercise its administrative and proprietary rights in the ceded territory until this territory passed to Poland under the Treaty of Peace, the only ground on which the position of Poland could be justified is, in the opinion of the Court, the contention that the granting of the *Rentengutsvertrag* was prohibited by the provision in the Spa Protocol, by which the German Government engaged, while the Armistice lasted, not to take any measure that could diminish the value of its domain, public or private, as a common pledge to the Allies for the recovery of reparations. The Court thinks that in view of the connection which has been shown to exist between the *Pachtverträge* and the *Rentengutsverträge*, it would be an unreasonable straining of the prohibition in the Protocol to hold that it precluded the Prussian State from granting, prior to the passing of the territory to Poland, a *Rentengutsvertrag* to the holder of a *Pachtvertrag* granted prior to the Armistice.

For these reasons,

The Court is of opinion,

That the points referred to in (a) and (b) of the Resolution of the Council of the League of Nations of February 3rd, 1923, do involve international obligations of the kind contemplated by the Treaty between the United States of America, the British Empire, France, Italy, Japan and Poland, signed at Versailles on June 28th, 1919, and that these points come within the competence of the League of Nations as defined in that Treaty;

That the position adopted by the Polish Government, and referred to in (a) and (b) of the said Resolution was not in conformity with its international obligations.[37]

Done in French and English, the English text being authoritative, at the Peace Palace, The Hague, this tenth day of September, nineteen hundred and twenty-three, in two copies, one of which is to be deposited

[37] "And note that the political origin attaching to the rights, and rendering them obnoxious to the successor State, does not relieve it of the duty to respect acquired rights of this character." OPPENHEIM, 4th ed., I, 168 n. See MOORE, Dig. Int. L., I, 414; SAYRE, "Change of Sovereignty and Private Ownership of Land," 12 Am. Jour. Int. L. 475.

in the archives of the Court and the other to be forwarded to the Council of the League of Nations.

Dent v. Emmeger

United States. Supreme Court. 1871.

14 *Wallace's Reports* 308.

Error to the Circuit Court for the District of Missouri.

[The names of counsel and part of the opinion are omitted. The case is stated in the opinion.]

Mr. Justice Swayne stated the case, and delivered the opinion of the court.

The plaintiff in error brought an action of ejectment to recover the premises described in his declaration. They consist of thirty acres of land, and are lots 90 and 91 of the commons tract of the town or village of Carondelet, as subdivided by the survey made by Jasper Myer, in 1837. The parties waived the intervention of a jury and submitted the case to the court. The court found the facts specially and adjudged that the plaintiff could not recover and that the Carondelet title, which was held to be the better one, was in the defendants. . . .

The premises in controversy are within the Territory of Louisiana which belonged originally to France, was transferred by that country to Spain, and by Spain subsequently back to France, and by France to the United States by the treaty of the 30th of April, 1803. Carondelet was a village of that part of the Territory which subsequently became the State of Missouri, and contained four descriptions of real property. They were known as in-lots, out-lots, common-field lots, and commons. It is with the last only that we have to do in this case. At the period of the transfer to the United States, the claim of the village to the premises in controversy was supported by no clear and definite evidence, and the out-boundaries of the tract had not been run. On the 25th of December, 1797, Soulard, then the surveyor-general of the Territory of Louisiana, certified that at the request of the inhabitants of the village of Carondelet, Berthelemy had been appointed to survey the tract granted to them as commons by Lieutenant Governor Trudeau, and that he had failed to perform the work by reason of his compass being found out of order, and that want of time had prevented the surveyor-general subsequently from having the survey made.

This condition of things subsisted when the Territory came into the possession of the United States under the treaty with France of 1803, and it continued until Congress acted upon the subject. By the act of June 13th, 1812 [2 U. S. Stat. L. 748], it was declared "that the rights,

titles, and claims to town or village lots, out-lots, common-field lots, and commons, in, adjoining, and belonging to the several towns and villages," of which Carondelet is one, "which have been inhabited, cultivated, or possessed prior to the 20th of December, 1803, are hereby confirmed to the inhabitants of the respective towns or villages aforesaid according to their several rights in common thereto." It was provided that nothing in the act should affect the rights of persons whose titles had been confirmed by the board of commissioners appointed to adjust and settle such claims. It was made the duty of the principal deputy surveyor of the Territory to survey, where it had not been done, the out-boundary lines of the villages named, so as to include the out-lots, common-field lots, and commons belonging to them respectively. Plats of the surveys were to be forwarded to the surveyor-general, who was required to forward copies to the Commissioner of the General Land Office and the Recorder of Land Titles.

The act of April 29th, 1816 [3 U. S. Stat. L. 325], provided for the appointment of a surveyor of the public lands in the Territories of Illinois and Missouri, and after requiring him to appoint a sufficient number of skilful surveyors as his deputies, made it his duty, among other things, to cause to be surveyed the lands in those Territories, claims to which had been or might thereafter be confirmed by Congress, which had not already been surveyed according to law.

Under the act of 1812, a survey of the out-boundary lines of Carondelet was made by Rector, a deputy surveyor, under instructions from the office of his principal, and the survey and field-notes were deposited in that office in the year 1817.

The act of January 27th, 1831 [4 U. S. Stat. L. 435], declared that the United States did thereby relinquish to the inhabitants of the villages named in the act of 1812 all the title of the United States to the lots and commons "in, adjoining, and belonging to said towns and villages, to be held according to their respective rights, to be regulated and disposed of according to the laws of Missouri."

Pursuant to orders from the surveyor-general, his deputy, Brown, retraced the lines of the commons of Carondelet, as run by Rector, and re-established the corners. This resurvey was returned to the surveyor-general, and was approved by him on the 29th of July, 1834.

This statement exhibits the several links in the defendants' chain of title, so far as regards the action of the government.

That of the plaintiff in error had its inception also at a period preceding the treaty of cession of 1803. In 1789 the then Lieutenant Governor of Upper Louisiana, on the petition of Gabriel Cerre, conceded to him a tract of land of ten by forty arpents. In 1812 Cerre presented the claim for confirmation under the acts of congress of 1805 and 1807, and it was rejected by the commissioners. It was presented by

Cerre's legal representatives before the commissioners appointed under the act of Congress of July 9th, 1832, and was by them recommended for confirmation, and was confirmed accordingly by an act of Congress of the 4th of July, 1836 [5 U. S. Stat. L. 127]. The right of all adverse claimants, to assert their claims in a court of justice was saved, and it was provided that if any of the land confirmed had been located by any other person under any law of the United States, or had been surveyed and sold by the United States, the confirmation should not avail against the title thus acquired; but that the confirmee might, to the extent of the interference, locate his claim elsewhere in the State of Missouri or the Territory of Arkansas, as the claim might have originated on one or the other, upon any lands of the United States, subject to entry at private sale. Under this act the claim of Cerre was surveyed for the first time, and the survey was made within the limits of the commons of Carondelet as previously run by Rector in 1817, and by Brown in 1834. Before this survey the Cerre claim was totally undefined and uncertain as regards its out-boundaries.

The act of March 3d, 1869, declared that the claim of the legal representatives of Cerre was thereby confirmed "in place, subject to any valid adverse rights, if such there be," and that a patent should be issued accordingly. A patent bearing date the 3d of July, 1869, was accordingly issued. It was admitted in the court below that the plaintiff in error held whatever title was conveyed by this patent. The premises in controversy are within the limits of the Carondelet commons as surveyed by Rector and Brown, and embrace the premises in controversy in this suit.

The labors of our predecessors have left us little to do, and a few remarks will be sufficient to dispose of the case.

Titles which were perfect before the cession of the Territory to the United States, continued so afterwards, and were in nowise affected by the change of sovereignty. [United States v. Roselius, 15 How. 36.] The treaty so provided, and such would have been the effect of the principles of the law of nations if the treaty had contained no provision upon the subject. According to that code, a change of government is never permitted to affect pre-existing rights of private property. Perfect titles are as valid under the new government as they were under its predecessor. [Strother v. Lucas, 12 Pet. 412.] But inchoate rights such as those of Cerre were of imperfect obligation and affected only the conscience of the new sovereign. They were not of such a nature (until that sovereign gave them a vitality and efficacy which they did not before possess) that a court of law or equity could recognize or enforce them. When confirmed by Congress they became American titles, and took their legal validity wholly from the act of confirmation and not from any French or Spanish element which entered into their previous existence.

The doctrine of senior and junior equities and of relation back has no application in the jurisprudence of such cases. The elder confirmee has always a better right than the junior, without reference to the date of the origin of their respective claims or the circumstances attending it. Such is the settled course of adjudication both by this court and the Supreme Court of Missouri. [Menard's Heirs v. Massey, 8 How. 307; Chouteau v. Eckhart, 2 How. 345; Les Bois v. Bramell, 4 How. 449; Mackay v. Dillon, 4 How. 430; Bird v. Montgomery, 6 Mo. 514; Widow and Heirs of Mackay v. Dillon, 7 Mo. 7; Vasquez v. Ewing, 42 Mo. 248.]

After the passage of the act of 1812 the claim of the city was still indefinite and unenforceable until made definite and located by the survey prescribed and provided for. A survey made under the direction of the officer designated to have it made and approved by him was final and conclusive unless an appeal were taken to the Commissioner of the General Land Office. [Menard's Heirs v. Massey, 8 How. 313.] The survey made by Rector in 1817, retraced by Brown, and approved by the surveyor-general in 1834, is binding upon the village and estops her from claiming any land beyond the lines thus established. [Carondelet v. St. Louis, 1 Bl. 179.] And those lines must necessarily be of equal validity as regards those claiming against her. The confirmation by the act of 1812 was exclusive except as to adverse claims which had then been confirmed. The Cerre claim was within this category. It was confirmed subsequently, and after the lines of the commons had been defined and established by the surveys of 1817 and 1834. The action of Congress in confirming it was in every instance made subject to all prior valid conflicting rights. The title of the village asserted in this litigation was of that character.

Upon principle, authority, and the express legislation of Congress, we are constrained to hold that the adverse claim of the plaintiff in error cannot prevail against the title of the village. . . .

Judgment affirmed.

ALVAREZ Y SANCHEZ v. UNITED STATES

United States. Supreme Court. 1910.

216 *United States Reports* 167.

[The arguments of counsel are omitted. The case is stated in the opinion.]

MR. JUSTICE HARLAN delivered the opinion of the court.

The appellant, an inhabitant and citizen of Porto Rico, seeks to recover from the United States the value of a certain office held by him in that Island before and during the war with Spain, of which office, it is

alleged, he was illegally deprived by the United States. A demurrer to the complaint was sustained and judgment given for the United States, the opinion of the Court of Claims being delivered by Chief Justice Peelle. 42 Ct. Cl. 458, 472.

The complaint which, on demurrer, was adjudged to be bad, presents—using substantially the words of the complaint—the following case:

In the year 1878 the claimant, Sanchez, purchased from one Florenzio Berrios y Lopez, for a valuable consideration, the office known as "Numbered Procurador (Solicitor) of the Courts of First Instance of the capital of Porto Rico," at Guayamo, in perpetuity, and in the same year the Governor General of Porto Rico issued a provisional patent in his favor. In 1881 the claimant's tenure of the office was approved and confirmed, and a final patent therefor was issued by the King of Spain, in accordance with the laws, practice and custom of Spain and Porto Rico governing the sale, surrender and transfer of such an office. The claimant, it is alleged, thereby became vested with all the legal rights and privileges appertaining to the office.

From the date of the provisional patent issued to him until, as will be presently stated, he was deprived of his office, August 31st, 1899, the claimant exercised all the rights and privileges belonging to the office of *Procurador* or Solicitor. Under the laws of Spain and Porto Rico, it will be assumed, the office was transferable in perpetuity and vested the incumbent with exclusive rights and privileges, and as a consequence thereof the claimant was entitled under the laws of Spain in force in Porto Rico, during all the time he held the office, to perform its duties and receive its fees and emoluments which, prior to August 31st, 1899, averaged, it is alleged, more than $200 per month, of which he could not be legally deprived except by due process of law.

On the tenth day of December, 1898, a Treaty of Peace between the United States and Spain was concluded and having been duly ratified by the respective countries, was duly proclaimed April 11th, 1899. The Treaty contained these provisions: "Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the Island of Guam in the Marianas or Ladrones." Art. 7. " . . . And it is hereby declared that the relinquishment or cession, as the case may be, to which the preceding paragraph refers, cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or of private individuals, of whatsoever nationality such individuals may be." Art. 8.

A military government was organized in Porto Rico and was maintained there from October, 1898, up to and after April 30th, 1900. On the latter date, General Davis, as Military Governor, issued what is known as General Order 134, containing these among other paragraphs: "XI. The office of Solicitor ('*procurador*') is abolished. Those who have heretofore practiced as such before any court and are of good repute shall, in default of lawyers, have the right to be appointed municipal judges or clerks of Municipal Courts. XII. Hereafter, litigants who do not appear personally shall be represented before the Supreme Court and District Courts exclusively by a lawyer, no powers of attorney being necessary therefor; it shall be the duty of the courts to suspend from the practice of his profession any lawyer who shall, without authority, assume to represent a litigant; but this shall not affect the civil or criminal liability which such lawyer may thereby incur. In the Municipal Courts, litigants may represent themselves or may be represented by an attorney in fact, resident of the place. XIII. For the purpose of conducting the proceedings, lawyers may make use of such agents as they may by writing designate to the court." That order was issued without notice to claimant and without any complaint being made as to the manner in which he was exercising his rights or discharging his duties.

On the twelfth day of April, 1900, Congress passed (to take effect May 1st, 1900) what is known as the Foraker Act temporarily to provide revenues and civil government for Porto Rico and for other purposes. That act contained this provision: "Sec. 8. That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended or modified hereinafter, or as altered, or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico, or by act of Congress of the United States." 31 Stat. 77, 79, c. 191, April 12, 1900.

The reasonable value, the claimant alleges, of the "transferable" or "Numbered Procurador of the Courts of First Instance of the capital of Porto Rico," in perpetuity, was $50,000, for which amount he asks judgment. No compensation has ever been made to claimant for the loss of his office, and no action has been taken on his present claim either by Congress or by any Department of the United States Government.

Such is the case made by the claimant in his petition.

The claimant proceeds in his petition on the ground that the effect of the eighth section of the act of Congress of April 12th, 1900, was to confiscate, finally and effectually, without compensation to him, the

office which he claims to have lawfully purchased in perpetuity, prior to the occupation of Porto Rico by the military forces of the United States, and the cession of that Island to this country; which confiscation, he insists, could not have been legally done without violating the Treaty between the United States and Spain which was in force when the act of 1900 was passed.

We do not think that the present claim is covered by the Treaty. It is true that a Treaty negotiated by the United States is a part of the Supreme Law of the Land, and that it is expressly provided in the Treaty in question that it "cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds . . . of private individuals." But, clearly, those provisions have no reference to public or quasi-public stations, the functions and duties of which it is the province of government to regulate or control for the welfare of the people, even where the incumbents of such stations are permitted, while in the discharge of their duties to earn and receive emoluments or fees for services rendered by them. The words in the Treaty "property . . . of private individuals," evidently referred to ordinary, private property, of present, ascertainable value and capable of being transferred between man and man.

When the United States, in the progress of the war with Spain, took firm, military possession of Porto Rico, and the sovereignty of Spain over that Island and its inhabitants and their property was displaced, the United States, the new Sovereign, found that some persons claimed to have purchased, to hold in perpetuity, and to be entitled, without regard to the public will, to discharge the duties of certain offices or positions which were not strictly private positions in which the public had no interest. They were offices of a quasi-public nature, in that the incumbents were officers of court, and in a material sense connected with the administration of justice in tribunals created by government for the benefit of the public. It is inconceivable that the United States, when it agreed in the Treaty not to impair the property or rights of private individuals, intended to recognize, or to feel itself bound to recognize, the salability of such positions in perpetuity, or to so restrict its sovereign authority that it could not, consistently with the Treaty, abolish a system that was entirely foreign to the conceptions of the American people, and inconsistent with the spirit of our institutions. It is true that Congress did not, we assume, intend by the Foraker Act to modify the Treaty, but if that act were deemed inconsistent with the Treaty the act would prevail; for, an act of Congress, passed after a Treaty takes effect, must be respected and enforced, despite any previous or existing Treaty provision on the same subject. Ribas y Hijo v. United States, 194 U. S. 315, 324, and authorities cited. If, originally, the claimant lawfully purchased, in perpetuity, the office of

Solicitor (*Procurador*) and held it when Porto Rico was acquired by the United States, he acquired and held it subject, necessarily, to the power of the United States to abolish it whenever it conceived that the public interest demanded that to be done. The intention of Congress in relation to the office of Solicitor or *Procurador* by the Foraker Act cannot be doubted—indeed, its abolition by Congress is made the ground of the present action and claim. Upon the acquisition of Porto Rico that Island was placed under military government, subject, until Congress acted in the premises, to the authority of the President as Commander-in-Chief acting under the Constitution and laws of the United States. Porto Rico was made a Department by order of the President on the eighteenth of October, 1898. By his sanction, it must be presumed, General Order No. 134 was made, abolishing the office of Solicitor or *Procurador*. That order was recognized by Congress, if such recognition was essential to its validity, when Congress, by the Foraker Act of 1900, provided that the laws and ordinances of Porto Rico, then in force, should continue in full force and effect, *except* "as altered or modified by military orders in force" when that act was passed. It is clear that claimant is not entitled to be compensated for his office by the United States because of its exercise of an authority unquestionably possessed by it as the lawful sovereign of the Island and its inhabitants. The abolition of the office was not, we think, in violation of any provision of the Constitution, nor did it infringe any right of property which the claimant could assert as against the United States. See O'Reilly de Camara v. Brooke, 209 U. S. 45, 49. The judgment of the Court of Claims must be affirmed.

It is so ordered.[38]

[38] See BORDWELL, "Purchasable Offices in Ceded Territory," 3 Am. Jour. Int. L. 119; FULLER, "Are Franchises Affected by Change of Sovereignty?" 3 Col. L. Rev. 241, 245.

On succession, in general, see BARCLAY, STRUYCKEN, KAUFMANN, Studien zur Lehre von der Staatensukzession; CAVAGLIERI, La Dottrina della Successione di Stato a Stato; FAUCHILLE, I, Pt. I, 391; FOCHERINI, Le Successioni degli Stati; GUGGENHEIM, Beiträge zur völkerrechtlichen Lehre vom Staatenwechsel; HERSHEY, "Succession of States," 5 Am. Jour. Int. L. 285; HUBER, Die Staatensuccession; KEITH, Theory of State Succession; LAUTERPACHT, Private Law Sources and Analogies of International Law, 125; OPPENHEIM, 4th ed., I, §§80–84; SACK, Les Effets des Transformations des États sur leurs Dettes Publiques et autre Obligations Financières; SCHOENBORN, Staatensukzessionen.

CHAPTER X

TREATIES IN THE LAW OF NATIONS

SECTION 1. DEFINITION AND CLASSIFICATION

HALL, INTERNATIONAL LAW

Eighth Edition, page 379, section 107. 1924.

§107. It follows from the position of a state as a moral being, at liberty to be guided by the dictates of its own will, that it has the power of contracting with another state to do any acts which are not forbidden, or to refrain from any acts which are not enjoined by the law which governs its international relations, and this power being recognised by international law, contracts made in virtue of it, when duly concluded, become legally obligatory.[1]

OPPENHEIM, INTERNATIONAL LAW

Third Edition, Volume I, pages 664–666, section 508. 1920.

§508. International compacts which take the form of written contracts are sometimes termed not only *agreements* or *treaties*, but *acts*, *conventions*, *declarations*, *protocols*, and the like.[2] But there is no essential difference

[1] "The important functions of treaties are manifest if attention is given to the variety which exist nowadays, and are day by day concluded for innumerable purposes. In regard to State property, treaties of cession, boundary treaties, and many others are concluded. Alliances, treaties of protection, of guarantee, of neutrality, and of peace are concluded for political purposes. Various purposes are served by consular treaties, commercial treaties, treaties in regard to the post, telegraphs, and railways, treaties relating to copyright and the like, to jurisdiction and to extradition, monetary treaties, treaties in regard to measures and weights, to rates, taxes, and customs duties, sanitation treaties with respect to epidemics, treaties in the interest of industrial labourers, and treaties with regard to agriculture and industry. Again, various purposes are served by treaties concerning warfare, mediation, arbitration, and so on." OPPENHEIM, 3d ed., I, §492. "It has been estimated that the number of treaties in force between the several States at the outbreak of the World War exceeded eight thousand; and although a number were abrogated by the war, the number is again increasing daily." OPPENHEIM, 4th ed., I, 701 n.

[2] "International engagements may be denominated acts, conventions, declarations, protocols, concordats, exchanges of notes, covenants, procès-verbaux, agreements, arrangements, statutes, additional articles, notifications, denunciations, adhesions, decrees, regulations, orders, supplementary provisions, modifications, amendments." HUDSON, "Registration and Publication of Treaties," 19 Am. Jour. Int. L. 273, 277.

between them, and their binding force upon the contracting parties is the same, whatever be their name. The Geneva Convention, the Declaration of Paris, and the Final Act of the Vienna Congress are as binding as any agreement which goes under the name of 'treaty' or 'convention.' . . .

Again, the distinction made by the Government of the United States between *treaties*, which can only be ratified by the President with the consent of the Senate, and *agreements*, which do not require such consent, has nothing to do with International Law. It is a distinction according to the constitutional law—or the constitutional practice—of the United States. And the distinction made by the British Foreign Office between treaties and one class of conventions on the one hand, and another class of conventions, together with most agreements and declarations, on the other hand, according to which the former instruments are said to be concluded in the name of the heads of the States concerned, and the latter in the name of the respective 'Governments,' has nothing to do with International Law.

HALL, INTERNATIONAL LAW

Eighth Edition, page 384, note 4. 1924.

An important example of the permanence of an arrangement reached by means of an exchange of diplomatic notes is found in the case of the agreement reached between Messrs. Rush and Bagot on the 28th and 29th April 1817, limiting the naval forces of Great Britain and the United States on the Great Lakes of North America. Each state agreed to limit their forces to four vessels not exceeding 100 tons and armed with one 18 lb. cannon on the lakes. The agreement is terminable by six months' notice on either side. There was no formal international treaty, and no exchange of ratification took place, the agreement becoming effective by means of executive orders on either side. This arrangement has lasted until the present time, but negotiations are now pending to replace the Rush-Bagot agreement by a treaty which takes account of modern conditions (J. M. Callahan, The Neutrality of the American Lakes. J. W. Foster, Limitation of Armaments on the Great Lakes; Report to the President, 7 Dec. 1892). By a somewhat similar arrangement the Canadian territory of Horse-Shoe Reef in the Niagara River was ceded to the United States for the purpose of erecting a lighthouse thereon (J. B. Moore, Dig. Int. Law, i. 554). For other examples of the use of Diplomatic Notes see Sir E. Satow, Diplomatic Practice, ii. 253.[3]

[3] See also MOORE, Dig. Int. L., V, 214; MOORE, "Treaties and Executive Agreements," 20 Pol. Sci. Quart. 385, 389; 3 U. S. Treaties 2637, 2638.

"May 16, 1894, Mr. Alexander, American minister at Athens, was authorized to conclude with Greece a convention concerning the registration of trade-marks.

B. Altman & Co. v. United States

United States. Supreme Court. 1912.

224 *United States Reports* 583.

[This was an appeal from an order of the Circuit Court of the United States for the Southern District of New York, affirming a decision of the Board of General Appraisers, which sustained an assessment of duty by the collector at the port of New York upon a certain bronze bust imported by the appellants from France. Section 3 of the Tariff Act of 1897 (30 U. S. Stat. L. 151, 203) authorized the President to negotiate commercial agreements with foreign countries for the reciprocal reduction of import duties and to make effective by proclamation during the life of such an agreement the minimum duties prescribed by the Act. By a proclamation of 1898 (30 U. S. Stat. L. 1774) the President had announced the conclusion of such an agreement with France and had ordered imposition of the minimum duties. The importer protested that the bronze bust in question should have been classed as statuary under this commercial agreement. The United States moved to dismiss the appeal on the ground that no question was involved which entitled the appellant to a direct appeal from the Circuit Court to the Supreme Court. Direct appeals were authorized by the Circuit Court of Appeals Act of 1891, sec. 5 (26 U. S. Stat. L. 826, 827, 828), in any case, *inter alia*, "in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question."]

[The above statement is substituted for the statement of the case in the opinion. Parts of the arguments of counsel are omitted.]

Mr. Henry J. Webster, with whom Mr. John K. Maxwell and Mr. Howard T. Walden were on the brief, for plaintiff in error:

The so-called agreement with France is a treaty.

The President and Senate undoubtedly have complete control of the making of treaties, so long as they refuse to join with the House of Repre-

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After conference with the minister for foreign affairs, who represented that a convention would require the ratification of the Greek chamber of deputies, which in the condition of affairs then existing might be attended with great delay, Mr. Alexander, on July 19, 1894, signed with him a declaration which purported to secure the desired end by way of an interpretation of the treaty of December 10–22, 1837. The Department of State, however, being of opinion that the treaty of 1837 would not bear the interpretation given to it, considered the declaration to be 'practically a new treaty,' which 'could only be ratified by the President of the United States by and with the advice and consent of the Senate.' To this position the Department of State adhered, and, as the Greek government was disinclined to negotiate a formal convention, Mr. Alexander was instructed to permit the matter to rest." Moore, Dig. Int. L., V, 196. *Cf.* U. S. For. Rel. (1889) 480, *ibid.* (1890) 509; Moore, Dig. Int. L., V, 283.

sentatives in making a treaty by act of Congress. There is a practical limitation to their power of carrying treaties into execution in cases where an act of Congress is necessary for that purpose, but that is a separate matter from their power to make treaties, which is unqualified. The House, therefore, has no right to demand any agency or share in the making of treaties, but has only a right to demand a share in the legislation, if any be necessary, to make them effective. If, however, the President and Senate voluntarily join with the House in the enactment of a law which authorizes the making of a treaty, and provides for its taking effect upon proclamation by the President, such action includes the approval of the President, the advice and consent of the Senate, and the legislation required to put it into execution.

The power to pass a law authorizing the President to make a treaty reducing rates of duty in consideration of reciprocal reductions by a foreign nation, is an exercise of the power conferred by Art. I, §8, to make all laws necessary and proper for carrying into execution the foregoing powers. Legal Tender Cases, 12 Wall. 457, 533, 538; quoting from Fisher v. Blight, 2 Cranch, 358.

The mere designation of the instrument by another name, even by Congress and the President, does not prevent its being a treaty, if it is such in substance. Pollock v. Farmers' L. & T. Co., 157 U. S. 429, quoted with approval in Fairbank v. United States, 181 U. S. 283.

Treaties have quite frequently been denominated conventions, but that does not change their nature as treaties. Bartram v. Robertson, 122 U. S. 116, 118.

If a treaty remains a treaty when called a convention, it would seem equally to remain a treaty when called an agreement. . . .

This contract with France was between two independent nations; it was a formal contract, written in both French and English, signed by both parties and duly proclaimed by the President and also by the Secretary of the Treasury; it was upon consideration—a promise for a promise; it was for a considerable time and furnished a rule for almost daily action during its continuance; it was for the public welfare, and made in the name of the State, and was actually executed for a period of eleven years, its termination having been directed by §4, act of August 5th, 1909, 36 Stat. 83. . . .

Mr. Assistant Attorney General Wemple, with whom Mr. Charles E. McNabb, Assistant Attorney, and Mr. Frank L. Lawrence, Special Attorney, were on the brief, for the United States:

This court has no jurisdiction of the appeal in any view of the case.

A reciprocal commercial agreement under §3 of the Tariff Act of 1897 is not a treaty within the meaning of the Constitution of the United States and §5 of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, 828. . . .

No question is presented of which this court has jurisdiction upon direct appeal from the Circuit Court. . . .

It is incompatible with the constitution to regard an agreement under §3 of the Tariff Act of 1897 as a treaty upon the theory that the legislative assent was signified in advance rather than after negotiation, when such assent is implied from a majority vote, as in the case of the Tariff Act of 1897. The vote in the Senate stood: Yeas 38, nays 28, not voting 23 (Cong. Rec., 55th Cong., 1st sess., vol. 30, pt. 3, p. 2447). That is less than "two-thirds of the Senators present," and a treaty to be one in the constitutional sense can only thus be made by the President and the Senate. Head Money Cases, 112 U. S. 580, 599; New York Indians v. United States, 170 U. S. 1, 23; De Lima v. Bidwell, 182 U. S. 1, 194, 195. . . .

The commercial agreement with France was negotiated as an agreement and not as a treaty. The word "treaty" nowhere appears, but the word "agreement" is frequently used. The certificate of the Secretary of State, furthermore, refers to it as a "reciprocal commercial agreement." . . .

Mr. Justice Day delivered the opinion of the court. . . .

[Only so much of the opinion is reproduced as deals with the motion to dismiss the appeal.]

An examination of the record in the present case shows that the importer throughout insisted that the statuary was dutiable at 15 per cent. *ad valorem* under the reciprocal agreement between the United States and France entered into under the authority of §3 of the Tariff Act of 1897. If this contention be correct, then the assessment was wrong, and, if the reciprocal agreement referred to was a treaty within the meaning of §5 of the Circuit Court of Appeals Acts, then there was a right of direct appeal to this court.

Generally, a treaty is defined as "a compact made between two or more independent nations with a view to the public welfare." 2 Bouvier's Dictionary, 1136. True, that under the Constitution of the United States the treaty making power is vested in the President, by and with the advice and consent of the Senate, and a treaty must be ratified by a two-thirds vote of that body (Art. II, §2), and treaties are declared to be the supreme law of the land (Art. VI); but we are to ascertain, if possible, the intention of Congress in giving direct appeal to this court in cases involving the construction of treaties. As is well known, that act was intended to cut down and limit the jurisdiction of this court, and many cases were made final in the Circuit Court of Appeals which theretofore came to this court, but it was thought best to preserve the right to a review by direct appeal or writ of error from a Circuit Court in certain matters of importance, and, among others, those involving the construction of treaties. We think that the purpose of Congress

was manifestly to permit rights and obligations of that character to be passed upon in the Federal court of final resort, and that matters of such vital importance, arising out of opposing constructions of international compacts, sometimes involving the peace of nations, should be subject to direct and prompt review by the highest court of the Nation. While it may be true that this commercial agreement, made under authority of the Tariff Act of 1897, §3, was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of two sovereign nations and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President. We think such a compact is a treaty under the Circuit Court of Appeals Act, and, where its construction is directly involved, as it is here, there is a right of review by direct appeal to this court.[4]

Charles Watts v. The United States

United States. Supreme Court of the Territory of Washington. 1870.

1 *Washington Territory Reports* 288.

Error to the Third Judicial District.

In this case Watts was indicted by the grand jury of the United States for the crime of murder committed on San Juan Island, within the limits of the Third Judicial District, in the month of June, 1869. Both the defendant and deceased were citizens of the United States.

[4] See United States, Department of State, List of Commercial Treaties and Conventions and Agreements Effected by Exchange of Notes or Declarations, in Force between the United States and Other Countries, 9th ed., corrected to Aug. 1, 1928; Crandall, Treaties, 2d ed., 121.

An Act of 1872, c. 335, §167, provided: "That for the purpose of making better postal arrangements with foreign countries, or to counteract their adverse measures affecting our postal intercourse with them, the Postmaster-General, by and with the advice and consent of the President, may negotiate and conclude postal treaties or conventions, and may reduce or increase the rates of postage on mail-matter conveyed between the United States and foreign countries." 17 U. S. Stat. L. 283, 304. The Treaty of Berne, Oct. 9, 1874, establishing the General Postal Union, was negotiated and concluded by the Postmaster-General by and with the advice and consent of the President by virtue o the above enactment. 19 U. S. Stat. L. 577. Likewise the Universal Postal Union conventions signed at Vienna, July 4, 1891, 28 *ibid.* 1078, at Washington, June 15, 1897, 30 *ibid.* 1629, and at Rome, May 26, 1906, 35 *ibid.* 1639. See U. S. Rev. Stat., §398; 5 U. S. Code Ann. §372; Cotzhausen v. Nazro, 107 U. S. 215; 19 Op. Atty. Gen. 513; Crandall, *op. cit.*, 131.

At the time of the homicide, San Juan Island was claimed both by Great Britain and the United States. Prior to this time, and in 1859, these governments entered into a convention, by which it was provided, that until it was finally determined to which of these powers the island did belong, it should be held in their joint military occupation. At the time of the homicide both British and United States soldiers were in possession of the island, and officers under the territorial government in the performance of their official functions were excluded.

The military arrested the defendant and turned him over to the civil authorities to be dealt with for his crime.

At the September term of the District Court, holding terms at Port Townsend, he was tried, found guilty of murder, and sentenced to be executed.

On the writ of error sued out from this court, numerous errors were assigned, but the single one of jurisdiction in the United States was passed upon by the court.

[The names of counsel and part of the opinion are omitted.]

Opinion by GREENE, ASSOCIATE JUSTICE.

This is a cause involving the life of one of the citizens of the nation, and, to pass judgment, we are called to solve at least one question of difficulty, a jurisdictional question novel and perplexing, and not only of serious individual but of constitutional and international concern. . . .

The crime of which the plaintiff in error stands indicted is wilful murder, and jurisdiction is asserted. (Sec. 3 of the act of Congress, approved April 30, 1790, 1 Stats. 113.)

That act provides that "if any person or persons shall, within any fort, arsenal, dockyard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or persons, on being thereof convicted, shall suffer death."

The indictment charges the crime to have been committed at "San Juan Island, and under the sole and exclusive jurisdiction of the United States." The whole prosecution proceeds upon the hypothesis that the Island of San Juan is within the sole and exclusive jurisdiction of the federal government. If the jurisdiction of the federal government be not "sole and exclusive," then confessedly there was no jurisdiction, at the suit of the United States, in the court below, of the crime of which the plaintiff in error is charged.

There has been for twenty-five years a dispute between the governments of the United States and Great Britain, as to whether the boundary line between the United States and the British possessions passes along Rosario Strait and east of the Island of San Juan, or along the Canal de Haro west of it. If along Haro, then San Juan falls within

United States limits; if along Rosario, within the British possessions. Since 1859 the island has been held by both nations in joint military occupation. By mutual understanding between them, by a very loose and ill-defined convention (if it can be called a convention), not by any formal treaty, in consideration of a certain attitude and forbearance assumed and exercised by the British government on its part, the United States on their part have, among other things (and apparently so far only as appeared to them necessary, in order to prevent troubles growing out of questions of jurisdiction), excluded local officers appointed by the territorial government, from exercising their functions on the island pending the dispute. And in such a delicate posture of affairs, it was both expedient and necessary, in order to prevent conflicts of authority, embarrassing complications, and perhaps hostilities not readily to be quelled, that the general government, which alone, as against Great Britain, could claim the soil of the island and eminent domain therein, and from which the territorial authorities derived all their sway, coming as a principal upon a pressing exigency to take the management into its own hands, should assume in some measure control exclusive of the territorial government, not only of the dispute itself, but of the land which it concerned.

This, acting through the departments of State and war, the government of the United States did. Congress, the legislative branch of the government, which must be presumed to have been fully appraised by the President of all the diplomatic relations and acts of the nation, has for a long term of years tacitly acquiesced. A provisional convention, to all intents and purposes, and of the character indicated, has for many years been operative upon the Island of San Juan. Whatever was to be done under it, by either government, has been done upon the faith of it; each nation maintains its present attitude until a permanent settlement can be made.

This convention respecting the common territory, in which it had, as respecting the common interests, a vested right of eminent domain, we think the government of the United States had power to make. No question of State rights or State sovereignty intervenes. The power to make and enforce such a temporary convention respecting its own territory is a necessary incident to every national government, and inheres where the executive power is vested. Such conventions are not treaties within the meaning of the Constitution, and, as treaties, supreme law of the land, conclusive on the courts, but they are provisional arrangements, rendered necessary by national differences involving the faith of the nation and entitled to the respect of the courts. They are not a casting of the national will into the firm and permanent condition of law, and yet in some sort they are for the occasion an expression of the will of the people through their political organ, touching the matters affected; and

to avoid unhappy collision between the political and judicial branches of the government, both which are in theory inseparably all one, such an expression to a reasonable limit should be followed by the courts and not opposed, though extending to the temporary restraint or modification of the operation of an existing statute. Just as here, we think this particular convention respecting San Juan should be allowed to modify for the time being the operation of the Organic Act of this Territory, so far forth as to exclude to the extent demanded by the political branch of the government of the United States, in the interest of peace, all territorial interference for the government of that island. For the general welfare a few are prejudiced.

There is another view, also, in which we think the political authority of the United States are justified in their action respecting San Juan Island.

Congress in establishing temporarily a territorial government intended to establish one strictly subsidiary to the authority of the United States, not one which should in any manner limit, hinder, fetter, or interfere with the free, legitimate, and necessary action of the general government, or of any of its departments. The central government holds its acquired territory in trust for the States in common. To resist invasion of that territory; to preserve it in full and undiminished area; to assert dominion over it against every foreign power; to settle and adjust, in the most amicable and inexpensive manner, consistent with the nation's dignity, all disputes with foreign powers concerning it; to secure it, when in controversy, from being unnecessarily the field of hostile collision between local authorities and foreign agents; and, if possible, to prevent upon it the precipitation of a war dreadful to all the States,—these are some of the plainest duties of the general government to its *cestui que trust.* The trust is prior in origin, and stronger in obligation upon every department and officer of the general government than any countervailing law of Congress can be, for Congress itself is subject to it, and its legislation is qualified by it. The executive department of the United States, in taking possession of San Juan Island exclusive of the local territorial authorities, under the circumstances existing at the time and not yet altered, executed reasonably and fitly as the appropriate governmental organ the duty of the government as trustee towards the States. And the organization of Washington Territory being the creature of the national government, not merely subordinate but subject to it, cannot be supposed to dissent from, much less resist this reasonable and obligatory exercise of power.

But it is not to be inferred, because of the international dispute, nor because a few local territorial officers are for a time restrained from the exercise of their functions on the island, that the island is thereby removed from the dominion of law. It still is a part of the United States of

America, still a part of Washington Territory, still a part of the Third Judicial District.

This court cannot recognize as of any validity the adverse claim of any foreign power upon the island.

Whether or not any tract of land is within the geographical limits belonging to the United States is a political and not a judicial question. (Foster v. Neilson, 2 Peters, 252, 307.) "And whatever the political department of the government shall recognize as within the limits of the United States, the judicial department is also bound to recognize and to administer in it the laws of the United States, so far as they apply, and to maintain in the Territory the authority and right of the government, and also the personal rights, and rights of property of individual citizens." (Scott v. Sandford, 19 How. 393, 447; 2 Vattel, ch. 7, sec. 84.)

Since, then, the United States claims San Juan Island, we must treat it as under the general laws of the United States, and as under the laws providing for the government of this part of the territory of the United States, and as entitled to the peace and security afforded by law in matters criminal as well as civil.

The Organic Act of the Territory is operative upon the island. The northwestern geographical bounds of the territory and of the Third Judicial District are the same as if there were no dispute of boundary, no restraint of local officers. Those bounds are identical, in the eye of the courts of the United States, with the boundary line along the Canal de Haro, claimed by the political department of the general government to be the true political boundary.

Yet, in order that the crime of which the defendant is charged should be within the jurisdiction of the court below, it was not only necessary that it be committed within the United States, but in a place within the "sole and exclusive jurisdiction of the United States." This phrase, "sole and exclusive," means exclusive of any other domestic jurisdiction, and has no reference to foreign authority. . . .

We are of opinion that the jurisdiction of the United States is not "sole and exclusive" on the Island of San Juan, within the meaning of the act, April 30, 1790; that the statute of the Territory against murder, at the time laid in this indictment, was, and still is, in force there, and that the District Court of the Third Judicial District, in the exercise of its jurisdiction over all cases arising under the laws of the Territory, had authority to try and punish any person who had committed murder on that island. So far forth as the exercise of such jurisdiction might be inconsistent with the understanding between the United States and Great Britain respecting the island and offenses upon it, it might be the duty of that court to decline to exercise it; but, in the case of the defendant below, there was not only no lack of jurisdiction of the offense, at the suit of the Territory and under territorial law, but

there was no good reason why that jurisdiction should not be exercised by the court. By the international arrangement, each nation was to exercise jurisdiction over its own citizens on the island. The defendant below was a citizen of the United States, and was by the United States military commander on the island turned over to civil authority for punishment. The prosecution below should have been at the suit of the Territory, and not at the suit of the United States. . . .

Let the judgment of the court below be reversed and the prisoner be returned to the sheriff of the proper county, there to abide the order of the District Court thereof. . . .

KENNEDY, ASSOCIATE JUSTICE, concurring.

I concur with my brother Greene in the conclusion that "the prosecution below should have been at the suit of the Territory, and not at the suit of the United States," and that the judgment therein must therefore be reversed.

I coincide with the reasons assigned by him in support of that position, but express no opinion on the various independent propositions not necessary to establish it, contained in the decision. . . .

Dissenting opinion by JACOBS, CHIEF JUSTICE. . . .

[Part of the dissenting opinion is omitted.]

I have come to the conclusion that the United States side of the court had jurisdiction, and for the following reasons:—

1. We all agree that the phrase "sole and exclusive jurisdiction," as used in the Crime Act of A. D. 1790, 1 Stats. 113, has no reference to a claim of jurisdiction made by any foreign power, but to State and federal jurisdiction, or as we are situated, to federal as contradistinguished from territorial jurisdiction. We also agree that it is the duty of the judiciary to extend the jurisdiction of the laws of the United States as far as the political department of the government extends the territorial area.

2. In my judgment it is the duty of the courts to construe all such conventions as that entered into between the governments of the United States and Great Britain, with reference to the Island of San Juan, so as to avert the evil apprehended, and sought to be prevented. . . .

3. Was it the intention then of the high contracting parties to exclude all law from San Juan Island, and to make it a secure asylum for thieves and murderers? I think not. . . .

The exclusion of the territorial laws since the date of the convention has been open, manifest, and palpable, and I believe rightful. Then, if I am correct in my conclusions, no other laws were in force on the island for the punishment of persons guilty of murder (not connected with the military), but the laws of the United States. In fact it would follow as a logical sequence that if the territorial laws were excluded it would be a place "under the sole and exclusive jurisdiction of the United States," hence the laws of the United States would be operative there.

I can see many cogent reasons why it was desirable to exclude territorial laws and territorial officers from that island. The territorial legislature represented but a small fraction of the American people and was far removed from the power which was responsible for a state of peace or war, and before measures could be disapproved by Congress a conflict might be precipitated. Territorial officers were not responsible, directly at least, to the supreme power. It had no control over their official conduct. All will agree that such control ought to be directly with the responsible power. That could only exist legitimately, but by the exclusion of the local jurisdiction and the operation of the national jurisdiction, modified by express convention or necessary implication.

It might be very competent and very proper in the accomplishment of the object had in view, for the treaty-making power to suspend the operations of all laws for the punishment of offenders save in the cases where the acts were crimes, by the universal judgment of mankind. The power to suspend or modify must exist somewhere, or in case of disputed jurisdiction, there could be no treaty or conventions.

All such conventions are founded on the mutual concessions of the high contracting parties. After the convention had been signed, the supreme power in our government, in order to secure its honest and faithful execution, took possession of the disputed Territory, segregated it from its former local jurisdiction, and administers, modifies, or suspends its own laws by its own military or judicial agents. The supreme power acts through its own functions and not through that of an inferior jurisdiction. It administers its own laws so far as such administration is not in conflict with the convention. Its power is ample and it need not borrow from the inferior jurisdiction. . . .

4. I am unable to convince myself that, if one general law of the Territory went to that island, but what all general laws went there. That they were not and are not permitted to go there is a fact too palpable for argument. The alternative then is presented, either that their exclusion by force has been rightful, or that the military department has been guilty of a gross usurpation. . . .

To have permitted all the laws of the territorial legislature to have gone to that island would have resulted in the nullification of the convention. It would in fact have given the territorial legislature a veto on the treaty-making power of the government. Could this convention have stood for a day with the extension of the taxing power of this Territory over that island? Every one knows that it could not. If the territorial jurisdiction extended there, it had a right to tax the property of the inhabitants thereof for territorial and other legitimate purposes. Taxes are not levied upon citizens, only, but inhabitants, property-holders, resident within the jurisdiction. The rightful exercise of such a power would have been decisive of the controversy, or rather it would have been

exclusive of any rightful claim to controversy. Its attempted exercise would have been resisted with all the power of Great Britain. Reverse the circumstances and let British Columbia attempt to extend its taxing power over that island, and our government would resist the insult with all its military power.

On what principle could a part of the general laws of the Territory go to that island and a part not? It is of the very essence of general laws, at least, that they should be uniform and universal. If the territorial jurisdiction extended at all it is complete and entire. It reaches all rightful subjects of legislation, and is supreme within those limits.

For the above reasons, I am of the opinion that Watts was rightfully indicted under section 4 of the Crime Act of 1790[5] . . .

OPPENHEIM, INTERNATIONAL LAW

Third Edition, Volume I, page 653, section 492. 1920.

I do not intend to discuss the question of classification of the different kinds of treaties, for hitherto all attempts at such classification have failed.[6] But there is one distinction to be made, which is of the greatest importance, and according to which the whole body of treaties is to be divided into two classes. In one class are treaties concluded for the purpose of confirming, defining, or abolishing existing customary rules, and of establishing new rules for the Law of Nations. Treaties of this kind ought to be termed *law-making* treaties.[7] Into the other class fall treaties concluded for any other purpose.

SECTION 2. CAPACITY TO MAKE TREATIES

OPPENHEIM, INTERNATIONAL LAW

Third Edition, Volume I, page 656, section 494. 1920.

§494. The so-called right of making treaties is not a right belonging to a State in the technical meaning of the term, but a mere competence attaching to sovereignty. A State possesses, therefore, treaty-making power only so far as it is sovereign. Full sovereign States may become

[5] See BARNETT, "International Agreements without the Advice and Consent of the Senate," 15 Yale L. Jour. 18, 63; CRANDALL, Treaties, 2d ed., 102; MOORE, Dig. Int. L., V, 210; MOORE, "Treaties and Executive Agreements," 20 Pol. Sci. Quart. 385.

[6] See RAPISARDI-MIRABELLI, "La classification des traités internationaux," 4 Rev. de Dr. Int., 3 sér., 653.

[7] See HUDSON, "Development of International Law since the War," 22 Am. Jour. Int. L. 330, 341, 22 Am. Jour. Int. L. Suppl. 90; OPPENHEIM, 3d ed., I, §§555–568, 581–596; OPPENHEIM, 4th ed., I, App. B, App. C.

parties to treaties of all kinds, being regularly competent to make treaties on whatever matters they please. Not-full sovereign States, however, can become parties only to such treaties as they are competent to conclude. It is impossible to lay down a hard and fast rule defining the competence of all not-full sovereign States. Everything depends upon the special case.

HALL, INTERNATIONAL LAW

Eighth Edition, page 380, section 108. 1924.

All states which are subject to international law are capable of contracting, but they are not all capable of contracting for whatever object they may wish. The possession of full independence is accompanied by full contracting power; but the nature of the bond uniting members of a confederation, or joining protected or subordinate states to a superior, implies either that a part of the power of contract normally belonging to a state has been surrendered, or else that it has never been acquired. All contracts therefore are void which are entered into by such states in excess of the powers retained by, or conceded to, them under their existing relations with associated or superior states.[8]

THE CONSTITUTION OF THE UNITED STATES

Articles 1, 2, and 6. 1789.

Art. I. Sect. x. 1. No state shall enter into any treaty, alliance, or confederation. . . .

Art. I. Sect. x. 2. . . . No state shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

Art. II. Sect. i. 1. The executive power shall be vested in a President of the United States of America. . . .

Art. II. Sect. ii. 2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur. . . .

Art. VI. 2. This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound

[8] *Quære:* are contracts likewise void which are entered into in excess of powers given by a state's organic or constitutional law? See DICKINSON, Equality of States, 206; Constitution of Mexico, 1917, art. 15, *supra*, 107.

thereby; anything in the Constitution or laws of any state to the contrary notwithstanding.

Jefferson, Manual of Parliamentary Practice

Section 52. 1800.

By the Constitution of the United States this department of legislation is confined to two branches only of the ordinary legislature—the President originating and the Senate having a negative. To what subjects this power extends has not been defined in detail by the Constitution; nor are we entirely agreed among ourselves. 1. It is admitted that it must concern the foreign nation party to the contract, or it would be a mere nullity, *res inter alias acta*. 2. By the general power to make treaties, the Constitution must have intended to comprehend only those subjects which are usually regulated by treaty, and cannot be otherwise regulated. 3. It must have meant to except out of these the rights reserved to the States; for surely the President and Senate cannot do by treaty what the whole Government is interdicted from doing in any way. 4. And also to except those subjects of legislation in which it gave a participation to the House of Representatives. This last exception is denied by some on the ground that it would leave very little matter for the treaty power to work on. The less the better, say others.

Treaty with Prussia Removing the Property Disabilities of Aliens

United States. Opinion of Attorney-General Cushing. 1857.

8 *Opinions of Attorneys General* 411.

[The following opinion was in response to a request from the Secretary of State.]

I have bestowed attention, at the earliest possible moment, on the reference which you made to me of the despatch of the Baron von Gerolt, Minister of Prussia, of the 16th instant, and the questions of law which it presents, regarding the construction and effect of certain provisions in Article XIV of the subsisting treaty of amity and commerce between the United States and Prussia.

The words are as follows:

"The citizens or subjects of each party shall have power to dispose of their personal goods within the jurisdiction of the other, by testament, donation, or otherwise, and their representatives, being citizens or subjects of the other party, shall succeed to their said personal goods, whether by testament or *ab intestato*, and may take possession thereof,

either by themselves or by others acting for them, and dispose of them, at their will, paying such dues only as the inhabitants of the country, wherein the goods are, shall be subject to pay in like cases. And in case of the absence of the representative, such care shall be taken of the goods as would be taken of the goods of a native in like case, until the lawful owner may take measures for receiving them. And if question should arise among several claimants, to which of them such goods belong, the same shall be decided finally by the laws and judges of the land where the goods are.

"And where, on the death of any person holding real estate within the territories of the one party, such real estate would, by the laws, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation, and exempt from all duties of detraction on the part of the government of the respective states."

Here we have the most unequivocal and positive stipulations as to both personal and real estate of decedents on each side, to the points,—1. that heirs, legatees or donees, residing in one country, may take and dispose freely of personal estate in the other country; and, 2. that where impediment of alienage intervenes, the foreign heir at law or devisee of real estate may sell the same, and withdraw the proceeds without molestation.

It is not denied that Prussia has faithfully executed the engagement in each of its parts; and estates real and personal of decedents in Prussia, or the proceeds thereof, are continually passing to heirs at law or devisees in the United States.

There has not been the same faithful execution of the treaty in the United States: that is to say, in some of the States of the Union impediments of internal legislation have embarrassed, obstructed, and practically defeated the beneficial enjoyment of the advantages of the treaty by subjects of Prussia. A signal case of this nature has occurred in the State of Iowa, the courts of which, as the documents annexed to the despatch of the Baron von Gerolt show, have set up the alienage laws of the State against the treaty obligations of the United States.

The main difficulty is not in the execution of the first clause, that appertaining to personal estate. To be sure, in the extensive territory of the United States, it frequently happens that notice of a testamentary or intestate succession does not in due time reach the parties interested; but the citizens of the country are subject to the inconvenient consequences of this fact equally with foreigners, and may be trusted to remedy the evil in their own proper interest. Meanwhile the personal estate of every decedent is permitted to go to the heirs or devisees wherever they reside, by the law of each and all of the States of the Union.

With real estate it is otherwise. Although the public domain of the United States is subject to entry and purchase by aliens, (Opinions, vol. vii, p. 351,) and although in some of the States they are made quasi-citizens prematurely even, (*Ibid.* p. 751,) yet, in other States, all the peculiarities of the feudal law regarding the *droit d'aubaine* still subsist. (Slater v. Mason, xv Pick. p. 345.)

Legal opinion in the United States has not kept pace on this great subject with that of the countries of the Continent of Europe, where the discussions of the French Convention, and the consequent changes of legislation in France, have produced results, which reflect on our comparative tardiness of improvement, continuing, as we do, in many of the States, under the influence of the legal systems of Great Britain. (Merlin, *Répertoire, voc. Aubaine.*)

The lawgivers of Spain, from a remote period, have taken a sensible view of the subject. Instead of making the tenure of land in the country to depend on previously acquired citizenship, they provided that citizenship should follow the purchase and occupation of the land, well conceiving that it is the Government which exercises authority over the proprietor of land within its jurisdiction, not the proprietor of the land over the Government. (*Nov. Recop., lib. vi, tit.* 11, *leg.* 3; *Escriche, s. voc. Estranjero.*)

In the United States especially, with our vast unoccupied domain, it is for the public interest to facilitate the purchase of land, by which not only is capital drawn to the country, but it becomes fixed here in the most beneficial and stable manner.

Nevertheless, the particular facts represented by the Baron von Gerolt show, as above hinted, that opinions hereupon are in arrear in some of the States, the embarrassments produced by which, in their present relation, are incidental to the federal organization of the United States. The Union, as such, has no law of succession, of inheritance, of descent, of filiation, or of tenure of land, whether in the case of citizens of the United States or of foreigners. Relationship, inheritance, testaments, successions, tenure of estates, real and personal,—all these are questions of the local law of the individual States. (Opinion of September 12, 1857. See also Opinions, vol. vii, p. 271.)

Thus it is that, in stipulating to permit to Prussian heirs or devisees the withdrawal of the proceeds of real estate, belonging to them of right but for the impediment of alienage, the United States have stipulated that such withdrawal shall not be prevented by the legislation of any one of the States. Such, indubitably, are the nature and effect of the engagement.

The apparent conflict of power between the United States and particular States, which a stipulation of this nature involves, has prevented its revival in some cases of new treaties substituted for old ones, which

had contained it, especially those of the United States with France and the Netherlands, and even led to question of its constitutionality. (See Treaty of Commerce with France, of February 6, 1778, art. xi; and Convention of September 30, 1800, art. vii; also Treaty with Netherlands of October 8, 1782, art. vi.)

No argument as to the constitutionality of such stipulations can be deduced from the treaties of 1778 and 1782, which were diplomatic stages of the Revolution; but that of 1800 deserves attention as the most expressive of all precedents, it having passed through the hands, and received the approbation, of John Adams, John Marshall, Oliver Ellsworth, Thomas Jefferson, and James Madison, who, if anybody, should have understood the Constitution.

Supposing engagement of this nature to exceed the constitutional power of the Federal Government, that with Prussia does not the less exist: it is for the consideration of reciprocal benefits actually received by us; and, if it be unconstitutional, it will remain for us,—after pleading *mea culpa, mea culpa gravissima*, and begging pardon for entering into stipulations which we had no power to make,—then it will only remain for us to indemnify Prussia for our past shortcomings, and to negotiate a release from further obligation.

But can it be, is there any good reason to think, that the Federal Government has no power to make such a stipulation? It may be inconvenient, because involving conflict with, or abrogation of, the laws of one or more of the States. Granted: but inconvenience is not unconstitutionality: question of which depends on the text of the Federal Constitution.

The power, which the Constitution bestows on the President, with advice and consent of the Senate, to make treaties, is not only general in terms and without any express limitation, but it is accompanied with absolute prohibition of exercise of treaty-power by the States. That is, in the matter of foreign negotiation, the States have conferred the whole of their power, in other words, all the treaty-powers of sovereignty, on the United States. Thus, in the present case, if the power of negotiation be not in the United States, then it exists nowhere, and one great field of international relation, of negotiation, and ordinary public and private interest, is closed up, as well against the United States as each and every one of the States. That is not a supposition to be accepted, unless it be forced upon us by considerations of overpowering cogency. Nay, it involves political impossibility. For, if one of the proper functions of sovereignty be thus utterly lost to us, then the people of the United States are but incompletely sovereign,—not sovereign,—nor in coequality of right with other admitted sovereignties of Europe and America.

All the federal relation of the question in this point of view, that is, regarding the general public law, will be perceived by us at once, if we

suppose the Union not to have been formed, or now to be unconditionally dissolved. In that supposition, each of the States, New York for instance, is a sovereign power, possessing all the rights of peace and war which the law of nations accords to independent states. Among these rights are the *jus legationis* and the *jus pactionis*, which are *jura majestatica*, to be exercised in such manner as a state may by its internal constitution prescribe,—but existing, plenary and absolute, in the political sovereignty, as inherent qualities of its very essence. New York, the independent State, we see clearly, could treat with Great Britain, France, Spain, for the reciprocal abolition of the *droit d'aubaine*, as well as for the modification of any other fact of private international right. It had the power to do this, *de facto*, on the day of the political separation of the Thirteen Colonies from Great Britain; it exercised it through the intermediary agency of the Congress of the Revolution, in the treaties with France and the Netherlands; it finally parted with the power in consenting to the Federal Constitution; and the power, which it indubitably possessed of original right, which it exercised repeatedly, and which it has now ceased to possess, not being extinguishable in its nature, must, and in fact and in law did, pass from its hands into those of the Federal Government.

Looking now to the letter of the Constitution, and considering the inquiry as one of constitutional jurisprudence, it is the mere question of implied exceptions to a power, general and complete in its nature, and in the terms in which it is granted. I am not able to perceive any implication of exception as to the present matter.

Mr. Calhoun carefully explores the treaty-making power, and states how he supposes it is limited. The Federal Government, he concludes, cannot do a thing, or do a thing in a manner, by treaty, when either the thing or the manner is contrary to any general prohibition of the Constitution; nor can it, by treaty, change the character, or the general structure, or any of the constitutional functions, of the Federal Government. (Dis. on the Govt. p. 203.) All this may be conceded: the stipulation in the treaty before me is not affected by any of the considerations of exception, which Mr. Calhoun thus designates.

Whatever there is of general question in the matter, has been duly considered by the courts of the United States, in construing the ninth article of the treaty between the United States and Great Britain of November 19, 1794, which stipulated in substance that British subjects might continue to hold lands in the United States, and grant, sell, and devise the same, in like manner as if resident citizens; and that neither they, nor their heirs or assigns, should, as respecting said lands and the legal remedies incident thereto, be regarded as aliens: with reciprocal engagements of the same tenor on the part of Great Britain. Here, all impediment of alienage was absolutely levelled with the ground, despite

the laws of the States. It is the direct constitutional question in its fullest conditions. Yet the Supreme Court held that the stipulation was within the constitutional powers of the Union. (Fairfax's Lessee v. Hunter's Lessee, vii Cranch, p. 627. See also Ware v. Hylton, iii Dall. p. 242.)

There is also a recent judicial decision in the State of California, in which the power is affirmed, and in application to the precise article of the treaty with Prussia. (The People v. Gerke, MS.[9]) I think the conclusions of the court in that case are just and true, and in accordance with the Constitution.

Here, then, is a stipulation of treaty, constitutional in substance and form; which, as such, is the supreme law of the land; and which abrogates any incompatible law of either of the States. Thus the Supreme Court of the United States has repeatedly adjudged, in cases of much more serious conflict of law than the present, and thus it would, in my opinion, decide here, if the question were duly brought before it, so as to subject to revision any contrary decision of the courts of a State.

In the circumstances suggested by the Baron von Gerolt, it is an act of mere duty, and of simple good faith, on our part, to assure him that such is the law; that the engagements in this respect, which the United States made, we had constitutional power to make; that these engagements are valid, and obligatory alike on the United States and on each one of the States; and that the decision of any local court to the contrary is an erroneous decision, reversible by the Supreme Court.

The President has no power to redress a wrong of this kind summarily, or to withdraw it from the jurisdiction of the courts of law. Citizens of the United States defend similar rights of their own by process of law, and thus only; and our courts are freely open for that purpose to the subjects of Prussia.

In addition to which, and for the more complete discharge of the good faith of the United States in the premises, the expediency of aiding the Baron von Gerolt with advice, and co-operation of the law officers of the Government, for the better protection of the rights of his countrymen, may well receive consideration. But that is an executive question, to be determined by the President, on a suitable case presenting itself in such time and form as to be capable of reaching authoritative adjudication in the courts of the United States.[10]

[9] 5 Calif. 381. *Cf.* Siemssen v. Bofer, 6 Calif. 250. But see Forbes v. Scanell, 13 Calif. 242, 282.

[10] "Were the question whether a treaty provision which gives to aliens rights to real estate in the States to come up now for the first time, grave doubts might be entertained as to how far such a treaty would be constitutional. A treaty is, it is true, the supreme law of the land, but it is nevertheless only a law imposed by the Federal government, and subject to all the limitations of other laws imposed by the same authority. While internationally binding the United States to the other con-

Mr. Justice Field, in Geofroy v. Riggs

United States. Supreme Court. 1890.

133 *United States Reports* 258, 266.

That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries. As commercial intercourse increases between different countries the residence of citizens of one country within the territory of the other naturally follows, and the removal of their disability from alienage to hold, transfer and inherit property in such cases tends to promote amicable relations. Such removal has been within the present century the frequent subject of treaty arrangement. The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. Fort Leavenworth Railroad Co. v. Lowe, 114 U. S. 525, 541. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country. Ware v. Hylton, 3 Dall. 199; Chirac v. Chirac, 2 Wheat. 259; Hauenstein v. Lynham, 100 U. S. 483; 8 Opinions Attys. Gen. 417; The People v. Gerke, 5 California, 381.[11]

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tracting powers, it may be municipally inoperative because it deals with matters in the States as to which the Federal government has no power to deal. That a treaty, however, can give to aliens such rights, has been repeatedly affirmed by the Supreme Court of the United States (see Chirac v. Chirac, 2 Wheat. 259; Carneal v. Banks, 10 Wheat. 181; Hauenstein v. Lynham, 100 U. S. 483); and consequently, however much hesitation there might be as to advising a new treaty containing such provisions, it is not open to this Department to deny that the treaties now in existence giving rights of this class to aliens may in their municipal relations be regarded as operative in the States." Bayard, Secretary of State, to Miller, June 15, 1886, Moore, Dig. Int. L., V, 178.

[11] See Holden v. Joy, 17 Wall. 211, 242; United States v. 43 Gallons of Whiskey, 93 U. S. 188, 197; In re Ross, 140 U. S. 453, 463; 22 Op. Atty. Gen. 214; Butler, Treaty-Making Power of the United States, I, 4; Kellogg, "Treaty Making Power," 38 Am. Bar. Assoc. Rep. 331; Root, in Am. Soc. Int. L. Proc. (1907) 43. *Cf.* Tucker, Limitations on the Treaty-Making Power.

State of Missouri v. Holland, United States Game Warden

United States. Supreme Court. 1920.

252 *United States Reports* 416.

The case is stated in the opinion.

[The arguments of counsel are omitted.]

Mr. Justice Holmes delivered the opinion of the court.

This is a bill in equity brought by the State of Missouri to prevent a game warden of the United States from attempting to enforce the Migratory Bird Treaty Act of July 3, 1918, c. 128, 40 Stat. 755, and the regulations made by the Secretary of Agriculture in pursuance of the same. The ground of the bill is that the statute is an unconstitutional interference with the rights reserved to the States by the Tenth Amendment, and that the acts of the defendant done and threatened under that authority invade the sovereign right of the State and contravene its will manifested in statutes. The State also alleges a pecuniary interest, as owner of the wild birds within its borders and otherwise, admitted by the Government to be sufficient, but it is enough that the bill is a reasonable and proper means to assert the alleged quasi sovereign rights of a State. Kansas v. Colorado, 185 U. S. 125, 142. Georgia v. Tennessee Copper Co., 206 U. S. 230, 237. Marshall Dental Manufacturing Co. v. Iowa, 226 U. S. 460, 462. A motion to dismiss was sustained by the District Court on the ground that the act of Congress is constitutional. 258 Fed. Rep. 479. Acc. United States v. Thompson, 258 Fed. Rep. 257; United States v. Rockefeller, 260 Fed. Rep. 346. The State appeals.

On December 8, 1916, a treaty between the United States and Great Britain was proclaimed by the President. It recited that many species of birds in their annual migrations traversed certain parts of the United States and of Canada, that they were of great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination through lack of adequate protection. It therefore provided for specified close seasons and protection in other forms, and agreed that the two powers would take or propose to their law-making bodies the necessary measures for carrying the treaty out. 39 Stat. 1702. The above mentioned Act of July 3, 1918, entitled an act to give effect to the convention, prohibited the killing, capturing or selling any of the migratory birds included in the terms of the treaty except as permitted by regulations compatible with those terms, to be made by the Secretary of Agriculture. Regulations were proclaimed on July 31, and October 25, 1918. 40 Stat. 1812; 1863. It is unnecessary to go into any details, because, as we have said, the question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the States.

To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, §2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article I, §8, as a necessary and proper means to execute the powers of the Government. The language of the Constitution as to the supremacy of treaties being general, the question before us is narrowed to an inquiry into the ground upon which the present supposed exception is placed.

It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do. An earlier act of Congress that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the States had been held bad in the District Court. United States v. Shauver, 214 Fed. Rep. 154. United States v. McCullagh, 221 Fed. Rep. 288. Those decisions were supported by arguments that migratory birds were owned by the States in their sovereign capacity for the benefit of their people, and that under cases like Geer v. Connecticut, 161 U. S. 519, this control was one that Congress had no power to displace. The same argument is supposed to apply now with equal force.

Whether the two cases cited were decided rightly or not they cannot be accepted as a test of the treaty power. Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found. Andrews v. Andrews, 188 U. S. 14, 33. What was said in that case with regard to the powers of the States applies with equal force to the powers of the nation in cases where the States individually are incompetent to act. We are not yet discussing the particular case before us but only are considering the validity of the test proposed. With regard to that we may add that when we are dealing with words

that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved.

The State as we have intimated founds its claim of exclusive authority upon an assertion of title to migratory birds, an assertion that is embodied in statute. No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away. If we are to be accurate we cannot put the case of the State upon higher ground than that the treaty deals with creatures that for the moment are within the state borders, that it must be carried out by officers of the United States within the same territory, and that but for the treaty the State would be free to regulate this subject itself.

As most of the laws of the United States are carried out within the States and as many of them deal with matters which in the silence of such laws the State might regulate, such general grounds are not enough to support Missouri's claim. Valid treaties of course "are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States." Baldwin v. Franks, 120 U. S. 678, 683. No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power. We do not have to invoke the later developments of constitutional law for this proposition; it was recognized as early as Hopkirk v. Bell, 3 Cranch, 454, with regard to statutes of limitation, and even earlier, as to confiscation, in Ware v. Hylton, 3 Dall. 199. It was assumed by Chief Justice Marshall with regard to the escheat of land to the State in Chirac v. Chirac, 2 Wheat. 259, 275. Hauenstein v. Lynham, 100 U. S. 483. Geofroy v. Riggs, 133 U. S. 258. Blythe v. Hinckley, 180 U. S. 333, 340. So as to a limited jurisdiction of foreign consuls within

a State. Wildenhus's Case, 120 U. S. 1. See Ross v. McIntyre, 140 U. S. 453. Further illustration seems unnecessary, and it only remains to consider the application of established rules to the present case.

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld. Carey v. South Dakota, 250 U. S. 118.

Decree affirmed.[12]

Mr. Justice Van Devanter and Mr. Justice Pitney dissent.

SECTION 3. CONCLUSION OF TREATIES

Hall, International Law

Eighth Edition, page 381, section 108. 1924.

The freedom of consent, which in principle is held to be as necessary to the validity of contracts between states as it is to those between individuals, is understood to exist as between the former under conditions which would not be thought compatible with it where individuals are concerned. In international law force and intimidation are permitted means of obtaining redress for wrongs, and it is impossible to look upon permitted means as vitiating the agreement, made in consequence of their use, by which redress is provided for. Consent therefore is conceived to be freely given in international contracts, notwithstanding that it may have been obtained by force, so long as nothing more is exacted than it may be supposed that a state would consent to give, if it were willing to afford compensation for past wrongs and security against the future commission of wrongful acts. And as international law cannot measure what is due in a given case, or what is necessary for the protection of a state which declares itself to be in danger, it regards all compacts as valid, notwithstanding the use of force or intimidation, which do not destroy the independence of the state which has been obliged to enter into them. When this point however is passed constraint vitiates the agreement, because it cannot be supposed that

[12] See 20 Col. L. Rev. 692; 6 Cornell L. Quart. 91; 33 Harv. L. Rev. 281; 29 Yale L. Jour. 445; 4 A. L. R. 1377, 1388.

a state would voluntarily commit suicide by way of reparation or as a measure of protection to another. The doctrine is of course one which gives a legal sanction to an infinite number of agreements one of the parties to each of which has no real freedom of will; but it is obvious that unless a considerable degree of intimidation is allowed to be consistent with the validity of contracts, few treaties made at the end of a war or to avert one would be binding, and the conflicts of states would end only with the subjugation of one of the combatants or the utter exhaustion of both.

OPPENHEIM, INTERNATIONAL LAW

Third Edition, Volume I, pages 660–661, sections 499, 500. 1920.

§499. As a treaty will lack binding force without real consent, absolute freedom of action on the part of the contracting parties is required. It must, however, be understood that circumstances of urgent distress, such as either defeat in war, or the menace of a strong State to a weak State, are, according to the rules of International Law, not regarded as excluding the freedom of action of a party consenting to the terms of a treaty. The phrase 'freedom of action' applies only to the *representatives* of the contracting States. It is *their* freedom of action in consenting to a treaty which must not have been interfered with, and which must not have been excluded by other causes. A treaty concluded through intimidation exercised against the representatives of either party, or concluded by intoxicated or insane representatives, is not binding upon the party so represented. But a State which was forced by circumstances to conclude a treaty containing humiliating terms has no right afterwards to shake off the obligations of such a treaty on the ground that its freedom of action was interfered with at the time.[13] This must be emphasized, because, in practice, such cases of repudiation have frequently occurred. A State may, of course, hold itself justified by political necessity in shaking off such obligations, but this does not alter the fact that such action is a breach of law.

§500. Although a treaty was concluded with the real consent of the parties, it is nevertheless not binding if the consent was given in error, or under a delusion produced by a fraud of the other contracting party. If, for instance, a boundary treaty were based upon an incorrect map, or a map fraudulently altered by one of the parties, such treaty would by no means be binding. Although there is freedom of action in such cases, consent has been given under circumstances which prevent the treaty from being binding.[14]

[13] *Cf.* Horwood v. Millar's Timber and Trading Co. [1917] 1 K. B. 305.

[14] See LAUTERPACHT, Private Law Sources and Analogies of International Law, 175.

OPPENHEIM, INTERNATIONAL LAW

Third Edition, Volume I, pages 667–669, 676, sections 510, 511, 518. 1920.

§510. Ratification is the term for the final confirmation given by the parties to an international treaty concluded by their representatives. Although a treaty is concluded as soon as the mutual consent is manifest from acts of the duly authorised representatives, its binding force is, as a rule, suspended till ratification is given. The function of ratification is, therefore, to make the treaty binding; and, if it is refused, the treaty falls to the ground in consequence. As long as ratification is not given, the treaty is, although concluded, not perfect. Many writers maintain that, as a treaty is not binding without ratification, it is the latter which really contains the mutual consent, and really concludes the treaty. Before ratification, they maintain, no treaty has been concluded, but a mere mutual proposal to conclude a treaty has been agreed to.[15] But this opinion does not accord with the real facts. For the representatives are authorised, and intend, to conclude a treaty by their signatures. The contracting States have always taken the standpoint that a treaty is concluded as soon as their mutual consent is clearly apparent. They have always made a distinction between their consent, given by representatives, and their ratification to be given afterwards; they have never for one moment confounded the two, and considered their ratification their consent. It is for that reason that a treaty cannot be ratified in part, that no alterations of the treaty are possible through the act of ratification, that a treaty may be tacitly ratified by its execution, that a treaty is always dated from the day when it was duly signed by the representatives, and not from the day of its ratification, that there is no essential difference between such treaties as want, and such as do not want, ratification.

§511. The rationale for the institution of ratification is another argument for the contention that the conclusion of the treaty by the representatives is to be distinguished from the confirmation given by the respective States through ratification. Its rationale is partly that States want to have an opportunity of re-examining, not the single

[15] "Thus, a transaction is no Treaty if the society which it purports to bind be not independent; or if it be not made, directly or through an agent, by the person or persons actually sovereign in the society; or if, where an agent is employed, he be not duly authorised; or if it be no completed agreement, but a mere negotiation or 'pollicitation;' or if, when completed, it have not the ratification of the sovereign; or if there be any material error or misconception on either side, such that the promise made by the one party was not in fact the promise accepted by the other. If any of the above conditions be wanting, there can be no Treaty, for there is no agreement; there has been only a supposed, or pretended, or inchoate agreement." BERNARD, Lectures on Diplomacy, 171.

stipulations, but the whole effect of the treaty upon their interests.[16] These interests may be of various kinds. They may undergo a change immediately after the signing of the treaty by the representatives. They may appear to public opinion in a different light from that in which they appear to the Governments, so that the latter want to reconsider the matter. Another reason for ratification is that treaties on many important matters are, according to the constitutional law of most States, not valid without some kind of consent on the part of parliaments. Governments must, therefore, have an opportunity of withdrawing from a treaty, in case parliaments refuse their approval. These two reasons have made, and still make, the institution of ratification a necessity for International Law.

§518. The effect of ratification by the parties is to make a treaty binding. If one party executes an instrument of ratification, and the other does not, the treaty falls to the ground. But the question arises whether the effect of ratification is retroactive, so as to make a treaty binding from the date when it was duly signed by the representatives. No unanimity exists among publicists as regards this question. As in all important cases treaties themselves stipulate the date from which they are to take effect, the question is chiefly of theoretical interest. The fact that ratification imparts the binding force to a treaty seems to indicate that ratification has regularly no retroactive effect. Different, however, is, of course, the case in which the contrary is expressly stipulated in the treaty itself, and, again, the case where a treaty contains stipulations to be executed at once, without waiting for the necessary ratification.

THE ELIZA ANN AND OTHERS

Great Britain. High Court of Admiralty. 1813.

1 *Dodson's Reports* 244.

These were three cases of American ships, laden with hemp, iron, and other articles, and seized in Hanoe Bay, on the 11th of August, 1812, by his Majesty's ship Vigo, which was then lying there, with other British ships of war. A claim was given, under the direction of the Swedish minister, for the ships and cargoes, "as taken within one mile of the main land of Sweden, and within the territory of his Majesty the King of Sweden, contrary to and in violation of the law of nations, and the territory and jurisdiction of his said Majesty."

[16] "It is an extra precaution, an artificial safeguard, against improvident or ill-considered engagements, exactly analogous to those rules of private law which require for certain private contracts a specified form of words, a notarial act, a payment of earnest, or a signature." BERNARD, Lectures on Diplomacy, 173.

[Part of the opinion is omitted.]

Sir W. Scott. These vessels came into Hanoe Bay, for the purpose of taking the benefit of British convoy, and were seized in consequence of the order for the detention of American property. This order has been since followed up by a declaration of war; the ships, therefore, would be liable to condemnation, unless it can be shown that they are entitled to some special protection. . . .

A claim, however, has been given by the Swedish minister. Now, in order to support and give effect to this claim, two things are necessary to be established. First, it is requisite that Sweden should appear to have been in a state of perfect neutrality at the time when the seizure was made. Secondly, it must be shown that the act of violence was committed within the limits of Swedish territory. . . .

The first question then is, how far, in August, 1812, Sweden was to be considered as a neutral country.

It is not to be disputed that the conduct of Sweden towards this country had been, for a considerable time, of a very unfriendly description. Impelled by fear, or some other motive, she had excluded British ships from her ports, and had, either from choice or compulsion, adopted that course of policy which has been imposed by the French ruler on the other nations of Europe, and which has been termed the continental system. It is clear, too, that Sweden acted in this manner, not from any private views respecting her own municipal regulations, but in the execution of a plan auxiliary to the enemy of this country. Sweden, therefore, by her conduct, afforded to Great Britain a legitimate cause of war, and perfectly justified the seizure of Hanoe by the British admiral. The seizure of this place has been countenanced by the government of this country, the British flag has been hoisted, and every act of sovereignty exercised on the island and roadstead adjoining.

This was the state of things originally; British ships were excluded from the ports of Sweden, and the island of Hanoe was occupied by British forces.

After this, a declaration of war was issued by the government of Sweden . . . This war has, however, been happily terminated by a treaty of peace, which was signed by the plenipotentiaries of the two countries, on the 18th of July, ratified by the Prince Regent of Great Britain on the 4th of August, and by the King of Sweden on the 17th of the same month. From the result of these dates it has been contended, that the war had ceased, and that friendship had been reëstablished before the time when these vessels were seized. The question, therefore, comes to this, whether a ratification is or is not necessary to give effect and validity to a treaty signed by plenipotentiaries. Upon abstract principles we know that, either in public or private transactions, the acts of those who are vested with a plenary power are binding upon the

principal. But, as this rule was in many cases found to be attended with inconvenience, the latter usage of states has been to require a ratification, although the treaty may have been signed by plenipotentiaries. According to the practice now prevailing, a subsequent ratification is essentially necessary; and a strong confirmation of the truth of this position is, that there is hardly a modern treaty in which it is not expressly so stipulated; and, therefore, it is now to be presumed, that the powers of plenipotentiaries are limited by the condition of a subsequent ratification. The ratification may be a form, but it is an essential form; for the instrument, in point of legal efficacy, is imperfect without it. I need not add, that a ratification by one power alone is insufficient; that, if necessary at all, it must be mutual; and that the treaty is incomplete till it has been reciprocally ratified.

It is said, however, that the treaty, when ratified, refers back to the time of its signature by the plenipotentiaries, and that it does so in this case more especially on account of the terms in which it is drawn. The words in one of the articles of the treaty, "*Dès ce moment tout sujet de mésintelligence, qui ait pu subsister sera regardé comme entièrement cessant et détruit,*" have been pointed out, and from these it has been contended, that all hostilities were to cease the moment the treaty was signed. But I take that not to be the case; the positive and enacting part of the articles is, that there shall be a firm and inviolable peace between the two countries; the other part is descriptive only of the pacific intention of the parties, and of their agreement to bury in oblivion all the causes of the war. It does not stand in the same substantive way as the former part of the article, and must be considered as mere explanatory description. The nature of a treaty of peace is well explained by Vattel [Book IV, c. 2], who lays it down that "a treaty of peace can be no more than an agreement. Were the rules (he says) of an exact and precise justice to be observed in it, each punctually receiving all that belongs to him, a peace would become impossible." He goes on to say, that "as in the most just cause we are never to lose sight of the restoration of peace, but are constantly to tend towards this salutary view, no other way is left than to agree on all the claims and grievances on both sides, and to extinguish all differences by the most equitable convention which the juncture will admit of." It is, therefore, an agreement to waive all discussion concerning the respective rights of the parties, and to bury in oblivion all the original causes of the war. It is an explanation of the nature of that peace and good understanding which is to take place between the two countries, whenever that event shall be happily accomplished. It would be a stretch beyond the limits to which a fair interpretation of these words could be carried, to say they were intended to convey any other meaning. I am of opinion, therefore, that the ratification is the point from which the treaty must take effect.

Dès ce moment must be referred to the moment at which the treaty received its valid existence by mutual ratification. It is perfectly clear that it was so considered on the part of Sweden. The British officer who was sent to the Swedish coast was still received with the same caution as in the time of war, and was blindfolded before he was permitted to enter Carlsham. Hanoe remained in British possession, and the only communication between that island and the main land of Sweden was by flags of truce. Though it was reasonable to expect that Sweden would return to the relations of amity with this country, yet it is quite clear that she had not at that time confirmed the treaty, and, therefore, could not be entitled to the benefit of a neutral character. . . .

. . . I am of opinion that the claim which has been given fails upon the two essential points, both in respect of the neutrality of Sweden, and of the neutrality of the place of capture, and consequently that these ships and cargoes are liable to condemnation.[17]

SAMUEL DAVIS, PLAINTIFF IN ERROR, v. THE POLICE JURY OF THE PARISH OF CONCORDIA

United States. Supreme Court. 1850.

9 *Howard's Reports* 280.

This case was brought up from the Supreme Court of the State of Louisiana, by a writ of error issued under the twenty-fifth section of the Judiciary Act. . . .

[The statement of the case, the arguments of counsel, and part of the opinion are omitted. The facts are stated sufficiently in the opinion.]

MR. JUSTICE WAYNE delivered the opinion of the court.

There is enough upon the record of this case to give this court jurisdiction, but not enough to give the appellant the relief for which he has brought it here.

His complaint is, that the application of the law of Louisiana for the establishment of ferries (2 Mart. Dig. 142, 3 Mart. Dig. 292) to a ferry franchise claimed by him, from Concordia to Natchez, is an invasion upon a right of property secured by the third article of the treaty between the United States and the Republic of France, ceding Louisiana to the former; and that it impairs the obligation of a contract, which was entered into between the Marquis de Casa Calvo and one Thomas Thompson, on the 19th of February, 1801, granting to Thompson a ferry at the post of Concordia to Natchez, as a privilege to be attached to his plantation,

[17] *Cf.* Chilean-Peruvian Accounts, Chile and Peru, Moore, Int. Arb., II, 2085, 2091. See Hijo v. United States, 1 Porto Rico Fed. 71, 194 U. S. 315; Kotzias v. Tyser [1920] 2 K. B. 69; Lloyd v. Bowring, 36 T. L. R. 397; Rattray v. Holden, 36 T. L. R. 798; HUDSON, "Duration of the War between the United States and Germany," 39 Harv. L. Rev. 1020, 1029.

on condition that Thompson would clear a public road from Concordia to the Bayou Cocodrillo. The appellant claims the franchise and land to which it was attached, as a purchaser of both from Joseph Vidal, who bought from Thompson the grantee, on the 16th of October, 1803. It is further said, that by the law, usages, and customs of Spain, in Louisiana, at the date of the grant, no other ferry could be established within a league above or below its locality. The interference with the franchise is said to be the establishment of another ferry by the Police Jury of Concordia, from the town of Vidalia, in that parish, to the city of Natchez. The validity of this proceeding is called in question, on the ground, as we have already said, of its being contrary to a treaty and the Constitution of the United States. Both having been decided by the highest court in Louisiana against the rights claimed, the cause is before us, under the provisions of the twenty-fifth section of the Judiciary Act of 1789. . . .

Four months before this privilege was given to Thompson, on the 1st of October, 1800, the treaty of St. Ildefonso was made, by which Spain retroceded to France the Province of Louisiana. The terms and conditions of that treaty we will speak of presently, as far as it may be necessary to do so, after we have shown the views taken by the different departments of the government of the United States of the obligations of it, when they began, and when the full sovereignty of Spain ceased over Louisiana.

Each of them has said officially, that the sovereignty of the king of Spain for granting lands in Louisiana ceased with the signatures of the treaty of St. Ildefonso, on the 1st of October, 1800. Within a year after the cession of Louisiana, Congress, having learned that concessions for lands had been made by the Governors of Louisiana, between the 1st of October, 1800, and the 30th of April, 1803, the date of our treaty with France, passed an act declaring all such concessions void, and of no effect in law or equity.

This act was passed coincidently with what had been the declaration of the executive department of the government. This court has said the same in several cases. In the case of the United States v. Joseph Reynes [9 How. 127], decided at this term, it has been reaffirmed, with a more extended examination than had been made before of the treaty of St. Ildefonso, that also between the French Republic and the king of Spain, signed in Madrid on the 21st of March, 1801, with the order of Barcelona for the delivery of Louisiana to France in execution of both treaties, and of the treaty between France and the United States in connection with the actual delivery of the Province to the United States, on the 20th of December, 1803, by Laussat, the commissioner of the French government appointed for that purpose. . . .

In Reynes's case, the judgment of the District Court affirming his grant was reversed, on the ground that the treaty between France and

the United States gave to the latter all the rights acquired by France by the treaty of St. Ildefonso, and that the political sovereignty of the king of Spain in Louisiana to grant lands ceased with the date of it, on the 1st of October, 1800.

We will now show, that the decision in that case accords with the received usages of nations in respect to rights acquired under treaties; that it is sustained by all that we now know of what were the relations between France and Spain at the time of the event, and the motives of the two governments for entering into the treaty of St. Ildefonso.

All treaties, as well those for cessions of territory as for other purposes, are binding upon the contracting parties, unless when otherwise provided in them, from the day they are signed. The ratification of them relates back to the time of signing. Vattel, B. 4, c. 2, sec. 22; Mart. Summary, B. 8, c. 7, sec. 5.

It is true, that, in a treaty for the cession of territory, its national character continues, for all commercial purposes; but full sovereignty, for the exercise of it, does not pass to the nation to which it is transferred until actual delivery. But it is also true, that the exercise of sovereignty by the ceding country ceases, except for strictly municipal purposes, especially for granting lands. And for the same reason in both cases;—because, after the treaty is made, there is not in either the union of possession and the right to the territory which must concur to give *plenum dominium et utile*. To give that, there must be the *jus in rem* and the *jus in re*, or what is called in the common law of England the *juris et seisinæ conjunctio*. "This general law of property applies to the right of territory no less than to other rights, and all writers upon the law of nations concur, that the practice and conventional law of nations have been conformable to this principle." Puffendorf *par* Barbeyrac, *lib.* 4, c. 9, sec. 8, note 2.

In this case, after the treaty was made, and until Louisiana was delivered to France, its possession continued in Spain. The right to the territory, though in France, was imperfect until ratified, but absolute by ratification from the date of the treaty. Such was the manifest intention, from the promise and engagement of his Catholic Majesty, in the third article of the treaty;—conditional upon the execution of the stipulations of the treaty relative to the Duke of Parma; but becoming retroactively absolute from the time of the signature of the treaty, as soon as these conditions were performed, or when others for the same end were substituted by the contracting parties.

The disability of France, or her refusal to perform the conditions for which the retrocession was to be made, would have released the king of Spain from his promise and engagement to make it. It may also be, that the conditions were to be performed by France in the time mentioned in the first article, and that Spain was to keep possession of the territory

as a security for that performance. But in either case, our conclusions that the rights of France attached, and that the sovereignty of Spain ceased from the signature of the treaty, would not be weakened; as the Republic of France and his Catholic Majesty entered into another treaty on the 21st of March, 1801, to determine in a positive manner what states were to be given to the infant Duke of Parma, as an equivalent for the Duchy of Parma. In which it is also declared, that this second treaty had its origin in that in which the king cedes to France the possession of Louisiana. And further, that the contracting parties agree to carry into effect the articles of that treaty, and that, while the difficulties with regard to them are in process of arrangement, the present treaty shall not destroy the rights of either party under the first treaty. And if, as has been said, possession was meant to be held by Spain, as a security for the fulfilment of the treaty by France, until the time when the delivery was to be made, that purpose must be considered as exclusive of any larger intent. The order given by Spain for the delivery of the territory to France precludes all inquiry about the performance of the stipulations of the treaties by either of the contracting parties. Its terms, as is said in Reynes's case, acknowledge that the right of France to the territory ceded was complete, and that the sovereignty of Spain over it ceased with the signature of the treaty of St. Ildefonso. . . .

There will be found also, in the order given for the delivery of Louisiana to France, a further confirmation that the king of Spain had not his former sovereignty over it after the treaty of St. Ildefonso was signed, and that his ministers did not think he had in the interval until the delivery was made.

The order does not vary, except as to the thing to be done, from the usual formula for such a purpose. It is in fact a copy of the order which was given by France when Louisiana was ceded to Spain in 1762. That had been preceded by others like it for more than a hundred years, when the monarchs of Europe ceded to each other by treaty distant territories, either in India or America. This which we are now considering must have the same meaning which international usages have uniformly given to the whole of them. . . .

Of course, what we have just said respecting sovereignty in cessions of territory is meant to be understood of treaties signed by plenipotentiaries having full powers to do so, and which have been afterwards ratified; and not of those conventions entered into and signed conditionally, *sub spe rati*, by a minister not furnished with orders to execute it absolutely. . . .

We have thus shown, that the conclusion to which this court came in Reynes's case respecting grants of land in Louisiana, after the treaty of St. Ildefonso had been signed, is in harmony with the usages and law of nations. They would have required it, if the documents attending the

transaction had not led to the same result. It has been shown before, that the legislation of Congress would not permit a different conclusion. The executive department of the government has uniformly acted under the same impression.

Finally, all of our proceedings respecting Louisiana have been done upon the principle, that the law of nations does not recognize in a nation ceding a territory the continuance of supreme power over it after the treaty has been signed, or any other exercise of sovereignty than that which is necessary for social order and for commercial purposes, and to keep the cession in an unaltered value, until a delivery of it has been made.[18] Such being the extent of sovereignty under such circumstances, is not the grant of a perpetual ferry franchise attached to land as much prohibited as a grant of land?

We cannot distinguish between them, as to the source from which they can only be made. They are only distinguishable from each other in this, that one of them is exclusively for the grantee, and the other for the use of the public, with a compensatory right of toll attached. If a ferry franchise could be given in such a case, every other franchise might be. When the extent of Spanish royal prerogative in respect to franchises is considered, and especially such as the king of Spain could give in his foreign dominions under the Roman civil law, without any modification of it in the Partidas, it will not be forgotten, that natural persons and bodies corporate might have been invested with monopolizing privileges and exemptions, both on the land and the water,—that charters could have been given to places, with licenses and exemptions which might have interfered seriously with the policy and institutions of a state coming into the possession of ceded territory. We will not mention them in detail. Enough has been said to show, that, if such a sovereignty could be exercised after a treaty has been signed, it would be a power to change materially the relations which the people of a ceded territory had to each other; and to establish between them and a new sovereign a different condition than had been contemplated when they were transferred.

Such being the law of this case, we must say that the appellant, under the privilege of a ferry right given by the Marquis de Casa Calvo, had no property in it secured by the third article of the treaty by which Louisiana was ceded to the United States, and that no contract arose from it, the obligation of which has been impaired either by the legislation of Louisiana, or the action of the Police Jury of Concordia, under it. . . .

We shall direct this cause to be remanded for such further proceedings in the court from which it has been brought as that court may deem necessary.[19]

[18] *Cf.* Parker v. Wood, 1 Dall. 436, 438; Keene v. M'Donough, 8 Pet. 308.

[19] See United States v. D'Auterive, 10 How. 609; Montault v. United States, 12 How. 47; 23 Op. Atty. Gen. 551.

Haver v. Yaker

United States. Supreme Court. 1869.

9 *Wallace's Reports* 32.

Error to the Court of Appeals of Kentucky; the case being thus:

One Yaker, a Swiss by birth, who had come many years ago to the United States and become a naturalized citizen thereof, died in Kentucky in 1853, intestate, seized of real estate there. He left a widow, who was a resident and citizen of Kentucky, and certain heirs and next of kin, aliens and residents in Switzerland.

By the laws of Kentucky in force in 1853, the date of his death, aliens were not allowed to inherit real estate except under certain conditions, within which Yaker's heirs did not come, and if the matter was to depend on those laws, the widow was, by the laws then in force in Kentucky, plainly entitled to the estate.

However, in 1850, a treaty was "concluded and signed" by the respective plenipotentiaries of the two countries, between the Swiss Confederation and the United States [11 U. S. Stat. L. 587], upon the proper construction of which, as Yaker's heirs asserted—although the widow denied that the construction put upon the treaty by the heirs was a right one—these heirs were entitled to take and hold the estate. The treaty provided by its terms that it should be submitted on both sides to the approval and ratification of the respective competent authorities of each contracting party, and that the ratifications should be exchanged at Washington as soon as circumstances should admit. It was so submitted, but was not duly ratified, nor were the respective ratifications exchanged in Washington till November 8th, 1855, at which time the ratification and exchange was made. And on the next day the President, by proclamation—the treaty having been altered in the Senate—made the treaty public.

In 1859 the Swiss heirs, who had apparently not heard before of their kinsman's death, instituted proceedings to have the real estate of their kinsman, now in possession of the widow, assigned to them, and arguing that on a right construction of the treaty it was theirs.

But a preliminary question, and in case of one resolution of it, a conclusive objection to their claim was here raised; the question, namely, at what time the treaty of 1850-55, as it regarded private rights, became a law. Was it when it bore date, or was it only when the ratifications were exchanged between the parties to it? If not until it was ratified, then there was no necessity of deciding whether by its terms the heirs of Yaker had any just claim to this real estate, because in no aspect of the case could the treaty have a retroactive effect so as to defeat the title of the widow, which vested in her, by the law of Kentucky of 1853, on the death of her husband.

The Court of Appeals of Kentucky, where the heirs set up the treaty as a basis of their title, decided that it took effect only when ratified, and so deciding against their claim, the case was now here for review under the twenty-fifth section of the Judiciary Act.

[The arguments of counsel are omitted.]

Mr. Justice Davis delivered the opinion of the court.

It is undoubtedly true, as a principle of international law, that, as respects the rights of either government under it, a treaty is considered as concluded and binding from the date of its signature. In this regard the exchange of ratifications has a retroactive effect, confirming the treaty from its date. [Wheaton, Dana's 8th ed., 336 §264.] But a different rule prevails where the treaty operates on individual rights. The principle of relation does not apply to rights of this character, which were vested before the treaty was ratified. In so far as it affects them, it is not considered as concluded until there is an exchange of ratifications, and this we understand to have been decided by this court, in Arredondo's case, reported in 6th Peters [pp. 691, 749]. The reason of the rule is apparent. In this country, a treaty is something more than a contract, for the Federal Constitution declares it to be the law of the land. If so, before it can become a law, the Senate, in whom rests the authority to ratify it, must agree to it. But the Senate are not required to adopt or reject it as a whole, but may modify or amend it, as was done with the treaty under consideration. As the individual citizen, on whose rights of property it operates, has no means of knowing anything of it while before the Senate, it would be wrong in principle to hold him bound by it, as the law of the land, until it was ratified and proclaimed. And to construe the law, so as to make the ratification of the treaty relate back to its signing, thereby divesting a title already vested, would be manifestly unjust, and cannot be sanctioned.

These views dispose of this case, and we are not required to determine whether this treaty, if it had become a law at an earlier date, would have secured the plaintiffs in error the interest which they claim in the real estate left by Yaker at his death.

Judgment affirmed.[20]

The Covenant of the League of Nations

Article 18. 1920.

Article 18. Every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it.

[20] See United States v. Arredondo, 6 Pet. 691, 748; United States v. Sibbald, 10 Pet. 313, 322; Ex parte Ortiz, 100 Fed. 955; Armstrong v. Bidwell, 124 Fed. 690; Moore, Dig. Int. L., V, 244; 4 A. L. R. 1378.

No such treaty or international engagement shall be binding until so registered.[21]

SECTION 4. LEGAL EFFECT OF TREATIES

Oppenheim, International Law

Third Edition, Volume I, page 677, section 520. 1920.

§520. It must be specially observed that the binding force of a treaty concerns the contracting States only, and not their subjects. As International Law is a law between States only and exclusively, treaties can have effect upon, and can bind, States only and exclusively. If treaties contain stipulations with regard to rights and duties of the subjects of the contracting States, their courts, officials, and the like, these States have to take such steps as are necessary, according to their Municipal Law, to make these stipulations binding upon their subjects, courts, officials, and the like.[22] It may be that, according to the Municipal Laws of some countries, the official publication of a treaty concluded by the Government is sufficient for this purpose, but in other countries other steps are necessary, such as, for example, special statutes to be passed by the respective Parliaments.[23]

Weymberg v. Touch

Great Britain. High Court of Chancery. 1669.

1 *Cases in Chancery* 123.

The Bill was, to be relieved against an Action of Debt for Money due to the Defendant as a Merchant from the Plaintiff, for Wares sold in Denmark. The Equity was, That in the Time of Hostility between that Crown and this, the Defendant being a Subject to this Crown, the Plaintiff was forced to pay the Money he owed the Defendant to Commissioners authorized in that Behalf to the King of Denmark; And that by the Articles of Peace between the two Crowns it was agreed, That all Monies so exacted from each others Subjects should be compensated by setting one against the other; and that the Parties that paid

[21] See "Registration and Publication of Treaties," 1 L. of N. T. S. 8; Hudson, "Registration and Publication of Treaties," 19 Am. Jour. Int. L. 273; Hyde, II, §491; Oppenheim, 4th ed., I, §518a.

[22] *Cf.* Jurisdiction of the Courts of Danzig, P. C. I. J. Publ., Series B, Advisory Opinion No. 15, p. 17.

[23] *Cf.* Constitution of Argentine, 1860, art. 31, Dodd, I, 2, 9; Constitution of Haiti, 1918, art. 127, 112 Br. & For. S. P. 1113, 1129; Constitution of Mexico, 1917, art. 133, 111 *ibid.* 778, 830; Constitution of Paraguay, 1870, art. 16, Rodriguez, II, 381, 384; Constitution of United States, 1789, art. 6, paragraph 2, *supra*, 1029.

the Money to either of the Kings Orders, Should be discharged against the Creditor.

To this Bill the Defendant demurred, and insisted there was no Equity; and that if the Articles did bind private Persons, they were as good at Law as here; but at Law they did not bind, for the Defendant had a Verdict.

For the Plaintiff it was insisted, That the Chancery was a Court of State; and that the Articles of Peace were inrolled there; and that the Bill was, to have Witnesses examined beyond Sea. The Judge ordered the Defendant to answer.[24]

IN RE CALIFORNIAN FIG SYRUP COMPANY'S TRADE-MARK

Great Britain. High Court of Justice; Chancery Division. 1888.

Law Reports 40 *Chancery Division* 620.

[Part of the statement of the case, the arguments of counsel, and part of the opinion are omitted.]

On the 20th of March, 1883, the International Convention for the Protection of Industrial Property was signed in Paris, on behalf of France, Belgium, and other states. It contained a provision that other states should be permitted to adhere to the Convention at their request.

The Convention contained, amongst others, the following provisions:— . . .

"VI. Every trade-mark duly registered in the country of origin shall be admitted for registration, and protected in the form originally registered in all the other countries of the Union.

"That country shall be deemed the country of origin where the applicant has his chief seat of business.

"If this chief seat of business is not situated in one of the countries of the Union, the country to which the applicant belongs shall be deemed the country of origin.

"Registration may be refused if the object for which it is solicited is considered contrary to morality or public order."

The plenipotentiaries of the contracting states at the time of signing the Convention signed also a protocol, which, it was declared, should have the same force and solidity as the Convention itself. The 4th paragraph of the protocol stated that:—

"Paragraph 1 of Article VI. is to be understood as meaning that no trade-mark shall be excluded from protection in any state of the Union, because it does not satisfy, in regard to the signs composing it, the conditions of the legislation of that state, provided that on this point

[24] See The Barenfels, 1 B. & C. P. C. 122.

it comply with the legal requirements of the country of origin, and that it had been properly registered in said country of origin. With this exception, which relates only to the form of the mark, and otherwise reserving the clauses of the other articles of the Convention, the internal legislation of each state remains in force.

"To avoid misconstruction, it is agreed that the use of public armorial bearings and decorations may be taken to be contrary to public order in the sense of the last paragraph of Article VI."

The Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), was passed on the 25th of August, 1883, but it was enacted that the Act (sect. 3): "Except where it is otherwise expressed, shall commence from and immediately after the 31st day of December, 1883." . . .

On the 17th of March, 1884, the Convention was acceded to by the Government of Great Britain.

On the 14th of February, 1885, the Californian Fig Syrup Company sent in an application for the registration of their trade-mark in the United States of America, and on the 14th of April, 1885, the application was granted.

By an Order in Council dated the 12th day of July, 1887, it was declared that the provisions of sect. 103 of the Patents, Designs, and Trade Marks Act, 1883, should be applicable to the United States of America.

On the 30th of July, 1887, the Convention was acceded to by the Government of America.

On the 23rd of February, 1888, the company sent in an application to the Comptroller-General for registration of the words "Syrup of Figs" as a trade-mark under the Patents, Designs, and Trade Marks Act, 1883, and he refused the application, on the ground that, in his discretion, which he was allowed to exercise, the trade-mark was not a fancy word; and also that the application to him was not made within the four months after the application made by the company in America. The company appealed to the Board of Trade, on the ground that they were entitled to registration under the provisions of sect. 103 of the Act, and under the provisions of the Convention of March, 1883, and the Board of Trade referred the appeal to the Court. This was a motion on behalf of the company, in the matter of the Act of 1883, for an order upon the Comptroller-General directing him to proceed with the registration. . . .

STIRLING, J.:—This is an application by subjects or citizens of the United States of America, who carry on business in that country, for the registration of a trade-mark under the 103rd section of the Patents, Designs, and Trade Marks Act of 1883, which I have now to construe. Sub-sect. 1 enacts, reading it shortly,that "if Her Majesty is pleased to make any arrangement with the Government or Governments of any foreign state or states for mutual protection of . . . trade-marks . . . then any

person who has applied for protection for any . . . trade-mark in any such state shall be entitled to . . . registration of his . . . trade-mark . . . under this Act, in priority to other applicants; and such . . . registration shall have the same date as the date of the application" (I read the Act as amended by the Act of 1885) "in such foreign state. Provided that his application is made, in the case of a . . . trade-mark, within four months from his applying for protection in the foreign state with which the arrangement is in force." Now it seems to me that that is plain enough. At the time when the Act was passed, in August, 1883, there was no Convention or arrangement between the English Government and the Government of any foreign state as to the mutual protection of any of the matters which are mentioned in the 103rd section; but a Convention had, in the month of March, 1883, been entered into by certain foreign states, and it was contemplated that other Governments would accede to it. At that time the Government of her Majesty the Queen had not acceded to that Convention or any other. Now the sub-section is perfectly hypothetical. It does not in terms refer either to that Convention or any other Convention. It provides that if an arrangement is come to, "any person who has applied for protection for" his trade-mark in a foreign state "shall be entitled . . . to registration of his . . . trade-mark . . . under this Act, in priority to other applicants;" provided his application is made, in the case of a "trade-mark within four months from his applying for protection in the foreign state." I cannot see that there is any doubt as to the meaning of the proviso. It makes it essential that the applicant shall apply within four months from the time of his applying for protection in the foreign state with which the arrangement is in force. . . . I am of opinion that the present Applicants not having made their application within four months from their applying for protection for their trade-mark in the United States of America, and the Crown, through the Attorney-General, insisting on the objection, the application for registration fails.

But I must notice the argument which was addressed to me, and was founded on this: that the Convention which was entered into in March, 1883, between certain states, but to which her Majesty was not at that time a party, does apparently provide in art. 6, that every trade-mark duly registered in the country of origin shall be admitted for registration and protection in the form originally registered in all the countries of the Union. By that article her Majesty is now bound. Certainly, according to my construction of the Act, the Act does not afford the means of carrying out that article, and it will be for her Majesty's Government to consider, and seeing the Attorney-General here, I have no doubt that they will consider, what legislative steps ought to be taken to give effect to that article, if necessary. But with that I have nothing to do. I have simply to consider this question; dealing as I am with, and being

bound by, a statute of this realm, whether I can give it a different interpretation from that which I should otherwise give it, simply because at the date of the passing of the Act, the Convention had been entered into between certain foreign states, and it was within the bounds of possibility that her Majesty might afterwards accede to it, and several years afterwards, in point of fact, her Majesty did accede to it. I am of opinion that I cannot do so. I do not think that the Crown ought to ask for costs.

The application was refused without costs.[25]

CHIEF JUSTICE MARSHALL, IN FOSTER & ELAM v. NEILSON

United States. Supreme Court. 1829

2 *Peters' Reports* 253, 314–315.

Whatever difference may exist respecting the effect of the ratification, in whatever sense it may be understood, we think the sound construction of the eighth article[26] will not enable this Court to apply its provisions to the present case. The words of the article are, that "all the grants of land made before the 24th of January 1818, by his catholic majesty, &c. shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his catholic majesty." Do these words act directly on the grants, so as to give validity to those not otherwise valid; or do they pledge the faith of the United States to pass acts which shall ratify and confirm them?

A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.

The article under consideration does not declare that all the grants made by his catholic majesty before the 24th of January 1818, shall be

[25] See The Parlement Belge, 4 P. D. 129, 149 (reversed on another ground, 5 P. D. 197); MCNAIR, "When do British Treaties Involve Legislation?" B. Y. B. Int. L. (1928) 59. And see CRANDALL, Treaties, 2d. ed., 279.

[26] Of the Treaty of Amity, Settlement, and Limits between Spain and the United States, Feb. 22, 1819, 8 U. S. Stat. L. 252, 258.

valid to the same extent as if the ceded territories had remained under his dominion. It does not say that those grants are hereby confirmed. Had such been its language, it would have acted directly on the subject, and would have repealed those acts of congress which were repugnant to it; but its language is that those grants shall be ratified and confirmed to the persons in possession, &c. By whom shall they be ratified and confirmed? This seems to be the language of contract; and if it is, the ratification and confirmation which are promised must be the act of the legislature. Until such act shall be passed, the Court is not at liberty to disregard the existing laws on the subject.[27]

United States v. Schooner Peggy

United States. Supreme Court. 1801.

1 *Cranch's Reports* 103.

[The Peggy, a French vessel, was captured in April, 1800, by a vessel of the United States commissioned by the President pursuant to the Act of Congress of July 9, 1798 (1 U. S. Stat. L. 578), and was libelled as prize in the United States District Court for the district of Connecticut. The District Court decreed restoration and the captors appealed. By a decree pronounced September 23, 1800, the Circuit Court reversed the District Court and condemned the ship to the captors as lawful prize. The case was then taken to the Supreme Court by a writ of error dated October 2, 1800. Meanwhile, on September 30, 1800, a treaty between France and the United States had been signed at Paris. Article 4 of the treaty provided as follows: "Property captured, and not yet definitively condemned, or which may be captured before the exchange of ratifications (contraband goods destined to an enemy's port excepted) shall be mutually restored . . . This article shall take effect from the date of the signature of the present convention." (8 U. S. Stat. L. 178.) The treaty was ratified and was proclaimed by the President on December

[27] *Cf.* United States v. Percheman, 7 Pet. 51; Little v. Watson, 32 Me. 214; Puget Sound Agricultural Co. v. Pierce County, 1 Wash. Terr. 159.

See "Caveats for Patents for Inventions," 19 Op. Atty. Gen. 273. But *cf.* Hennebique Const. Co. v. Myers, 172 Fed. 869; General Electric Co. v. Robertson, 21 F. (2d) 214; 26 Mich. L. Rev. 316.

"An examination of the decisions of the Supreme Court on this topic will show there is no practical distinction whatever as between a statute and a treaty with regard to its becoming presently effective, without awaiting further legislation. A statute may be so framed as to make it apparent that it does not become practically effective until something further is done, either by Congress itself or by some officer or commission intrusted with certain powers with reference thereto. The same may be said with regard to a treaty. Both statutes and treaties become presently effective when their purposes are expressed as presently effective." Putnam, J., in United Shoe Machinery Co. v. Duplessis Shoe Machinery Co., 155 Fed. 842, 845.

21, 1801, before the Supreme Court gave judgment upon the writ of error.]

[The above statement is substituted for the statement of the case in the report.]

The CHIEF JUSTICE delivered the opinion of the court.

In this case the court is of opinion that the schooner Peggy is within the provisions of the treaty entered into with France and ought to be restored. This vessel is not considered as being definitively condemned. The argument at the bar which contends that because the sentence of the circuit court is denominated a final sentence, therefore its condemnation is definitive in the sense in which that term is used in the treaty, is not deemed a correct argument. A decree or sentence may be interlocutory or final in the court which pronounces it, and receives its appellation from its determining the power of that particular court over the subject to which it applies, or being only an intermediate order subject to the future control of the same court. The last decree of an inferior court is final in relation to the power of that court, but not in relation to the property itself, unless it be acquiesced under. The terms used in the treaty seem to apply to the actual condition of the property and to direct a restoration of that which is still in controversy between the parties. On any other construction the word *definitive* would be rendered useless and inoperative. Vessels are seldom if ever condemned but by a final sentence. An interlocutory order for a sale is not a condemnation. A stipulation then for the restoration of vessels not yet condemned, would on this construction comprehend as many cases as a stipulation for the restoration of such as are not yet definitively condemned. Every condemnation is final as to the court which pronounces it, and no other difference is perceived between a condemnation and a final condemnation, than that the one terminates definitively the controversy between the parties and the other leaves that controversy still depending. In this case the sentence of condemnation was appealed from, it might have been reversed, and therefore was not such a sentence as in the contemplation of the contracting parties, on a fair and honest construction of the contract, was designated as a definitive condemnation.

It has been urged that the court can take no notice of the stipulation for the restoration of property not yet definitively condemned, that the judges can only enquire whether the sentence was erroneous when delivered, and that if the judgment was correct it cannot be made otherwise by any thing subsequent to its rendition.

The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence its obligation on the courts of the United States must be admitted. It is certainly true that the execution of a contract between nations is to be demanded from, and, in the general, superintended by the executive of each nation, and there-

fore, whatever the decision of this court may be relative to the rights of parties litigating before it, the claim upon the nation if unsatisfied, may still be asserted. But yet where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress; and although restoration may be an executive, when viewed as a substantive, act independent of, and unconnected with, other circumstances, yet to condemn a vessel, the restoration of which is directed by a law of the land, would be a direct infraction of that law, and of consequence, improper.

It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns where individual rights, acquired by war, are sacrificed for national purposes, the contract, making the sacrifice, ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.[28]

The Pictonian

United States. District Court, Eastern District of New York. 1924.

3 *Federal Reporter, Second Series*, 145.

[The statement of the case, the names of counsel, and part of the opinion are omitted. The facts are stated sufficiently in the opinion.]

Campbell, District Judge. This is an action brought by the United States of America against the schooner Pictonian, her tackle, etc., in causes of forfeiture and penalty, civil and maritime, for breach of the

[28] "Although a treaty is primarily a contract between nations it operates by virtue of Article VI of the Constitution as a municipal law and so far as it prescribes a rule by which rights of individuals under it may be determined the courts look to the treaty as they would to a statute for a rule of decision." Crandall, Treaties, 2d ed., 160.

provisions of section 3450 of the Revised Statutes of the United States (Comp. St. §6352), sections 584, 586, 587, and 593 of the Tariff Act of 1922 (Comp. St. Ann. Supp. 1923, §§5841h-3, 5841h-5, 5841h-6, 5841h-12, 5841h-13), and sections 3 and 26, tit. 2, of the act of Congress approved October 28, 1919, and commonly known as the National Prohibition Act (Comp. St. Ann. Supp. 1923, §§10138½aa, 10138½mm), and section 2 of article 2 of the Treaty between the United States and Great Britain, to aid in the prevention of the smuggling of intoxicating liquors into the United States, adopted May 26, 1924. The case comes before this court on the hearing of exceptions and amended exceptions to the libel filed herein.

The plaintiff in its libel alleges that each of the causes of forfeiture therein specified arose from a violation of article 2, section 2, of the Treaty between the United States and Great Britain, to aid in the prevention of the smuggling of intoxicating liquors into the United States, adopted May 26, 1924, and that the several causes of forfeiture also arose from a violation of the several sections of the Revised Statutes or other acts of Congress as hereinafter set forth . . .

To all of these causes the claimant has excepted. He urges that no authority exists in any United States Statute for the boarding and seizing of a vessel 14 miles from the United States coast, that the British treaty does not and cannot extend the right to search and seize beyond the 12-mile limit, and that aside from the question of illegality of seizure, each and every of the grounds of forfeiture in law is in itself defective and insufficient in law.

I do not agree with the claimant. . . .

Under the Constitution of the United States, the right to make treaties is vested in the President subject to ratification by the Senate, and the Constitution further provides, article 6, clause 2:

"2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

The treaty having been ratified by the Senate is self-executing and needs no further legislation to insure its validity.

There is nothing in the Constitution nor in the treaty itself which requires the passage of any further legislation to carry out the terms of a treaty. Foster v. Neilson, 2 Pet. (27 U. S.) 253, 7 L. Ed. 415.

Claimant contends that the acts alleged against the vessel in the case at bar are not crimes because Congress has not by law declared such acts to be crimes when committed beyond the three or at most the twelve-mile limits, and that Congress is without power to make such acts crimes when committed beyond such limits.

This claim is not, in my opinion, well founded, because while Congress might under international law be without power to enact laws which without their consent would bind foreign nationals outside of the territorial limits of this country, I see no reason why any such foreign sovereign or government cannot either consent to the extension of the territorial limits of this country as to their ships, subjects, or citizens, or where, as in the treaty to which reference will be made, uphold the three-mile limit as the territorial limits of the United States, and at the same time agree not to object to the seizure within certain other defined limits, beyond the three-mile limit, and the forfeiture after adjudication by the courts of the United States of any vessel which has committed, is committing, or is attempting to commit any offense against the existing laws on any particular subject which had prior thereto been enforceable within the territorial limits of the United States, its territories or possessions.

As I read the treaty wnich will hereinafter be referred to, that is exactly what Great Britain has done, and such treaty binds her ships and subjects and has the effect of law, and perforce the laws of the United States relating to the particular subject are extended in their application to the ships and subjects of Great Britain within such additional limits, to accomplish the purpose in said treaty set forth, and the right to search and seize is given.

So much of the treaty between the United States and Great Britain to aid in the prevention of the smuggling of intoxicating liquor into the United States, dated January 23, 1924, which became effective May 22, 1924, as is necessary for consideration in the matter at bar, reads as follows:

"Article I. The high contracting parties declare that it is their firm intention to uphold the principle that 3 marine miles extending from the coast line outwards and measured from low-water mark constitute the proper limits of territorial waters."

"Article II. (1) His Britannic majesty agrees that he will raise no objection to the boarding of private vessels under the British flag outside the limits of the territorial waters by the authorities of the United States, its territories or possessions in order that inquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are endeavoring to import or have imported alcoholic beverages into the United States, its territories or possessions in violation of the laws there in force. When such inquiries and examination show a reasonable ground for suspicion, a search of the vessel may be initiated.

"(2) If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offense against the laws of the United States, its territories, or possessions prohibiting

the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States, its territories, or possessions for adjudication in accordance with such laws.

"(3) The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States, its territories, or possessions than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense. In cases, however, in which the liquor is intended to be conveyed to the United States, its territories, or possessions by a vessel other than the one boarded and searched, it shall be the speed of such other vessel and not the speed of the vessel boarded which shall determine the distance from the coast at which the right under this article can be exercised."

"Article III. No penalty or forfeiture under the laws of the United States shall be applicable or attach to alcoholic liquors or to vessels or persons by reason of the carriage of such liquors, when such liquors are listed as sea stores or cargo destined for a port foreign to the United States, its territories, or possessions on board British vessels voyaging to or from ports of the United States, or its territories or possessions, or passing through the territorial waters thereof, and such carriage shall be as now provided by law with respect to the transit of such liquors through the Panama Canal, provided that such liquors shall be kept under seal continuously while the vessel on which they are carried remains within said territorial waters and that no part of such liquors shall at any time or place be unladen within the United States, its territories, or possessions."

The right to search under the circumstances alleged in the case at bar seems, under the terms of said treaty, to be beyond question, and in my opinion the treaty was intended by both nations to and did deal with the matter in a complete way. . . .

For the decision of the question now presented it is not necessary that the libel allege that the ship was committing an offense against the laws of the United States at the time of the seizure, because by the treaty, article 2, subdivision (2), *supra*, attempting to commit an offense against the laws of the United States is made a sufficient ground of seizure, and it is impossible to deny that a ship is attempting to violate the laws specified in the libel, even if such laws applied only within the three-mile limit, when it is alleged, as in the libel in the action at bar, that the ship was off our coast attempting to make contact with an American vessel, motorboat K14622, and that it did attempt to smuggle intoxicating liquor into the United States. . . .

Claimant makes some objection to the particular causes of forfeiture alleged in the libel, but I find the exceptions to the second, third, fourth, and fifth causes of forfeiture should be overruled and disallowed; but the exception to the first cause of forfeiture requires further consideration.

The treaty was made to aid in the prevention of the smuggling of intoxicating liquor into the United States, and I do not believe that the mere possession of liquor at some undescribed place beyond the territorial limits of the United States by a British ship, without any intention to attempt to commit an offense against the laws of the United States, would be sufficient under the treaty to constitute a cause of forfeiture under the laws of the United States, including the treaty; but to possess the liquor within the extended limits with the intent to smuggle it into the United States would seem to constitute an attempt to commit an offense against our laws.

In the first cause of forfeiture as alleged in the libel there are no allegations as to the location of the vessel, nor that the distance from the coast to the schooner can be traversed in one hour by the vessel endeavoring to commit the offense. I therefore hold that the exception to the first cause of forfeiture, solely because of a lack of the necessary allegations as pointed out, is sustained. But as an amendment of this cause of forfeiture, if the district attorney desires to amend, can undoubtedly be made within a short period of time, I will give the district attorney leave to file an amended libel, with the necessary allegations to bring this cause of forfeiture under the treaty, within 10 days after the granting of the order hereon, if entered on the motion of the district attorney, or within 10 days after service of a copy of the order with notice of entry, if granted on the motion of the attorney for the claimant; and also leave to amend, within the same time, any of the causes of forfeiture, if he intends to show that the liquor was intended to be conveyed to the United States by the motorboat instead of by the Pictonian, or cannot at this time say by which one of the vessels the liquor was intended to be conveyed to the United States, by making allegation as to the ability of each of them to reach the coast within an hour.

Settle order on notice.[29]

[29] *Accord:* United States v. Henning, 7 F. (2d) 488. *Contra:* The Over the Top, 5 F. (2d) 838 (*semble*); The Panama, 6 F. (2d) 326 (*semble*); The Sagatind, 11 F. (2d) 673. See DICKINSON, "Are the Liquor Treaties Self-Executing?" 20 Am. Jour. Int. L. 444; JESSUP, Territorial Waters, 300, 322.

Cf. United States v. Robins, 27 Fed. Cas. 825; In re Sheazle, 21 Fed. Cas. 1214; Matter of Metzger, 1 Barb. (N. Y.) 248; In re Metzger, 17 Fed. Cas. 232; Terlinden v. Ames, 184 U. S. 270, 288; Charlton v. Kelly, 229 U. S. 447, 464; CRANDALL, Treaties, 2d ed., 230; MOORE, Extradition, I, 100, n. 3.

Cf. also The Bello Corrunes, 6 Wh. 152, 171; United States v. Forty-Three Gallons of Whiskey, 93 U. S. 188. And see CRANDALL, Treaties, 2d ed., 160, 164, 183, 200, 233; WRIGHT, Control of American Foreign Relations, 354.

ASAKURA v. CITY OF SEATTLE ET AL

United States. Supreme Court. 1924.

265 *United States Reports* 332.

Error to a decree of the Supreme Court of Washington which sustained an ordinance of the City of Seattle restricting the business of pawnbroking, in a suit brought by Asakura to prevent its enforcement.

[The arguments of counsel are omitted. The case is stated in the opinion.]

MR. JUSTICE BUTLER delivered the opinion of the Court.

Plaintiff in error is a subject of the Emperor of Japan, and, since 1904, has resided in Seattle, Washington. Since July, 1915, he has been engaged in business there as a pawnbroker. The city passed an ordinance, which took effect July 2, 1921, regulating the business of pawnbroker and repealing former ordinances on the same subject. It makes it unlawful for any person to engage in the business unless he shall have a license, and the ordinance provides "that no such license shall be granted unless the applicant be a citizen of the United States." Violations of the ordinance are punishable by fine or imprisonment or both. Plaintiff in error brought this suit in the Superior Court of King County, Washington, against the city, its Comptroller and its Chief of Police to restrain them from enforcing the ordinance against him. He attacked the ordinance on the ground that it violates the treaty between the United States and the Empire of Japan, proclaimed April 5, 1911, 37 Stat. 1504; violates the constitution of the State of Washington, and also the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States. He declared his willingness to comply with any valid ordinance relating to the business of pawnbroker. It was shown that he had about $5,000 invested in his business, which would be broken up and destroyed by the enforcement of the ordinance. The Superior Court granted the relief prayed. On appeal, the Supreme Court of the State held the ordinance valid and reversed the decree. The case is here on writ of error under §237 of the Judicial Code.

Does the ordinance violate the treaty? Plaintiff in error invokes and relies upon the following provisions: "The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established. . . . . The

citizens or subjects of each . . . shall receive, in the territories of the other, the most constant protection and security for their persons and property, ..."

A treaty made under the authority of the United States "shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding." Constitution, Art. VI, §2.

The treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend "so far as to authorize what the Constitution forbids," it does extend to all proper subjects of negotiation between our government and other nations. Geofroy v. Riggs, 133 U. S. 258, 266, 267; In re Ross, 140 U. S. 453, 463; Missouri v. Holland, 252 U. S. 416. The treaty was made to strengthen friendly relations between the two nations. As to the things covered by it, the provision quoted establishes the rule of equality between Japanese subjects while in this country and native citizens. Treaties for the protection of citizens of one country residing in the territory of another are numerous, and make for good understanding between nations. The treaty is binding within the State of Washington. Baldwin v. Franks, 120 U. S. 678, 682-683. The rule of equality established by it cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts. Foster v. Neilson, 2 Pet. 253, 314; Head Money Cases, 112 U. S. 580, 598; Chew Heong v. United States, 112 U. S. 536, 540; Whitney v. Robertson, 124 U. S. 190, 194; Maiorano v. Baltimore & Ohio R. R. Co., 213 U. S. 268, 272.

The purpose of the ordinance complained of is to regulate, not to prohibit, the business of pawnbroker. But it makes it impossible for aliens to carry on the business. It need not be considered whether the State, if it sees fit, may forbid and destroy the business generally. Such a law would apply equally to aliens and citizens, and no question of conflict with the treaty would arise. The grievance here alleged is that plaintiff in error, in violation of the treaty, is denied equal opportunity.

It remains to be considered whether the business of pawnbroker is "trade" within the meaning of the treaty. Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. Hauenstein v. Lynham, 100 U. S. 483, 487; Geofroy v. Riggs, *supra*, 271; Tucker v. Alexandroff, 183 U. S. 424, 437. The ordinance defines "pawnbroker" to "mean and include every person whose business or occupation (it) is to take

and receive by way of pledge, pawn or exchange, goods, wares or merchandise, or any kind of personal property whatever, for the repayment or security of any money loaned thereon, or to loan money on deposit of personal property"; and defines "pawnshop" to "mean and include every place at which the business of pawnbroker is carried on." The language of the treaty is comprehensive. The phrase "to carry on trade" is broad. That it is not to be given a restricted meaning is plain. The clauses "to own or lease . . . shops, . . . to lease land for . . . commercial purposes, and generally to do anything incident to or necessary for trade," and "shall receive . . . the most constant protection and security for their . . . property . . . " all go to show the intention of the parties that the citizens or subjects of either shall have liberty in the territory of the other to engage in all kinds and classes of business that are or reasonably may be embraced within the meaning of the word "trade" as used in the treaty.

By definition contained in the ordinance, pawnbrokers are regarded as carrying on a "business." A feature of it is the lending of money upon the pledge or pawn of personal property which, in case of default, may be sold to pay the debt. While the amounts of the loans made in that business are relatively small and the character of property pledged as security is different, the transactions are similar to loans made by banks on collateral security. The business of lending money on portable securities has been carried on for centuries. In most of the countries of Europe, the pledge system is carried on by governmental agencies; in some of them the business is also carried on by private parties. In England, as in the United States, the private pledge system prevails. In this country, the practice of pledging personal property for loans dates back to early colonial times, and pawnshops have been regulated by state laws for more than a century. We have found no state legislation abolishing or forbidding the business. Most, if not all, of the States provide for licensing pawnbrokers and authorize regulation by municipalities. While regulation has been found necessary in the public interest, the business is not on that account to be excluded from the trade and commerce referred to in the treaty. Many worthy occupations and lines of legitimate business are regulated by state and federal laws for the protection of the public against fraudulent and dishonest practices. There is nothing in the character of the business of pawnbroker which requires it to be excluded from the field covered by the above quoted provision, and it must be held that such business is "trade" within the meaning of the treaty. The ordinance violates the treaty. The question in the present case relates solely to Japanese subjects who have been admitted to this country. We do not pass upon the right of admission or the construction of the treaty in this respect, as that question is not before us and would require consideration of other matters with which it

is not now necessary to deal. We need not consider other grounds upon which the ordinance is attacked.

Decree reversed.[30]

HEAD MONEY CASES. EDYE AND ANOTHER v. ROBERTSON, COLLECTOR; CUNARD STEAMSHIP CO. v. SAME

United States. Supreme Court. 1884.

112 *United States Reports* 580.

These suits were brought to recover back sums collected at various times as duties on immigrants arriving in the United States, under the provision of the act of August 3, 1882, 23 Stat. 214, "that there shall be levied, collected, and paid a duty of fifty cents for each and every passenger not a citizen of the United States, who shall come by steam or sail vessel from a foreign port to any port within the United States." Protests were filed against each payment, and all other steps required as foundations for the actions were taken. In the Edye Case there was a trial, jury being waived, a finding of facts, a judgment, and exceptions. 18 Fed. Rep. 135. In the Cunard Cases judgment was entered in favor of the collector on demurrer to the complaints. The causes were brought here on writs of error.

[The arguments of counsel are omitted.]

MR. JUSTICE MILLER delivered the opinion of the court. . . .

[Only so much of the opinion is reproduced as deals with the argument that the act was invalid because inconsistent with prior treaties.]

Another objection to the validity of this act of Congress, is that it violates provisions contained in numerous treaties of our government with friendly nations. And several of the articles of these treaties are annexed to the careful brief of counsel. We are not satisfied that this act of Congress violates any of these treaties, on any just construction of them. Though laws similar to this have long been enforced by the State of New York in the great metropolis of foreign trade, where four-fifths of these passengers have been landed, no complaint has been made by any foreign nation to ours, of the violation of treaty obligations by the enforcement of those laws.

But we do not place the defence of the act of Congress against this objection upon that suggestion.

We are of opinion that, so far as the provisions in that act may be found to be in conflict with any treaty with a foreign nation, they must

[30] "That treaties, made under the authority of the United States, operate by virtue of Article VI of the Constitution, *proprio vigore*, as laws, and, without the aid of State legislation, supersede conflicting State acts, was fully established in Ware v. Hylton [3 Dall. 199], decided by the Supreme Court, March 7, 1796." CRANDALL, Treaties, 2d ed., 154. See also Hauenstein v. Lynham, 100 U. S. 483.

prevail in all the judicial courts of this country. We had supposed that the question here raised was set at rest in this court by the decision in the case of The Cherokee Tobacco, 11 Wall. 616. It is true, as suggested by counsel, that three judges of the court did not sit in the case, and two others dissented. But six judges took part in the decision, and the two who dissented placed that dissent upon the ground that Congress did not intend that the tax on tobacco should extend to the Cherokee tribe. They referred to the existence of the treaty which would be violated if the statute was so construed as persuasive against such a construction, but they nowhere intimated that, if the statute was correctly construed by the court, it was void because it conflicted with the treaty, which they would have done if they had held that view. On the point now in controversy it was therefore the opinion of all the judges who heard the case. See United States v. McBratney, 104 U. S. 621–3.

The precise question involved here, namely, a supposed conflict between an act of Congress imposing a customs duty, and a treaty with Russia on that subject, in force when the act was passed, came before the Circuit Court for the District of Massachusetts in 1855. It received the consideration of that eminent jurist, Mr. Justice Curtis of this court, who in a very learned opinion exhausted the sources of argument on the subject, holding that if there were such conflict the act of Congress must prevail in a judicial forum. Taylor v. Morton, 2 Curtis, 454. And Mr. Justice Field, in a very recent case in the Ninth Circuit, that of Ah Lung, 18 Fed. Rep. 28, on a writ of *habeas corpus*, has delivered an opinion sustaining the same doctrine in reference to a statute regulating the immigration of Chinamen into this country. In the Clinton Bridge Case, Woolworth, 150, 156, the writer of this opinion expressed the same views as did Judge Woodruff, on full consideration, in Ropes v. Clinch, 8 Blatchford, 304, and Judge Wallace, in the same circuit, in Bartram v. Robertson, 15 Fed. Rep. 212.

It is very difficult to understand how any different doctrine can be sustained.

A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in trea-

ties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that "this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land." A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

But even in this aspect of the case there is nothing in this law which makes it irrepealable or unchangeable. The Constitution gives it no superiority over an act of Congress in this respect, which may be repealed or modified by an act of a later date. Nor is there anything in its essential character, or in the branches of the government by which the treaty is made, which gives it this superior sanctity.

A treaty is made by the President and the Senate. Statutes are made by the President, the Senate and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participate. And such is, in fact, the case in a declaration of war, which must be made by Congress, and which, when made, usually suspends or destroys existing treaties between the nations thus at war.

In short, we are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal. . . .

The judgment of the Circuit Court in all the cases is

Affirmed.[31]

[31] A treaty which operates as law without the aid of legislation supersedes prior conflicting statutes. The Van Bokkelen Case, Moore, Int. Arb., II, 1807; General Electric Co. v. Robertson, 21 F. (2d) 214. That a statute supersedes prior conflicting treaties, see, in addition to Head Money Cases, *supra*, Taylor v. Morton, 2 Curtis 454; The Cherokee Tobacco, 11 Wall. 616; Ropes v. Clinch, 8 Blatchf. 304; Whitney v. Robertson, 124 U. S. 190; Botiller v. Dominguez, 130 U. S. 238; Chinese Exclusion Case, 130 U. S. 581, *supra*, 828; United Shoe Machinery Co. v. Duplessis Shoe Machinery Co., 155 Fed. 842. But statutes should be construed to preserve prior treaty rights unless the treaty rights are clearly annulled. Chew Heong v. United States, 112 U. S. 536; Cheung Sum Shee v. Nagle, 268 U. S. 336; United States v. Karnuth, 24 F. (2d) 649.

SECTION 5. INTERPRETATION OF TREATIES

JOHN DOE, ON THE DEMISE OF LOT CLARK, DAVID CLARKSON, JOSEPH D. BEERS, ANDREW TALCOTT, BRANTZ MAYER, AND HARRIET HACKLEY, PLAINTIFF IN ERROR, v. JOSEPH ADDISON BRADEN

United States. Supreme Court. 1853.

16 *Howards Reports* 635.

[This was an action of ejectment brought in the District Court of the United States for the Northern District of Florida to recover Florida land. There was an instructed verdict for defendant, a bill of exceptions to the instructions, and judgment on the verdict. The case was taken to the Supreme Court on writ of error.]

[The above statement is substituted for the statement of the case in the report. Other facts are stated sufficiently in the opinion. The arguments of counsel and part of the opinion are omitted.]

MR. CHIEF JUSTICE TANEY delivered the opinion of the court.

This controversy has arisen out of the treaty with Spain by which Florida was ceded to the United States.

The suit is brought by the plaintiff in error against the defendant to recover certain lands in the State of Florida. It is an action of ejectment. And the plaintiff claims title under a grant from the King of Spain to the Duke of Alagon. This is the foundation of his title. And if this grant is null and void by the laws of the United States, the action cannot be maintained.

The treaty in question was negotiated at Washington, by Mr. Adams, then Secretary of State, and Don Luis De Onis, the Spanish Minister. It was signed on the 22d of February, 1819; and by its terms the ratifications were to be exchanged within six months from its date.

It appears, from the treaty, that the negotiations commenced on the 24th of January, 1818, by a proposition from the Spanish government to cede the Floridas to the United States. The grant to the Duke of Alagon bears date February 6th, in the same year, and consequently was made after the King of Spain had authorized his minister to negotiate a treaty for the cession of the territory, and after the negotiation had actually commenced. It embraces ten or twelve millions of acres.

The fact that this grant had been made came to the knowledge of the secretary, pending the negotiation; and he also learned that two other grants—one to the Count of Puñonrostro, and the other to Don Pedro de Vargas, each containing some millions of acres, had also been made under like circumstances. These three grants covered all or nearly all of the public domain in the territory proposed to be ceded. And the secretary naturally and justly considered that grants of this description made while the negotiation was pending, and without the knowledge or

consent of the United States, were acts of bad faith on the part of Spain, and would be highly injurious to the interests of the United States, if Florida became a part of their territory. For the possession and ownership of such vast tracts of country by three individuals would be altogether inconsistent with the principles and policy on which this government is founded. It would have greatly retarded its settlement, and diminished its value to the citizens of the United States. For no one could have become a landholder in this new territory without the permission of these individuals, and upon such conditions and at such prices as they might choose to exact.

Acting upon these considerations, the secretary insisted that if the negotiations resulted in a treaty of cession, an article should be inserted by which these three grants, and any others made under similar circumstances, should be annulled by the Spanish government.

The demand was so obviously just, and the conduct of Spain in this respect so evidently indefensible, that after much hesitation it was acceded to, and the 8th article introduced into the treaty to accomplish the object. By this article "all grants made since the 24th of January, 1818, when the first proposal on the part of his Catholic Majesty for the cession of the Floridas was made, are thereby declared and agreed to be null and void;" and all grants made before that day, are confirmed.

With this provision in it, the treaty was submitted to the Senate, who advised and consented to its ratification on the 24th of February, 1819, and it was accordingly ratified by the President.

Before, however, the ratifications were exchanged, the Secretary of State was informed that the Duke of Alagon intended to rely on a royal order, of December 17, 1817, (which is recited in the grant hereinbefore mentioned,) as sufficient to convey to him the land from that date; and upon that ground claimed that his title was confirmed and not annulled by the treaty.

The secretary, it appears, was satisfied that this royal order conveyed no interest to the Duke of Alagon; and that the grant in the sense in which that word is used in the treaty, was not made until the instrument, dated the 6th of February, 1818, was executed.

But as a claim of this character, however unfounded, would cast a cloud upon the proprietary title of the United States, and as claims might also be set up under similar pretexts under the grants to the Count of Puñonrostro and Vargas, the secretary deemed it his duty to place the matter beyond all controversy before the ratifications were exchanged. He therefore requested and received from Don Louis de Onis a written admission that these three grants were understood by both of them to have been annulled by the 8th article of the treaty; and that it was negotiated and signed under that mutual understanding between the

negotiators. And having obtained this admission, he notified the Spanish minister that he would present a declaration to that effect, upon the exchange of ratifications, and expect a similar one from the Spanish government to be annexed to the treaty.

But the King of Spain for a long time refused to make the declaration required, or to ratify the treaty with the declaration of the American government attached to it. And a great deal of irritating correspondence upon the subject took place between the two governments. Finally, however, the King of Spain ratified it on the 21st of October, 1820, and admitted, in his written ratification annexed to the treaty, in explicit terms, that it was the positive understanding of the negotiators on both sides when the treaty was signed, that these three grants were thereby annulled; and declared also that they had remained and did remain entirely annulled and invalid; and that neither of the three individuals mentioned, nor those who might have title or interest through them, could avail themselves of the grants at any time or in any manner.

With this ratification attached to the treaty, it was again submitted by the President to the Senate, who on the 19th February, 1821, advised and consented to its ratification. It was ratified, accordingly, by the President, and the ratifications exchanged on the 22d of February, 1821. And Florida, on that day, became a part of the territory of the United States, under and according to the stipulations of treaty—the rights of the United States relating back to the day on which it was signed.

We have made this statement in relation to the negotiations and correspondence between the two governments for the purpose of showing the circumstances which occasioned the introduction of the 8th article, confirming Spanish grants made before the 24th of January, 1818, and annulling those made afterwards; and also for the purpose of showing how it happened that the three large grants by name were declared to be annulled in the ratification, and not by a stipulation in the body of the treaty. But the statement is in no other respect material. For it is too plain for argument that where one of the parties to a treaty, at the time of its ratification annexes a written declaration explaining ambiguous language in the instrument or adding a new and distinct stipulation, and the treaty is afterwards ratified by the other party with the declaration attached to it, and the ratifications duly exchanged—the declaration thus annexed is a part of the treaty and as binding and obligatory as if it were inserted in the body of the instrument. The intention of the parties is to be gathered from the whole instrument, as it stood when the ratifications were exchanged.

It is not material, therefore, to inquire whether the title of the Duke of Alagon takes date from the royal order of December 17th, 1817, or

from the grant subsequently made on the 6th of February, 1818. In either case the treaty by name declares it to be annulled.

. . . The judgment of the District Court must therefore be affirmed.[32]

[32] See also Interpretation of a Regulation of the Commercial Convention and Report signed at Berne, October 20, 1906, France and Switzerland, 6 Am. Jour. Int. L. 995. *Cf.* New York Indians v. United States, 170 U. S. 1; Fourteen Diamond Rings v. United States, 183 U. S. 176; 13 Am. Jour. Int. L. 767.

"It is a general rule of interpretation of written contracts, applicable to treaties, that prior negotiations are merged in the written instrument, and cannot be resorted to for the purpose of contradicting or explaining its plain provisions." CRANDALL, Treaties, 2d ed., 377. "There is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself." The Lotus Case, P. C. I. J. Publ., Series A, Judgment No. 9, p. 16. See also The S. S. "Wimbledon," P. C. I. J. Publ., Series A, Judgment No. 1.

"However, in case of ambiguity or doubt in the application of the terms of a treaty, reference is frequently made to the contemporaneous declarations of the negotiators who framed the treaty, and to prior negotiations, not to make a treaty where the parties have failed to do so, nor to change the terms of the treaty actually made, but to determine the general object of the negotiations, the particular sense in which the terms, otherwise uncertain of application, were used at the time, or the conditions as they existed at the time of the conclusion of the treaty." CRANDALL, *op. cit.*, 377. See United States v. Texas, 162 U. S. 1; Terrace v. Thompson, 263 U. S. 197, 222; Alaskan Boundary Arbitration, Great Britain and United States, Proceedings, U. S. Sen. Doc., No. 162, 58th Congress, 2d Session; Aroa Mines Case, Venez. Arb., 344; North Atlantic Coast Fisheries Arbitration, Great Britain and United States, Scott, Hague Court Reports, 141; Panama Tolls, Great Britain and United States, U. S. For. Rel. (1912) 467, *ibid.* (1913) 540, *ibid.* (1914) 317; HYDE, II, §§531–534.

On the respective functions of the political departments and the courts in the interpretation of treaties, Crandall says: "Where the treaty operates infraterritorially, as in the United States, or becomes by subsequent enactment a part of the law of the land, questions respecting its meaning in cases involving rights between individuals under it as a municipal law are determined by the courts. In those states where the act to carry the treaty into effect, and not the treaty itself, comes before the courts, the construction of the treaty is a function of the legislative or the executive branch, as the case may be, not of the judicial. And in the United States, although a treaty operates by its own force as municipal law binding on the courts equally with an act of the legislature, the courts will follow the determinations of the political departments of the government, the executive and legislative, in questions involving primarily the external operation of the treaty as an international compact. In controversies with a foreign nation respecting boundaries and territorial jurisdiction, as defined by treaty, the courts have, for instance, frequently declared that they will not review a determination in this respect of the executive and legislative branches, clearly expressed, to ascertain whether it is right or wrong, but will follow it." Treaties, 2d ed., 364. See U. S. For. Rel. (1910) 731. *Cf.* Charlton v. Kelly, 229 U. S. 447, 468; Chase v. United States, 222 Fed. 593, 596.

WESTLAKE, INTERNATIONAL LAW

Second Edition, Part I, Peace, pages 293–294. 1910.

On the whole we incline to think that the interpretation of international contracts is and ought to be less literal than that usually given in English courts of law to private contracts and acts of parliament. In the first place, English drafting is more minutely careful, and correspondingly English interpretation is more literal, than is common in those countries to which most of the ministers and diplomats who are responsible for the wording of international contracts belong. And secondly, the nature of the matters dealt with by those eminent functionaries, and the peculiar conditions under which they work, must be considered. A style of drafting accommodated to the expectation of a very literal interpretation would necessitate the suggestion and discussion of so many possible contingencies, as would be likely to cause needless friction between the representatives of countries not always very amicable. It seems best in the interest of peace that, when an agreement on broad lines has been reached, it should be expressed in language not striving to hide a felt doubt, but on the other hand not meticulously seeking occasions for doubt; and to such a style of drafting, which we believe to be that most common in treaties, a large and liberal spirit of interpretation will reasonably correspond.[33]

[33] "There is no place for the refinements of the courts in the rough jurisprudence of nations." HALL, 8th ed., 395 n. "Where a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred. Shanks v. Dupont, 3 Pet. 242. Such is the settled rule of this court." Hauenstein v. Lynham, 100 U. S. 483, 487. See also Geofroy v. Riggs, 133 U. S. 258, 271, *infra*, 1076, 1078; In re Ross, 140 U. S. 453, 475; Tucker v. Alexandroff, 183 U. S. 424, 437, *infra*, 1087, 1089; Asakura v. Seattle, 265 U. S. 332, 342, *supra*, 1065, 1066; Ford v. United States, 273 U. S. 593.

Cf. interpretations of the most-favoured-nation clause: Bartram v. Robertson, 122 U. S. 116; Whitney v. Robertson, 124 U. S. 190; 6 Op. Atty. Gen. 148; HORNBECK, "Most-Favored Nation Clause," 3 Am. Jour. Int. L. 395, 619, 797; MOORE, Dig. Int. L., V, 257; OPPENHEIM, 4th ed., I, §580; WICKERSHAM, Report on Most-Favoured-Nation Clause, League of Nations, Committee of Experts on Codification, L. of N. Doc., V. Legal, 1927, V. 10, 22 Am. Jour. Int. L. Spec. Suppl. 133, 134.

"In the opinion of the Court, the rules as to a strict or liberal construction of treaty stipulations can be applied only in cases where ordinary methods of interpretation have failed. It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd." Permanent Court of International Justice, Polish Postal Service in Danzig, P. C. I. J. Publ., Series B, Advisory Opinion No. 11, p. 39. See Marryat v. Wilson, 1 Bos. & Pul. 430; Ware v. Hylton, 3 Dall. 199, 239, 249; Sullivan v. Kidd, 254 U. S. 433, 439.

Geofroy v. Riggs

United States. Supreme Court. 1890.

133 *United States Reports* 258.

[Part of the statement of the case, the arguments of counsel, and part of the opinion are omitted.]

On the 19th day of January, 1888, T. Lawrason Riggs, a citizen of the United States and a resident of the District of Columbia, died at Washington, intestate, seized in fee of real estate of great value in the District. The complainants are citizens and residents of France and nephews of the deceased. On the 12th of March, 1872, the sister of the deceased, then named Kate S. Riggs, intermarried with Louis de Geofroy, of France. She was at the time a resident of the District of Columbia and a citizen of the United States. He was then and always has been a citizen of France. The complainants are the children of this marriage, and are infants now residing with their father in France. One of them was born July 14, 1873, at Pekin, in China, whilst his father was the French minister plenipotentiary to that country, and was there only as such minister. The other was born October 18, 1875, at Cannes, in France. Their mother, who was a sister of all the defendants except Medora, wife of the defendant E. Francis Riggs, died February 7, 1881. The deceased, T. Lawrason Riggs, left one brother, E. Francis Riggs, and three sisters, Alice L. Riggs, Jane A. Riggs and Cecilia Howard, surviving him, but no descendants of any deceased brother or deceased sister, except the complainants.

The defendants, with the exception of Cecilia Howard, are, and always have been, citizens of the United States and residents of the District of Columbia. Cecilia Howard, in 1867, intermarried with Henry Howard, a British subject, and since that time has resided with him in England.

The real property described in the bill of complaint cannot be divided without actual loss and injury, and the interest of the complainants, if they have any, as well as of the defendants, in the property, would be promoted by its sale and a division of the proceeds.

To the bill of complaint setting up these facts and praying a sale of the premises described and a division of the proceeds among the parties to the suit according to their respective rights and interests, the defendants demurred, on the ground that the complainants were incapable of inheriting from their uncle any interest in the real estate. The Supreme Court of the District of Columbia sustained the demurrer and dismissed the bill. From the decree the case is brought to this court on appeal. . . .

Mr. Justice Field, after stating the case, delivered the opinion of the court. . . .

The question presented for solution, therefore, is whether the complainants, being citizens and residents of France, inherit an interest in

the real estate in the District of Columbia of which their uncle, a citizen of the United States and a resident of the District, died seized. In more general terms the question is: can citizens of France take land in the District of Columbia by descent from citizens of the United States?

The complainants contend that they inherit an estate in the property described, by force of the stipulation of article 7 of the convention between the United States and France, concluded February 23, 1853, and the provisions of the act of Congress of March 3, 1887, to restrict the ownership of real estate in the Territories to American citizens. . . .

. . . The 7th article of that convention is as follows:

"In all the States of the Union, whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as the citizens of the United States. They shall be free to dispose of it as they may please, either gratuitously or for value received, by donation, testament, or otherwise, just as those citizens themselves; and in no case shall they be subjected to taxes on transfer, inheritance, or any others different from those paid by the latter, or to taxes which shall not be equally imposed.

"As to the States of the Union, by whose existing laws aliens are not permitted to hold real estate, the President engages to recommend to them the passage of such laws as may be necessary for the purpose of conferring this right.

"In like manner, but with the reservation of the ulterior right of establishing reciprocity in regard to possession and inheritance, the government of France accords to the citizens of the United States the same rights within its territory in respect to real and personal property, and to inheritance, as are enjoyed there by its own citizens." 10 Stat. 996.

This article is not happily drawn . It leaves in doubt what is meant by "States of the Union." Ordinarily these terms would be held to apply to those political communities exercising various attributes of sovereignty which compose the United States, as distinguished from the organized municipalities known as Territories and the District of Columbia. And yet separate communities, with an independent local government, are often described as states, though the extent of their political sovereignty be limited by relations to a more general government or to other countries. Halleck on Int. Law, c. 3, §§5, 6, 7. The term is used in general jurisprudence and by writers on public law as denoting organized political societies with an established government. Within this definition the District of Columbia, under the government of the United States, is as much a State as any of those political communities which compose the United States. Were there no other territory under the government of the United States, it would not be questioned that the

District of Columbia would be a State within the meaning of international law; and it is not perceived that it is any less a State within that meaning because other States and other territory are also under the same government. In Hepburn v. Ellzey, 2 Cranch, 445, 452, the question arose whether a resident and a citizen of the District of Columbia could sue a citizen of Virginia in the Circuit Court of the United States. The court, by Chief Justice Marshall, in deciding the question, conceded that the District of Columbia was a distinct political society, and therefore a State according to the definition of writers on general law; but held that the act of Congress in providing for controversies between citizens of different States in the Circuit Courts, referred to that term as used in the Constitution, and therefore to one of the States composing the United States. A similar concession, that the District of Columbia, being a separate political community, is, in a certain sense, a State, is made by this court in the recent case of Metropolitan Railroad Co. v. District of Columbia, 132 U. S. 1, 9, decided at the present term.

Aside from the question in which of these significations the terms are used in the convention of 1853, we think the construction of article 7 is free from difficulty. In some States aliens were permitted to hold real estate, but not to take by inheritance. To this right to hold real estate in some States reference is had by the words "permit it" in the first clause, and it is alluded to in the second clause as not permitted in others. This will be manifest if we read the second clause before the first. This construction, as well observed by counsel, gives consistency and harmony to all the provisions of the article, and comports with its character as an agreement intended to confer reciprocal rights on the citizens of each country with respect to property held by them within the territory of the other. To construe the first clause as providing that Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as citizens of the United States, in States, so long as their laws permit such enjoyment, is to give a meaning to the article by which nothing is conferred not already possessed, and leaves no adequate reason for the concession by France of rights to citizens of the United States, made in the third clause. We do not think this construction admissible. It is a rule, in construing treaties as well as laws, to give a sensible meaning to all their provisions if that be practicable. "The interpretation, therefore," says Vattel, "which would render a treaty null and inefficient cannot be admitted;" and again, "it ought to be interpreted in such a manner as that it may have its effect, and not prove vain and nugatory." Vattel, Book II, c. 17. As we read the article it declares that in all the States of the Union by whose laws aliens are permitted to hold real estate, so long as such laws remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same

manner as citizens of the United States. They shall be free to dispose of it as they may please—by donation, testament, or otherwise—just as those citizens themselves. But as to the States by whose existing laws aliens are not permitted to hold real estate, the treaty engages that the President shall recommend to them the passage of such laws as may be necessary for the purpose of conferring that right.

In determining the question in what sense the terms "States of the Union" are used, it is to be borne in mind that the laws of the District and of some of the Territories, existing at the time the convention was concluded in 1853, allowed aliens to hold real estate. If, therefore, these terms are held to exclude those political communities, our government is placed in a very inconsistent position—stipulating that citizens of France shall enjoy the right of holding, disposing of, and inheriting, in like manner as citizens of the United States, property, real and personal, in those States whose laws permit aliens to hold real estate; that is, that in those States citizens of France, in holding, disposing of, and inheriting property, shall be free from the disability of alienage; and, in order that they may in like manner be free from such disability in those States whose existing laws do not permit aliens to hold real estate, engaging that the President shall recommend the passage of laws conferring that right; while, at the same time, refusing to citizens of France holding property in the District and in some of the Territories, where the power of the United States is in that respect unlimited, a like release from the disability of alienage, thus discriminating against them in favor of citizens of France holding property in States having similar legislation. No plausible motive can be assigned for such discrimination. A right which the government of the United States apparently desires that citizens of France should enjoy in all the States, it would hardly refuse to them in the District embracing its capital, or in any of its own territorial dependencies. By the last clause of the article the government of France accords to the citizens of the United States the same rights within its territory in respect to real and personal property and to inheritance as are enjoyed there by its own citizens. There is no limitation as to the territory of France in which the right of inheritance is conceded. And it declares that this right is given in like manner as the right is given by the government of the United States to citizens of France. To ensure reciprocity in the terms of the treaty, it would be necessary to hold that by "States of the Union" is meant all the political communities exercising legislative powers in the country, embracing not only those political communities which constitute the United States, but also those communities which constitute the political bodies known as Territories and the District of Columbia. It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality

and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. Hauenstein v. Lynham, 100 U. S. 483, 487. The stipulation that the government of France in like manner accords to the citizens of the United States the same rights within its territory in respect to real and personal property and inheritance as are enjoyed there by its own citizens, indicates that that government considered that similar rights were extended to its citizens within the territory of the United States, whatever the designation given to their different political communities.

We are, therefore, of opinion that this is the meaning of the article in question—that there shall be reciprocity in respect to the acquisition and inheritance of property in one country by the citizens of the other, that is, in all political communities in the United States where legislation permits aliens to hold real estate, the disability of Frenchmen from alienage in disposing and inheriting property, real and personal, is removed, and the same right, of disposition and inheritance of property, in France, is accorded to citizens of the United States, as are there enjoyed by its own citizens. This construction finds support in the first section of the act of March 3d, 1887. 24 Stat. 476, c. 340. That section declares that it shall be unlawful for any person or persons not citizens of the United States, or who have not declared their intention to become citizens, to thereafter acquire, hold or own real estate, or any interest therein, in any of the Territories of the United States or in the District of Columbia, except such as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts previously created. There is here a plain implication that property in the District of Columbia and in the Territories may be acquired by aliens by inheritance under existing laws; and no property could be acquired by them in the District by inheritance except by virtue of the law of Maryland as it existed when adopted by the United States during the existence of the convention of 1800 or under the 7th article of the convention of 1853. Our conclusion is, that the complainants are entitled to take by inheritance an interest in the real property in the District of Columbia of which their uncle died seized. The decree of the court below will, therefore, be

Reversed and the cause remanded, with direction to overrule the demurrer of the defendants; and it is so ordered.[34]

[34] See In re Ross, 140 U. S. 453. *Cf.* Sullivan v. Kidd, 254 U. S. 433.

The Amiable Isabella, Munos, Claimant

United States. Supreme Court. 1821.

6 *Wheaton's Reports* 1.

Appeal from the Circuit Court of North Carolina.

This was the case of a ship and cargo, sailing under Spanish colours, and captured by the privateer Roger, Quarles, master, on an ostensible voyage from Havana to Hamburg, but really destined for London, or with an alternative destination, and orders to touch in England for information as to markets, and further instructions. The ship sailed from the Havana, on the 24th of November, 1814, under convoy of the British frigate Ister, with which she parted company on the 1st of December, the frigate having gone in chace of an American privateer; and on the 3d of December, was captured by the privateer Roger, and carried into Wilmington, North Carolina, for adjudication. The ship and cargo were condemned as prize of war in the District Court of North Carolina, and the sentence was, after the admission of farther proof in the Circuit Court, affirmed by that Court. An appeal was then allowed to this Court, with permission to introduce new proof here, if this Court should choose to receive it. . . .

[Part of the statement of the case, the arguments of counsel, and part of the opinion are omitted.]

At the present term the opinion of the Court was delivered by

Mr. Justice Story. This cause was heard upon the whole evidence, introduced by both parties, at the last term; and as it embraced several points of great importance and difficulty, the Court, *ex mero motu*, directed one of those points to be reargued; and another, including a final construction of the Spanish treaty in matters of deep and universal interest, was reargued upon the application of the Government itself. The last argument was heard at so late a period of the session, that it was found impracticable for all of us to prepare deliberate opinions, and the cause was ordered by the Court to be continued for advisement. The Court has now come to a result, which I am directed to pronounce. . . .

The captors contend, that the whole evidence establishes, that the ship and cargo are enemies property, the property of British subjects disguised under Spanish documents, and bound to a British port. That the voyage had its origin in London, and was to terminate there; and that the usual frauds of false papers, false destination, and suppression of evidence, have been resorted to for the purpose of giving a neutral character to hostile interests.

The counsel for the claimant deny the matter of fact, and assert, that the proprietary interest of ship and cargo is *bona fide* Spanish; and endeavour, with great ingenuity and force, to explain away the

difficulties with which it is admitted, on all sides, this part of the cause is surrounded. If this ground should be thought not to be entirely and satisfactorily made out, the counsel for the claimant farther contend, that the ship was duly documented as a Spanish ship, according to the stipulations of the Spanish treaty of 1795; and that the effect of those stipulations is to preclude all inquiry into the proprietary interest of ship and cargo. Of the former, because the passport is conclusive evidence of the national character and ownership of the ship, which all persons are estopped to deny; of the latter, because, by the treaty, free ships make free goods, and the national character of the cargo becomes wholly immaterial.

To this point, which, if settled one way, is decisive of the cause, the counsel for the captors have given several answers. 1. That the passport of this ship was obtained by fraud, and this is always inquirable into, and vitiates all, even the most sacred instruments and records. 2. That the passport is not conformable to the treaty, not having been issued by royal authority, or authenticated by the royal Government, but issued by a mere colonial Governor; and that, such as it is, it does not state the ship to be owned by Spanish subjects, which is indispensable under the treaty. 3. That the substituted proof required by the 17th article of the treaty, where the passport is not regular, must be such as is subject to the thorough examination of the Prize Court. 4. That the form of the passport, referred to in the 17th article of the treaty, never having been annexed to it by the contracting parties, that article, so far as it purports to give any effect to passports, is inoperative and imperfect, and the imperfection cannot be supplied by any judicial tribunal.

Such are the leading propositions, pressed with great ability and earnestness into the discussion of this cause, by the respective parties. They embrace principles of international law of vast importance; they embrace private interests of no inconsiderable magnitude; and they embrace the interpretation of a treaty which we are bound to observe with the most scrupulous good faith, and which our Government could not violate without disgrace, and which this court could not disregard without betraying its duty. It need not be said, therefore, that we feel the responsibility of our stations on this occasion, and that in delivering our opinion to the world, we have pondered on it with great solicitude and deliberation, and have looked to consequences no farther than the sound principles of interpretation and international justice required us to look.

The point to which the Court will first direct its attention, is that last made, *viz.* whether the 17th article of the treaty of 1795, so far as it respects passports, is inoperative and imperfect in consequence of the omission to annex the form of the passport to the treaty. This is a very delicate and interesting question.

The 17th article provides, "that in case either of the parties hereto shall be engaged in a war, the ships and vessels belonging to the subjects or people of the other party, must be furnished with sea letters or passports, (*patentes de mar o pasaportes,*) expressing the name, property, (*propiedad,*) and bulk of the ship; as, also, the name and place of habitation of the master or commander of the said ship, that it may appear thereby, that the ship really and truly belongs to the subjects of one of the parties, *which passports* (*dichos pasaportes*) *shall be made out and granted according to the form annexed to this treaty.*" The article proceeds to declare, "that such ships, being laden, are to be provided not only with passports, as above mentioned, but also with certificates containing the several particulars of the cargo, the place whence the ship sailed, that so it may be known whether any forbidden or contraband goods be on board the same; which certificates shall be made out by the officers of the place whence the ship sailed, in the accustomed form; and if any one shall think it fit or advisable to express in the said certificate, the person to whom the goods on board belong, he may freely do so; *without which requisites* they may be sent to one of the ports of the other contracting party, and adjudged by the competent tribunal, according to what is above set forth, that all the circumstances of the above omission, having been well examined, they shall be adjudged to be legal prizes, unless they shall give legal satisfaction of their property by testimony entirely equivalent." In point of fact, no form of a passport was made out and annexed to the treaty. The case, then, now before us, is not within the letter of the treaty, for as no form is prescribed, the documents found on board cannot be compared with any form; and until that comparison is made, it is impossible to say whether the stipulations originally intended by the treaty have been exactly and literally complied with or not. There is no room here left for interpretation, on account of ambiguous language of the parties. They have expressed themselves in the clearest manner, and it is to the passport, whose form is to be annexed to the treaty, and to none other, that the effect intended by the treaty, whatever that may be, either as conclusive or *prima facie* evidence of proprietary interest, is attributed. Into the reasons why this form was omitted to be annexed to the treaty, we are not permitted judicially to inquire. It may have been by accident, or by design, from difference of opinion as to what should be the solemnities accompanying it, or from a willingness to leave it to future negotiation. Can this Court annex a form to the treaty? Can it supply the deficiency of the treaty, and give effect to it in the same manner, as if no form were referred to? Can it look to the stipulations, and decide for itself what the parties regarded as substance, and what as mere form? Can it say that the stipulations in the text would have been agreed to without the auxiliary form of the passport? Can it decide judicially,

that under no circumstances the form of the passport could be of the essence of the stipulations? These are grave questions, and are not to be lightly answered. They deserve and require deliberate consideration. We have given it; and our opinion will now be delivered.

In the first place, this Court does not possess any treaty-making power. That power belongs by the constitution to another department of the Government; and to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subjectmatter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind. The parties who formed this treaty, and they alone, have a right to annex the form of the passport. It is a high act of sovereignty, as high as the formation of any other stipulation of the treaty. It is a matter of negotiation between the Governments. The treaty does not leave it to the discretion of either party to annex the form of the passport; it requires it to be the joint act of both; and that act is to be expressed by both parties in the only manner known between independent nations—by a solemn compact through agents specially delegated, and by a formal ratification.

Nor is there any thing strange or singular in leaving matters of this sort to be settled by future negotiations. In our treaty with Prussia of 1785, the 14th article contains a provision as to passports, in substance like that of the 17th article of our treaty with Spain, except that it declares that these "passports shall be made out in good and due form, to be settled by conventions between the parties, whenever occasion shall require." This stipulation manifestly contemplates that the form of the passport is to be a solemn act of the treaty-making power of both Governments, and that neither Government has authority in its discretion to use a form which shall be binding, without its consent, upon the other contracting party.

In the next place, this Court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualifications or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties, and whether they belong to the essence or the modal parts of the treaty, equally give

the rule to judicial tribunals. The same powers which have contracted, are alone competent to change or dispense with any formality. The doctrine of a performance *cy pres*, so just and appropriate in the civil concerns of private persons, belongs not to the solemn compacts of nations, so far as judicial tribunals are called upon to interpret or enforce them. We can as little dispense with forms as with substance.

In the next place, we cannot admit that the annexation of the form of the passport was, in itself, (supposing we had a right to inquire into it) a matter of small moment or importance, so that the omission could be dispensed with, as not belonging to the substance of the treaty. It was competent to the parties, by the particularity of the form, to have qualified the general expressions of the article, and to have made that determinate, which, upon the face of the article, stands indeterminate. It is, for instance, indeterminate upon the face of the article, whether there is to be a specification of the names of the owners of the ship, or only a general declaration that the owners are Americans or Spaniards. It has also been contended here, and is certainly susceptible of doubt, whether the passport was to express the individual ownership, or the national character of the ship. So the solemnities to be observed in granting the passport, the oaths to be made by the parties, the persons by whom they were to be verified, are all left indeterminate by the treaty. These might have been, and looking to the requisitions of other treaties, must have been explained and settled by the form annexed to this treaty. The 25th article of the Dutch treaty of 1782, is substantially the same as the 17th article of the Spanish treaty; and the form of the passport, certificate, and sea letter annexed to that treaty, reduce to a perfect certainty every circumstance which has been already mentioned. Other qualifications and limitations might have been added, in the pleasure of the parties. It is impossible, therefore, for this Court, judicially, to say what such passport might or would have contained. We may indeed conjecture, but in this conjecture we may err; and to assert what it would be, *in literis*, would be to exercise a sovereign control over the compact itself.

Nor are the circumstances already stated, mere form, or diplomatic ceremony. They might well have entered into the very substance of the stipulation. The counsel for the claimant alleges, that the passport, intended by the treaty, was to import perfect, unimpeachable verity; that it was to have a sanctity beyond that which is granted to any other solemn instrument. Fraud would not vitiate it, nor the most direct, unequivocal breach of good faith, or abuse of the passport, bring its protecting virtue into question. Assuming for the purpose of argument, that this is true, the form of the passport, and the solemnities accompanying it, were of the deepest interest and importance to both nations. It was vital to the treaty; vital to the acknowledged rights derived under

the law of nations. The immunity intended by the treaty, in this view of it, was a derogation from the general belligerent rights of both parties. They might be willing to confide the issuing of such passports to the Spanish high officers of state with the royal approbation and signature, or with the corresponding signatures of our own Secretary of State and President. They might have full faith and confidence, that under such guards, the danger of abuses would be very much diminished, if not entirely checked. But they might not be willing to trust to the integrity, discretion, and watchfulness of subordinate agents; to officers of the customs; to colonial Governors, or commanders in distant Provinces. In point of fact, our own passports have issued under the authority and signatures of our highest executive officers. What reason has this Court to presume that our Government would accept of a verification by inferior officers of Spain? What reason has this Court to presume, that our Government would have been satisfied with a passport signed by a colonial Governor for want of royal passports? It has not been so stipulated in the treaty. It has not, in terms, dispensed with the annexation of the form of the passport to the treaty. Even if one Government had been willing to dispense with it, it remains to be shown, that the other was also willing. And if both were willing, it would still remain to be shown, that the act of dispensation was consummated by a solemn renunciation; for the obligations of the treaty could not be changed or varied but by the same formalities with which they were introduced; or at least by some act of as high an import, and of as unequivocal an authority. All that can be said in the present case, is, that the subject of the annexation of the passport was taken *ad referendam* by the parties. They had competent authority so to do; and this Court is bound to presume, that they had good reasons for their conduct. It is far more consistent with every fair interpretation of the acts of the Government, to suppose, that the form of the passport was postponed with a view to the suspension of the article until the subject was more deliberately considered, or could be more conveniently attended to, than to suppose that words of reference were used without meaning, and forms carrying with them such important and interesting solemnities, and such obligatory force and dignity, were hastily abandoned at the very moment they were studiously sealed to the text. Unless this Court is prepared to say, that all forms and solemnities were useless and immaterial; that neither Government had a right to insist upon a form after having assented to the terms of the article; that a judicial tribunal may dispense with what its own notions of equity may deem unimportant in a treaty, though the parties have chosen to require it; it cannot consider the 17th article of this treaty as complete or operative, until the form of the passport is incorporated into it by the joint act of both Governments.

Upon the whole, it is the opinion of the Court, in which opinion six judges agree, that the form of the passport not having been annexed to the 17th article of the treaty, the immunity, whatever it was, intended by that article, never took effect; and therefore, in examining and deciding on the case before us, we must be governed by the general law of prize.

This view of the case renders it unnecessary to consider the other points made by the counsel for the captors, as to the effect of the treaty; and we therefore give no opinion upon them. . . .

[In an omitted part of the opinion the court considered the question of proprietary interest and concluded that ship and cargo were enemy property disguised under neutral documents and so liable to condemnation.]

It is the judgment of the Court, that the decree of the Circuit Court, condemning the ship and cargo, be affirmed, with costs. From so much of this opinion as respects the question of proprietary interest of vessel and cargo, three Judges dissent.

[The dissenting opinion of Mr. Justice Johnson is omitted.]

Tucker v. Alexandroff

United States. Supreme Court. 1902.

183 *United States Reports* 424.

This was a writ of *habeas corpus* issued upon the petition of Alexandroff, to inquire into the cause of his detention by Robert C. Motherwell, keeper of the Philadelphia County Prison, and Captain Vladimir Behr, master of the Russian cruiser Variag.

The petition set forth that the petitioner was illegally detained upon a commissioner's warrant, issued upon the affidavit of Captain Behr, to the effect that he was a duly engaged seaman of the Russian cruiser Variag, whose term of service had not expired; and that he had on or before April 25, 1900, deserted from said vessel, without any intention of returning thereto. Petitioner further averred that on May 24, 1900, he had declared his intention before the proper authorities to become a citizen of the United States, and to renounce his allegiance to the Emperor of Russia, of whom he was then a subject; that he had never deserted the Variag and had "never set his foot on that vessel as a seaman thereof." . . .

[Part of the statement of the case, the names of counsel, and part of the opinion are omitted.]

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

Upon the facts of this case, the District Court and Court of Appeals were agreed in the opinion that neither under terms of the treaty of 1832 with Russia nor upon principles of international comity could the relator be delivered over to the master of the Variag as a deserter.

In committing him to the Philadelphia County Prison, the commissioner acted in pursuance of Rev. Stat. sec. 5280, which provides as follows: "Sec. 5280. On application of a consul or vice-consul of any foreign government having a treaty with the United States stipulating for the restoration of seamen deserting, made in writing, stating that the person therein named has deserted from a vessel of any such government, while in any port of the United States, and on proof by the exhibition of the register of the vessel, ship's roll, or other official document, that the person named belonged, at the time of desertion, to the crew of such vessel, it shall be the duty of any court, judge, commissioner of any Circuit Court, justice, or other magistrate, having competent power, to issue warrants to cause such person to be arrested for examination." The procedure is then set forth.

The facts were, in substance, that Alexandroff entered the Russian naval service as a conscript, in 1896, at the age of seventeen, and was assigned to the duties of an assistant physician. Some time in October, 1899, an officer and a detail of fifty-three men, among whom was Alexandroff, were sent from Russia to Philadelphia to take possession of and man the Variag, then under construction by the firm of Cramp & Sons, in that city. The Variag was still upon the stocks when the men arrived in Philadelphia. She was, however, launched in October or November, 1899, and at the time Alexandroff deserted was lying in the stream still under construction, not yet having been accepted by the Russian government. Alexandroff left Philadelphia without leave April 20, 1899, went to New York, and there renounced his allegiance to the Emperor of Russia, declaring his intentions of becoming a citizen of the United States. He was subsequently arrested upon the written request of the Russian vice-consul, and on June 1, 1900, was committed upon a mittimus stating that he had been charged with desertion from the Imperial Russian cruiser Variag, upon the complaint of the captain, in accordance with the terms of the treaty between the United States and Russia.

The vice-consul, who prosecutes this appeal on behalf of the Russian government, relies chiefly upon Art. IX of the treaty of December, 1832, which reads as follows (8 Stat. 444): "The said Consuls, Vice-Consuls and Commercial Agents are authorized to require the assistance of the local authorities, for the search, arrest, detention and imprisonment of the deserters from the ships of war and merchant vessels of their country. For this purpose they shall apply to the competent tribunals, judges and officers, and shall in writing demand said deserters, proving by the

exhibition of the registers of the vessels, the rolls of the crews, or by other official documents, that such individuals formed part of the crews; and, this reclamation being thus substantiated, the surrender shall not be refused." . . .

While desertion is not a crime provided for by any of our numerous extradition treaties with foreign nations, the arrest and return to their ships of deserting seamen is no novelty either in treaties, legislation or general international jurisprudence. The ninth article of the treaty with the government of France, entered into November 14, 1788, before the adoption of the Constitution, contained a stipulation that "the Consuls and Vice-Consuls may cause to be arrested the captains, officers, mariners, sailors and all other persons, being part of the crews of the vessels of their respective nations, who shall have deserted from the said vessels, in order to send them back and transport them out of the country," specifying the procedure. 8 Stat. 106, 112. The same provision was contained in subsequent treaties with France, of June 24, 1822, and February 23, 1853, and it was to carry these and similar treaties into effect that the act of 1829, reproduced in Rev. Stat. sec. 5280, was adopted. Similar conventions were entered into with Brazil in 1828, Mexico in 1831, Chili in 1832, Greece in 1837, Bolivia in 1858, Austria in 1870, Belgium in 1880, and at different times with some seventeen or eighteen other powers, and finally by a special treaty with Great Britain, ratified June 3, 1892. In short, it may be said that with the exception of China, the Argentine Republic, and possibly a few others, there is not a maritime nation in the world with which we have not entered into a convention for the arrest and delivery over of deserting seamen. The multitude of these conventions is such as to indicate a pressing necessity that masters of vessels should have some recourse to local laws to prevent their being entirely stripped of their crews in foreign ports. . . .

We think, then, that the rights of the parties must be determined by the treaty, but that this particular convention being operative upon both powers and intended for their mutual protection, should be interpreted in a spirit of *uberrima fides*, and in a manner to carry out its manifest purpose. Taylor on International Law, sec. 383. As treaties are solemn engagements entered into between independent nations for the common advancement of their interests and the interests of civilization, and as their main object is not only to avoid war and secure a lasting and perpetual peace, but to promote a friendly feeling between the people of the two countries, they should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity, so far as it can be done without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation of our jurisprudence. It is said by Chancellor Kent in his Commentaries (vol. 1, p. 174): "Treaties of every kind are to receive a fair and liberal

interpretation according to the intention of the contracting parties, and are to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts."

What, then, are the stipulations to which we must look for the solution of the question involved in this case? They are found in the ninth article of the treaty, which authorizes the arrest and surrender of "deserters from the ships of war and merchant vessels of their country." It is insisted, however, that this article is no proper foundation for the arrest of Alexandroff for three reasons: First, that the Variag was not a Russian ship of war; second, that Alexandroff was not a deserter from such ship; and, third, that his membership of such crew was not proven by the exhibition of registers of vessels, the rolls of the crew, or by other official documents. The case depends upon the answers to these questions.

1. At the time Alexandroff arrived in Philadelphia, the Variag was still upon the stocks. Whatever be the proper construction of the word under the treaty, she was not then a ship in the ordinary sense of the term, but shortly thereafter and long before Alexandroff deserted, she was launched, and thereby became a ship in its legal sense. A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject only to mechanics' liens created by state law and enforcible in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name. Her owner's agents may not be her agents, and her agents may not be her owner's agents. The China, 7 Wall. 53; Thorp v. Hammond, 12 Wall. 408; Workman v. New York City, 179 U. S. 552; The Little Charles, 1 Brock. 347, 354; The John G. Stevens, 170 U. S. 113, 120; Homer Ramsdell Co. v. Comp. Gen. Trans., 182 U. S. 406. She is capable, too, of committing a tort, and is responsible in damages therefor. She may also become a quasi bankrupt; may be sold for the payment of her debts, and thereby receive a complete discharge from all prior liens, with liberty to begin a new life, contract further obligations, and perhaps be subjected to a second sale. We have had frequent occasion to notice the distinction between a vessel before and after she is launched. In The Jefferson, People's Ferry Company v. Beers, 20 How. 393, it was held that the admiralty jurisdiction did not extend to cases where a lien was claimed for work done and materials used in the construction of a vessel; while the cases holding that

for repairs or alterations, supplies or materials, furnished after she is launched, suit may be brought in a court of admiralty, are too numerous for citation.

So sharply is the line drawn between a vessel upon the stocks and a vessel in the water, that the former can never be made liable in admiralty, either *in rem* against herself or *in personam* against her owners, upon contracts or for torts, while if, in taking the water during the process of launching, she escapes from the control of those about her, shoots across the stream and injures another vessel, she is liable to a suit *in rem* for damages. The Blenheim, 2 W. Rob. 421; The Vianna, Swab. 405; The Andalusian, 2 P. D. 231; The Glengarry, 2 P. D. 235; The George Roper, 8 P. D. 119; Baker v. Power, 14 Fed. Rep. 483.

Inasmuch as the Variag had been launched and was lying in the stream at the time of Alexandroff's desertion, we think she was a ship within the meaning of the treaty. . . .

We are also of opinion that she was a Russian ship of war within the meaning of the treaty. The contract under which she was built not only provided that she was to be built for the Imperial Russian Government, but should be constantly, during the continuance of the contract, inspected by a board of inspection appointed by the Russian Ministry of Marine, who should have full liberty to enter the premises of the contractors for such purpose; and that speed trials should be made by the contractors in the presence of such board of inspection. The tenth article of the contract reads as follows:

"Art. 10. The contractors agree, that the vessel to be built, as aforesaid, whether finished or unfinished, and all steel, iron, timber and other materials as may be required by the contractors, and be intended for the construction of the said ship, and which may be brought upon the premises of the contractors, shall immediately thereupon become, and be, the exclusive property of the Russian Ministry of Marine. The flag of the Imperial Russian Government shall be hoisted on the said ship, whenever desired by the board of inspection, as evidence that the same is said government's exclusive property, and the Russian Ministry of Marine may at any time appoint an officer or officers to take actual possession of the said ship or materials, whether finished or unfinished, subject to the lien of the contractors for any portion of the value that may be unpaid."

Such being her status with respect to her title and employment, can it be doubted that, if the contractors had seen fit to institute proceedings under the mechanics' lien law of the State for labor and materials furnished in her construction, or if a materialman had filed a libel in admiralty against her for coal furnished in testing her engines, or if upon her trial trip she had negligently come into collision with another vessel whose owner had instituted a suit against her, the Emperor of

Russia might have claimed for her an immunity from local jurisdiction upon the ground that she was the property of a foreign sovereign? In making this defence it would necessarily appear that she was a public vessel; in other words, a ship of war, and upon that ground immune from suit or prosecution in the local courts. . . .

It is true there was a provision that the Variag might be rejected either for deficient speed or for excessive draft, and that she should be during her construction at the risk of the contractors, until she had been actually accepted by the Imperial Russian Government, or they had taken actual possession of her. This, however, did not prevent the property passing to the Russian Government as stipulated by article X of the contract, though with a provision for an ultimate rescission. True, the Russian flag had never been hoisted upon the vessel, but that was immaterial, as the government had not finally accepted or taken possession of her.

. . . There can be no doubt that the Variag, in the condition in which she was at the time Alexandroff deserted, was a subject of local jurisdiction, and that if any crime had been committed on board of her, such crime would have been cognizable in the local courts, although it would have been otherwise had the Russian government taken possession, put a crew on board of her, and commissioned her for active service. This, however, does not touch the question whether she was not a ship of war within the letter and spirit of the treaty of 1832.

2. Was Alexandroff a deserter from a Russian ship of war within the meaning of the treaty, or was he merely a deserter from the Russian naval service, a fact which of itself would not be sufficient to authorize his arrest under article IX of the treaty? To be a deserter from a particular ship he must have been a member of the crew of such ship, and bound to remain in its service until discharged. It is earnestly insisted that, although he had been detailed to serve thereafter as a member of the crew of the Variag, her crew had never been organized as such, that the detail was merely preliminary to such organization, and that Alexandroff had never set foot upon the vessel. This argument necessarily presupposes that seamen do not become a "crew" until they have actually gone on board the vessel, and entered upon the performance of their duties. We cannot acquiesce in this position. The more reasonable view is that seamen become obligated to merchant vessels from the time they sign the shipping articles, and from that time they may incur the penalties of desertion.

So early as the marine ordinances of Louis XIV—the foundation of all maritime codes—the service of the seaman was treated as beginning from the moment when the contract for such service was entered into. By title three, article III, of this ordinance, "if a seaman leaves a master, without a discharge in writing, *before the voyage is begun*, he may be taken

up and imprisoned wherever he can be found," etc. The present Commercial Code of France makes no express provision upon the subject, but by the general mercantile law of Germany, art. 532, "The master can cause any seaman, who, *after having been engaged*, neglects to enter upon or continues to do his duties, to be forcibly compelled to perform the same." By the Dutch code, art. 402, "The master, or his representative, can call in the public force against those *who refuse to come on board*, who absent themselves from the ship without leave, and refuse to perform to the end of the service for which they were engaged."

The rule is the same in England. By section 243 of the Merchants' Shipping Act of 1854, (17 & 18 Vic. chap. 104,) whenever any seaman, *who has been lawfully engaged*, or any apprentice to the sea service, commits any of the following offences, he shall be liable to be punished summarily, as follows, (that is to say): 2. For *neglecting or refusing*, without reasonable cause, *to join his ship*, or to proceed to sea in his ship, or for absence without leave at any time within twenty-four hours of the ship's sailing from any port, either at the commencement or during the progress of any voyage, . . . he shall be liable to imprisonment," etc. And by section 246, "Whenever, either at the commencement or during the progress of any voyage, any seaman or apprentice *neglects or refuses to join*, or deserts from or refuses to proceed to sea in any ship in which he is duly engaged to serve, the master may call upon the local police officers or constables to apprehend him." These provisions have been substantially carried into the new Merchants' Shipping Act. 57 & 58 Vic. chap. 60, sec. 221.

Congress, however, has so often spoken upon this subject that we think it can hardly be open to doubt. By Rev. Stat. sec. 4522, as amended in 1898, (30 Stat. 755,) regulating seamen engaged in interstate commerce, there is a provision that "at the foot of every such contract to ship upon such a vessel . . . there shall be a memorandum in writing of the day and the hour when such seaman who shipped and subscribed shall render himself on board to begin the voyage agreed upon. If any seaman shall neglect *to render himself on board the vessel* for which he has shipped at the time mentioned in such memorandum," and if the master shall make a proper entry in the log book, "then every such seaman shall forfeit for every hour which he shall so neglect to render himself one half of one day's pay." The rights of the seaman in this connection are protected by section 4527, which declares that "any seaman who has signed an agreement and who is afterwards *discharged before the commencement of the voyage* or before one month's wages are earned," shall be entitled to compensation. By section 4558, as amended, (30 Stat. 757,) if, after judgment, that such vessel is fit to proceed on her intended voyage, . . . the seamen, or either of them, *shall refuse to*

proceed on the voyage, he shall forfeit any wages that may be due him. Section 4596 is largely a reproduction of the section above cited from the Merchants' Shipping Act, and provides that "whenever any seaman who has been lawfully engaged . . . commits any of the following offences he shall be punishable as follows: Second. For *neglecting or refusing,* without reasonable cause, *to join his vessel* or to proceed to sea in his vessel, or for absence without leave at any time within twenty-four hours of the vessel's sailing from any port, either at the commencement or during the progress of any voyage," he shall forfeit his wages. By section 4599, "whenever, either at the commencement of or during any voyage any seaman or apprentice *neglects or refuses to join,* or deserts from or refuses to proceed to sea in, any vessel in which he is duly engaged to serve," the master may (in accordance with the English practice) apply for the local assistance of police officers or constables for his arrest and detention. It is true this section has been repealed, together with all other provisions authorizing the arrest and surrender to the vessel of seamen of domestic vessels deserting in this country. But throughout all this legislation there is a recognition of the principle that the obligation of the seaman begins with the signing of the shipping articles, and that he is liable to the penalty of a forfeiture of his wages from that moment.

Upon these authorities we are of opinion that, as applied to merchant vessels, the crews are organized and the service of each sailor begins with the signing of the shipping articles, and that the lien of the seaman upon the ship for his wages, and reciprocally the lien of the ship upon the seaman for his services, where such lien still exists, dates from that time. The difficulty of securing a crew would be greatly enhanced if, after signing the articles and perhaps drawing advance pay, seamen were at liberty to desert before rendering themselves on board.

The Variag being a ship of war, there was no signing of shipping articles, as required in the merchant service, since the seamen were enlisted or conscribed to serve where ordered. But there was a practical equivalent for the shipping articles in the detail of Alexandroff to this vessel. He entered the Russian naval service in 1896, and his term of service had not expired. He was, of course, subject to the orders of his officers, and was sent as a member of a force of one officer and fifty-three men ordered to take possession of the Variag as soon as she was completed. From the moment of such assignment and until relieved therefrom, he was as much bound to the service of the Variag, and a member of her crew, as if he had signed shipping articles. We express no opinion as to whether, if the Variag had not been launched when he deserted, he could be held as a member of her crew, but when she took the water and became a ship she was competent to receive a crew, and a detail to her service took effect. . . .

We do not regard it as material that the Variag had not yet been commissioned as a member of the Russ an Navy. The mere commissioning of a ship does not make her a ship of war, but merely indicates that she is assigned to active service. A merchant vessel, built for the purpose of trade and commerce, is a merchant vessel, though she may not yet have received her register—a formality only necessary to entitle her to the privileges of an American vessel. To hold that the treaty applies only to commissioned vessels of war is to introduce into it a new element and to rob it of a valuable feature. Under the contract with the builders she was clearly Russian property, and while ownership is not always proof of nationality, since a vessel may be owned in one country and registered in another, where the facts are undisputed, and there was no pretence she was an American vessel, her Russian nationality follows as a matter of course. If she went out of commission and her armament were taken out of her for a temporary purpose, she would nevertheless be a ship of war of the Russian Navy. Being, as we have already held, a ship, she must be either a ship of war or merchant vessel, and as she was clearly not a merchant vessel, the only other alternative applies. The treaty should be liberally interpreted in this particular to carry out the intent of the parties, since if a foreign government may not send details of men to take possession of vessels built here, without danger of losing their entire command by desertion, we must cease building them or foreign governments must send special ships of their own with crews ordered to take possession of them. It is true that possession of the Variag had not yet been delivered, but the title had passed, and the very fact that the Russian government had detailed a crew to take possession of her indicated that it regarded her as a constituent part of the Russian Navy. It is unnecessary to consider whether, if the Variag had been rejected, her crew would have been *eo instanti* at liberty to leave the Russian service and acquire a citizenship here. That probably would have involved the other question, whether they could be treated as a military force entering this country with the permission of the Executive and remaining subject to the orders of their officers. . . .

3. The only remaining question is whether there was a compliance with article IX of the treaty, that the vice-consul "shall in writing demand said deserters, proving, by the exhibition of the registers of the vessels, the rolls of the crews, or by any other official documents, that such individuals formed part of the crews; and this reclamation being thus substantiated, the surrender shall not be refused." We have no doubt this provision is obligatory, and that the vice-consul must show either that it was complied with or that a compliance was waived. . . .

[In an omitted part of the opinion the court referred to the offer made by the Russian vice-consul at the trial to produce the passport authorizing Alexandroff's entry into the United States and to the admission by

Alexandroff's counsel that he entered the United States as a member of the Russian navy for the purpose of becoming one of the Variag's crew.]

There was here a clear waiver of the production of the passport and an admission that Alexandroff came to this country as a member of the Russian Navy, was ordered here to become one of the crew of the Variag, and came for that express purpose. Under such circumstances, it does not lie in the mouth of the relator to insist that no official documents were produced, since the passport and the admission accompanying its offer show that Alexandroff came here as a member of the proposed crew of the Variag, (and we have discussed the case upon that assumption)—the question being whether under those circumstances he ought to be treated as a deserter from a Russian ship of war.

We are of opinion that this case is within the treaty, and the judgments of both courts below are therefore reversed, and the case remanded to the District Court for the Eastern District of Pennsylvania for further proceedings consistent with this opinion.

Mr. Justice Peckham concurred in the opinion, but also thought that the men, among whom was the respondent, came into the country with the expressed permission of the Executive as a part of the Russian Navy and as members of the crew of the steamship awaiting completion as a man-of-war; and the Russian government was, therefore, upon the principle of comity, entitled to the aid of the Government of the United States to accomplish the arrest and detention of a deserter from the ranks of those men it had thus expressly authorized to come in.[35]

Mr. Justice Gray, with whom concurred Mr. Chief Justice Fuller and Justices Harlan and White, dissenting.

[The dissenting opinion is omitted.]

Hall, International Law

Eighth Edition, page 392, section 111. 1924.

When terms used in a treaty have a different legal sense within the two contracting states, they are to be understood in the sense which is proper to them within the state to which the provision containing them applies; if the provision applies to both states the terms of double meaning are to be understood in the sense proper within them respectively.[36] Thus by the treaty of 1866 it was stipulated between Austria and Italy, that inhabitants of the provinces ceded by the former power should enjoy the right of withdrawing with their property into Austrian territory during a year from the date of the exchange of ratifications. In Austria the word inhabitant signifies such persons only as are domiciled according

[35] *Cf.* Motherwell v. United States, 107 Fed. 437. *Cf.* also United States v. Rauscher, 119 U. S. 407, *supra*, 738.

[36] *Cf.* University v. Miller, 14 N. C. 188; Adams v. Akerlund, 168 Ill. 632.

to Austrian law; in Italy it is applied to every one living in a commune and registered as resident. The language of the treaty therefore had not an identical meaning in the two countries. As the provision referred to territory which was Austrian at the moment of the signature of the treaty, the term inhabitant was construed in conformity with Austrian law.

Exchange of Greek and Turkish Populations

Greece and Turkey. Permanent Court of International Justice. 1925.

Publications of the Permanent Court of International Justice, Series B, Advisory Opinion No. 10.

Sixth (Extraordinary) Session.

Present: MM. Huber, President; Loder, Former President; Weiss, Vice-President; Lord Finlay, MM. Nyholm, Altamira, Oda, Anzilotti, Yovanovitch, Beichmann, Negulesco, Judges.

Advisory Opinion No. 10.

[In the course of the negotiations for the establishment of peace with Turkey, conducted at Lausanne during 1922 and 1923, amongst other diplomatic instruments, was concluded a Convention concerning the exchange of Greek and Turkish populations. This Convention, which was signed at Lausanne on January 30th, 1923, by the Greek and Turkish delegates, came into effect after the ratification by Greece and Turkey of the Peace Treaty of July 24th, 1923, *viz.* on August 6th, 1924.

Article II of this Convention provided for the setting up, within one month from its coming into force, of a Mixed Commission composed of four members representing each of the High Contracting Parties and three members chosen by the Council of the League of Nations from amongst nationals of Powers which did not take part in the war of 1914–1918. The neutral members were appointed by the Council on September 17th, 1923, and the Mixed Commission entered upon its task.

The Mixed Commission's duties under Article 12 were, amongst other things, to supervise and facilitate the emigration provided for in the Convention and to settle the method to be followed. Generally speaking, it had full power to take the measures necessitated by the execution of the Convention and to decide all questions to which the Convention might give rise.

Difficulties arose between the Greek and Turkish delegations to the Commission in connection with Article 2 of the Convention, which is as follows:

"The following persons shall not be included in the exchange provided for in Article I:

"(a) The Greek inhabitants of Constantinople.

"(b) The Moslem inhabitants of Western Thrace.

"All Greeks who were already established before the 30th October, 1918, within the areas under the Prefecture of the city of Constantinople, as defined by the Law of 1912, shall be considered as Greek inhabitants of Constantinople.

"All Moslems established in the region to the east of the frontier line laid down in 1913 by the Treaty of Bucharest shall be considered as Moslem inhabitants of Western Thrace."

The Delegations agreed to ask the Mixed Commission to settle their dispute, which related chiefly to the meaning and scope of the expression "established." After consideration, the Commission referred the matter to its legal section, which made a report on October 1st, 1924. Meanwhile, and up till October 21st, the authorities of Constantinople had proceeded to expel certain Greeks. These measures were stopped after representations had been made to the Vali by the competent international authority; but they had already given rise to representations on the part of the Greek Delegation to the Mixed Commission and subsequently to a letter sent by the Greek Chargé d'affaires at Berne to the Secretary-General of the League of Nations, dated October 22nd, 1924. In this letter, the Greek Government, in virtue of Article II of the Covenant, appealed to the League of Nations to include the question raised by the measures referred to, upon the agenda of the session of the Council to be held on the 27th of the same month. The Greek Government, though chiefly relying on Article II, also, according to this letter, considered that Article 14 of the Covenant was subsidiarily applicable.

The Council granted this request and included the question on the agenda of its 31st Session and, in agreement with the representatives of the two interested Governments, adopted a report on the subject, inviting the Mixed Commission to hold a plenary meeting as soon as possible, in order that the points at issue with regard to the Convention might be finally settled. At the same time the Council observed that it was open to the members of the Commission to cause the question to be referred to the Court of International Justice, one of whose special duties was the interpretation of treaties.

The Mixed Commission reopened the discussion on November 15th; on the following day thé President declared that the full Commission was unanimously agreed to request the Council of the League of Nations to obtain from the Court an advisory opinion on the matter. On receipt of this request, the Council decided on December 13th, 1924, to ask the Court for its opinion on the following points:

(1) The meaning and scope of the word "established" contained in Article 2 of the Convention of Lausanne regarding the exchange of Greek and Turkish populations.

(2) The conditions to be fulfilled by the persons described in that article as "Greek inhabitants of Constantinople," in order that they may be considered as "established" and exempt from compulsory exchange.]

[The above statement of the case is taken from the Annual Report of the Permanent Court of International Justice, Publications, Series E, No. 1, p. 226. Part of the opinion is omitted.]

In accordance with Article 73 of the Rules of Court, notice of the Request was given to Members of the League of Nations through the Secretary-General, and to the States mentioned in the Annex to the Covenant. Notice was also given to the Government of Turkey, as being a State likely to be able to furnish information on the question, and to the Mixed Commission for the Exchange of Greek and Turkish Populations, sitting at Constantinople.

Owing to the fact that the question in regard to which the Court's opinion had thus been asked was, by the nature of things, extremely urgent, the President decided to exercise the powers conferred upon him under Article 23 of the Statute and to convoke an extraordinary session of the Court, commencing on January 12th, 1925.

The Greek and Turkish Governments, at the invitation of the Court, each submitted within the time fixed a Memorandum on the question of the interpretation of Article 2 of the Convention regarding the exchange of Greek and Turkish populations signed at Lausanne on January 30th, 1923; and the Court heard, in the course of public sittings held on January 16th, 1925, oral statements upon the question made, on behalf of the Government of the Greek Republic, by H. E. M. Politis, Greek Minister at Paris, and, on behalf of the Government of Turkey, by Dr. Tevfik Rouchdy Bey, President of the Turkish Delegation to the Mixed Commission at Constantinople. . . .

The views of the Greek Government were definitely presented by H. E. M. Politis in his address as follows:

"(1) That the word 'established' means inhabitants of Constantinople who had taken up their residence there before October 30th, 1918, with the intention of habitually residing there.

"(2) That, to be exempt from exchange, a person must have arrived at Constantinople before October 30th, 1918, from any other place whatsoever, whether from another part of Turkey or a foreign country, and, also before that date, have manifested, either by an official formality or by some unequivocal fact such, for instance, as the exercise of a permanent profession, trade, industry, etc., or in any other similar manner, the value of which the Mixed Commission—which is sole judge—may estimate after consideration of any evidence, written or oral, or on the basis of mere indications, his intention to make it the centre of his interests and occupations." . . .

Tevfik Rouchdy Bey made no express submissions, but in the Memorandum presented on January 10th, 1925, on behalf of the Turkish Government, he gave the following summary of his views:

"There is in Turkey a law regarding persons "established." This law applies without distinction to minorities as well as to the majority of the country. It is obvious that to attempt for any reason to suspend the application of this law to any portion of the citizens of a country is tantamount to granting such citizens a privilege and also to an infringement of the rights of other minorities and of the majority. Until it is proved that under the terms of the Convention this law must be modified or suspended, it cannot be touched without infringing the sovereign rights of Turkey and the Turkish nation.

"It is admitted that the fact of having failed to fulfil a formality does not involve the loss of vested rights. But, on the other hand, these vested rights cannot exist in the absence of certain essential conditions connected with them. Furthermore, the procedure for making good this omission must be carried out by the Government concerned, which must have regard to its own relevant legislation, and the situation of fact must be established by proving before the Courts of the country that certain conditions exist, as provided in the Minutes annexed hereto, which relate to this very expression "established." Apart from these conditions, any decision or act involving the non-observance of the laws of a country by its citizens, will lead to administrative anarchy and may affect the domestic peace of the country concerned.

"No Government can admit the modification or suspension of laws other than those clearly contemplated in instruments which it has signed, and to expect it to do so would be to overstep the limits of the obligations entered into by it." . . .

The Court has not to define the meaning and scope of the word "established" in the abstract, but only to determine the meaning and scope of that word as used in Article 2 of the Convention of Lausanne. In the first place the Court is satisfied that the difference of opinion which has arisen regarding the meaning and scope of the word "established," is a dispute regarding the interpretation of a treaty and as such involves a question of international law. It is not a question of domestic concern between the administration and the inhabitants; the difference affects two States which have concluded a Convention with a view to exchanging certain portions of their populations, and the criterion afforded by the word "established" used in Article 2 of this Convention is precisely intended to enable the contracting States to distinguish the part of their respective populations liable to exchange from the part exempt from it.

The Convention, after having laid down in Article 1 the general principle of the exchange of Turkish nationals of Greek orthodox religion established in Turkey and Greek nationals of Moslem religion established

in Greece, proceeds in Article 2 to withdraw from this exchange, on the one hand, Greek inhabitants of Constantinople and, on the other, Moslem inhabitants of Western Thrace.

This restriction was placed upon the application of the principle of exchange for several reasons. As regards the Greek inhabitants of Constantinople, one reason amongst others was to save that city from the loss which it would have suffered as a result of the exodus of a part of the population which constitutes one of the most important economic and commercial factors in the life of the city.

It is therefore the Greek population of Constantinople which it was intended to exempt from compulsory exchange, and this is clearly indicated by the words "Greek inhabitants of Constantinople."

As, however, Turkey, for reasons which do not concern the Court, did not wish to be compelled to retain at Constantinople Greeks who had migrated there after the date of the armistice of Mudros, the Convention refers not to the whole of the Greek population of Constantinople as it at present exists, but only to those members of it who were such also on October 30th, 1918.

The Court will now, in the light of these considerations, proceed firstly to consider the meaning and scope of the word *établis* in general, and, secondly, the question whether the situation contemplated by this word should be determined according to the laws in force in the two countries concerned.

The Convention was drawn up in French and therefore regard must be had to the meaning of the disputed term in that language. In this respect it appears certain that *établissement*, according both to the etymology of this word—the noun corresponding to the verb *établir*—and to the current practice of the language, embraces two essential factors: residence and stability, *i.e.*, an intention to continue the residence in a particular place for an extended period.

In the present case, the word "established" having been used to describe a portion of the Greek inhabitants of Constantinople, naturally embraces those inhabitants who, on October 30th, 1918, were already residing at Constantinople with the intention of remaining there for an extended period.

An idea akin to that just expressed in order to define the conception of establishment, is the basis of the conception of domicile in several modern legal systems. But it in no way follows, as has sometimes been maintained on behalf of the Turkish Government, that the two expressions have the same meaning. At times the word "domicile" is used to describe a situation of fact similar to that contemplated by the word "establishment." If, however, the word domicile is used in a technical sense, and therefore in connection with some particular system of law, it will be seen that there are or may be cases in which the two conceptions

of domicile and establishment have not the same meaning. The question whether a provision refers to a mere situation of fact or to domicile in the legal sense of the term is a question of interpretation.

From this point of view, therefore, it becomes necessary to consider whether the Convention contains any express or implicit reference to national legislation for the purpose of determining what persons are to be regarded as "established."

No express reference is to be found; it remains to be ascertained whether in regard to the matter before the Court, the Convention makes implicit reference to national legislation.

It should in the first place be observed that it does not necessarily follow that, by reason of the nature of the situation contemplated in the Convention, there must be an implied reference to national legislation. Whereas the national status of a person belonging to a State can only be based on the law of that State, and whereas, therefore, any convention dealing with this status must implicitly refer to the national legislation, there is no reason why the local tie indicated by the word "established" should be determined by the application of some particular law. It may very well be that the Convention contemplated a mere situation of fact, sufficiently defined by the Convention itself without any reference to national legislation.

The Court is of opinion that this is the case as regards the condition implied by the word "established" in Article 2 of the Convention. As has been said above, the word "established", taken in conjunction with the references to date and place indicated in this article, is to serve to distinguish between the exchangeable and the non-exchangeable parts both of the Greek population of Constantinople and of the Moslem population of Western Thrace. It is hardly likely that the intention was to fix this criterion by means of a reference to national legislation. It is a well-known fact that the legislation of different States takes into account various kinds of local personal ties and deals with them in different ways. The application of Turkish and Greek law would probably have resulted in uncertainties, difficulties and delays incompatible with the speedy fulfilment always regarded as essential to the Convention under consideration. Moreover, it might well happen that a reference to Turkish and Greek legislation would lead to the division of the population being carried out in a different manner in Turkey and in Greece. This, again, would not be in accordance with the spirit of the Convention, the intention of which is undoubtedly to ensure, by means of the application of identical and reciprocal measures in the territory of the two States, that the same treatment is accorded to the Greek and Turkish populations. Nor is there any indication that the authors of the Convention, when they adopted the word which has given rise to the present controversy, had in mind national legislation at all.

Everything therefore seems to indicate that, in regard to this point, the Convention is self-contained and that the Mixed Commission in order to decide what constitutes an established inhabitant must rely on the natural meaning of the words as already explained.

The Turkish Delegation however maintains that the Convention contains a reference to national legislation and in support of this contention invokes amongst other things Article 18, according to which:

"The High Contracting Parties undertake to introduce in their respective laws such modifications as may be necessary with a view to ensuring the execution of the present Convention."

This clause, however, merely lays stress on a principle which is self-evident, according to which a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken. The special nature of the Convention for the Exchange of Greek and Turkish Populations, which closely affects matters regulated by national legislation and lays down principles which conflict with certain rights generally recognized as belonging to individuals, sufficiently explains the express inclusion of a clause such as that contained in Article 18. But it does not in the least follow because the contracting Parties are obliged to bring their legislation into harmony with the Convention, that that instrument must be construed as implicitly referring to national legislation in so far as that is not contrary to the Convention.

It is true that in the course of the oral proceedings Dr. Tevfik Rouchdy Bey also pointed out that the fact that a criterion was sought in order to fix the meaning of the word "established" showed that that word represented a legal conception. He drew the conclusion that such a criterion could only be found in the national legislation of the contracting States. In reply to this argument it may be observed that if an expression, not in itself of a legal nature, is used in a convention which derives legal consequences from it, it does not in the least follow that this criterion must be sought in the legislation of the respective contracting States.

Again, the objection of the Turkish Delegation to the effect that the non-application of national legislation would lead to inequality in the treatment of various categories of Turkish nationals, inhabiting Constantinople, does not go far; for if a person is recognized to be exempt from exchange under the terms of the Convention of 1923, he clearly remains subject to Turkish law in regard to all matters save those connected with the question of liability to exchange.

The principal reason why the Turkish Delegation has maintained the theory of an implicit reference to local legislation appears to be that, in their opinion, a contrary solution would involve consequences affecting Turkey's sovereign rights. But, as the Court has already had

occasion to point out in its judgment in the case of the Wimbledon, "the right of entering into international engagements is an attribute of State sovereignty." In the present case, moreover, the obligations of the contracting States are absolutely equal and reciprocal. It is therefore impossible to admit that a convention which creates obligations of this kind, construed according to its natural meaning, infringes the sovereign rights of the High Contracting Parties.

Having thus made it clear that the Convention does not refer to national laws, the Court does not feel it to be necessary to consider whether any particular provisions of the Turkish laws of 1902 and 1914 are or are not contrary to the Convention.

The Turkish Delegation has maintained, again basing its arguments on sovereign rights, that it should be for the municipal courts to decide, if need be, whether a person is established or not within the meaning of Article 2. But as has been said, national sovereignty is not affected by the Convention in question. Now this Convention, in Article 12, confers upon the Mixed Commission "full power to take the measures necessitated by the execution of the present Convention and to decide all questions to which this Convention may give rise." Moreover, to refer questions to the municipal courts would be hardly compatible with the rapid fulfilment of the provisions of the Convention which, as has already been stated, has always been regarded as necessitated by the nature and aims of that instrument.

Again, the Mixed Commission by its decision of April 4th, 1924, had already affirmed that it has exclusive jurisdiction to determine the nationality of persons liable to exchange: and it does not appear that in this respect any protest or reservation was made by either of the governments concerned. It is not easy to see why the Mixed Commission should have exclusive jurisdiction in questions of nationality, which must undoubtedly be settled by applying national law, and should not have such jurisdiction for the purpose of verifying the existence of the other conditions laid down in Article 2 of the Convention.

The Mixed Commission, therefore, is alone competent to investigate, in each individual case, whether a Greek inhabitant of Constantinople is "established" in conformity with Article 2 of the Convention and can be exempted from the compulsory exchange. . . .

As regards the second part of the question referred to the Court, concerning the conditions to be fulfilled by Greek inhabitants of Constantinople in order that they may be considered as "established" and exempt from compulsory exchange, the Court wishes to keep within the scope of the discussions and arguments set forth in the dossier placed before it. Indeed, the Court considers that it is neither called upon to prepare in advance solutions for all the problems which may arise in regard to the application of Article 2 of the convention of January 30th,

1923, and further, that it is not in possession of sufficient information to be able to do so. For instance, the Court has no information as to the possible existence of persons who, whilst possessing offices etc. in Constantinople, may reside with their families in the neighbourhood of that city.

The question is one of making a distinction, as regards the Greek population of Constantinople as it was at the time of the Convention, between inhabitants established there before October 30th, 1918, and the others, those not yet established at that date.

It may be said that the word "established" as used in Article 2 serves no other purpose than to indicate that the article relates to the inhabitants of a certain place upon a certain date. Nevertheless the choice of this word "established" serves to emphasize that, in order that a person may be considered as an inhabitant, his residence must be of a lasting nature and must have been so at the time in question. Persons who at that time were only residing at Constantinople as mere visitors cannot therefore be regarded as exempt from exchange.

The degree of stability required is incapable of exact definition. The Court however considers that inhabitants who before October 30th, 1918, fulfilled the conditions enumerated as examples under heading (2) of the Resolution adopted on October 1st, 1924, by the Legal Section of the Mixed Commission (see p. 12), are to be regarded as established within the meaning of the article and as consequently exempt from exchange, even if they have come to Constantinople with the intention of making their fortune and subsequently returning to their place of origin. During their residence in Constantinople they must be regarded as established, since they present the character of stability which is the condition necessary to constitute "establishment."

As has already been observed, the Court cannot foresee all the various cases with which the Mixed Commission may be confronted. It considers that in the absence of sufficient materials in the discussions and arguments submitted to it, it must abstain from providing concrete solutions for the complex problems which may arise on the application of Article 2 to persons who, though belonging to one family, do not individually satisfy the conditions laid down in that article. The powers conferred upon the Mixed Commission by Article 12 enable that body, within the limits fixed by the clauses of the Convention, to find an equitable solution for any disputed points. The Convention is silent on the question of the unity of the family. If in these circumstances the definition adopted by the Court in order to determine which inhabitants are to be considered established, might appear to lead under certain conditions, as regards families, to unreasonable or manifestly unjust consequences, the silence of the Convention cannot be construed as depriving the Mixed Commission of its right to consider how far

the Convention must be presumed to give to the criterion of establishment, according to the conditions of time and place laid down in Article 2, preponderance over the family ties in question.

No restriction as to place of origin is mentioned in Article 2, so that it is clear that Greek inhabitants of Constantinople, no matter where they come from, are exempt from the compulsory exchange, provided they fulfil the conditions laid down in Article 2 of the Convention. . . .

For these reasons, the Court is of opinion:

1. That the purpose of the word "established" in Article 2 of the Convention of Lausanne of January 30th, 1923, regarding the exchange of Greek and Turkish populations, is to indicate the conditions in point of time and place on which depends the liability to exchange of Greeks and Moslems who respectively inhabit Constantinople or Western Thrace; that this word refers to a situation of fact constituted, in the case of the persons in question, by residence of a lasting nature;

2. That, in order that the persons referred to in Article 2 of the Convention of Lausanne as "Greek inhabitants of Constantinople" may be considered as "established" under the terms of the Convention and exempted from the compulsory exchange, they must reside within the boundaries of the Prefecture of the City of Constantinople as defined by the law of 1912; have arrived there, no matter whence they came, at some date previous to October 30th, 1918; and have had, prior to that date, the intention of residing there for an extended period.

Done in French and English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-first day of February, nineteen hundred and twenty-five, in two copies, one of which is to be deposited in the archives of the Court, and the other to be forwarded to the Council of the League of Nations.[37]

SECTION 6. TERMINATION OF TREATIES

Declaration Relative to the Inviolability of Treaties

London, January 17, 1871.

British and Foreign State Papers, Volume 61, *pages* 1193, 1198–1199.

[The Treaty of Paris of 1856 (Hertslet, II, 1250), concluded at the end of the Crimean War between Great Britain, Austria, France, Prussia, Sardinia, and Turkey, provided among other things for the neutralization of the Black Sea (Arts. 11, 13, 14). These stipulations were imposed upon Russia by its victorious enemies as part of the peace settlement.

[37] On interpretation of treaties, in general, see Crandall, Treaties, 2d ed., 371; Fauchille, I, Pt. III, 373; Hall, 8th ed., 390; Hyde, II, §§530–537; Oppenheim, 4th ed., I, §§553–554; Phillimore, 3d ed., II, 94; Yü, Interpretation of Treaties.

In 1870, alleging changed conditions and violations of the Treaty of Paris by other states, Russia took advantage of the Franco-Prussian War to denounce the stipulations of the Treaty of Paris restricting its rights in the Black Sea (Hertslet, III, 1892, 1896). Great Britain protested (Hertslet, III, 1898). Conferences were arranged in London in 1871 between representatives of the signatories of the Treaty of Paris and a new treaty was concluded which provided for the abrogation of the articles of the former treaty neutralizing the Black Sea (Hertslet, III, 1919). The following declaration was annexed to the protocol of the the first meeting of the London Conference.]

The Plenipotentiaries of North Germany, of Austria-Hungary, of Great Britain, of Italy, of Russia, and of Turkey, assembled to-day in Conference, recognize that it is an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a Treaty, nor modify the stipulations thereof, unless with the consent of the Contracting Powers by means of an amicable arrangement.[38] [HERTSLET'S transl.]

[France adhered March 13, 1871.]

VATTEL, LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS

Book II, Chapter 13, sections 200, 201, 202. 1758.

§200. Treaties contain promises which are perfect in their nature and correlative. If one of the parties fails to carry out its part of the contract, the other State can force it to do so, for this is the right conferred by a perfect promise. But if there be no other way of forcing an allied State to keep its word than by recourse to arms, it is at times more expedient for the State to revoke its own promises and to break the treaty; and it is unquestionably justified in doing so, since its own

[38] "In spite of this declaration, signed also by herself, Russia in 1886 notified her withdrawal from Article 59 of the Treaty of Berlin of 1878 stipulating the freedom of the port of Batoum. The signatory Powers of the Treaty of Berlin seem to have tacitly consented, with the exception of Great Britain, who protested. Again, in October 1908, Austria-Hungary, in defiance of Article 25 of the Treaty of Berlin, 1878, proclaimed her sovereignty over Bosnia and Herzegovina, which hitherto had been under her occupation and administration, and simultaneously Bulgaria, in defiance of Article 1 of the same treaty, declared herself independent. Thus the standard value of the declaration of the Conference of London of 1871 has become doubtful again, and must remain doubtful until an independent international court is created with jurisdiction to set aside a treaty obligation which has become too oppressive." OPPENHEIM, 4th ed., I, 752.

On the various methods of terminating treaties by consent, see OPPENHEIM, 4th ed., I, §§534–538.

promises were made only on condition that the other State would carry out on its part the stipulations of the treaty. Accordingly the State which is offended or injured by the failure of the other to carry out the treaty can choose either to force the offender to fulfill its promises or can declare the treaty dissolved because of the violation of its provisions. Prudence and wise policy will suggest what it is best to do under the circumstances.

§201. But when the allied States have two or more different and independent treaties between them, the violation of one of the treaties does not thereupon release the injured party from the obligations which it has contracted in the others, for the promises contained in the latter do not depend upon those embodied in the violated treaty. But the injured State can threaten to revoke on its part all the other treaties between the two States and can carry out the threat if the other State persists in its conduct; for if any one takes or withholds from me my right, I may, in the state of nature, in order to force him to do me justice, to punish him, or to indemnify myself, deprive him in turn of some of his rights, or seize and hold them until full satisfaction has been made. And if recourse is had to arms to obtain satisfaction for the violation of the treaty, the injured party begins by withholding from the enemy all the rights which belonged to the latter by reason of the treaties between them; and we shall see, in speaking of war, that it can do so with justice.

§202. Certain authors [see Wolf, *Jus Gent.*, §432] wish to extend what we have just said to those articles of a treaty which have no natural connection with the article that has been violated, and they say that those separate articles should be regarded as so many distinct treaties concluded all at one time. Hence they maintain that if one of the allied States violates a single article of the treaty the other State is not thereupon justified in annulling the entire treaty, but that it can either refuse in turn to perform what it promised in view of the article violated or force the offending State to carry out its promises, if that can be done, and if not, to make good the loss; and they maintain that with this end in view the injured State may threaten to revoke the whole treaty, a threat which may be lawfully put into effect if it be disregarded. Such is unquestionably the conduct which prudence, moderation, the love of peace, and charity will ordinarily prescribe to Nations. Who is there who would deny it to be so, and madly assert that sovereigns may, upon the least subject of complaint, immediately have recourse to arms, or may at least break every treaty of friendship and alliance? But the question here is one of law and not of the proper action to be taken to obtain justice, and I hold that the principle upon which the above decision is based is absolutely untenable. The separate articles of the same treaty can not be regarded as so many distinct and independent treaties. Although it may be that no direct connection can be seen

between the articles, they are all bound together by this common relation, that each of the contracting parties agreed to certain articles less beneficial in view of others more so. I should never, perhaps, have agreed to this article had my ally not granted me another which has no relation of subject-matter to the first. All the articles taken as a whole have, consequently, the same force and character as a single mutual promise, unless certain articles are formally excepted. Grotius well observes that "each of the articles of a treaty has the force of a condition, the non-fulfillment of which renders the treaty void." [*De Jure Belli et Pacis, Lib.* II, *Cap.* xv, §15.] He adds, that "the clause is sometimes inserted that the violation of a single article is not to annul the whole treaty, in order that one of the contracting parties may not be able to free itself of its obligations upon the smallest provocation." The precaution is a wise one and fully in keeping with the care which Nations should have to maintain peace and to render their alliances stable.[39] [FENWICK'S transl.]

WILLIAM JONES v. THOMAS WALKER

United States. Circuit Court, District of Virginia.[40]

2 *Paine's Reports* 688.

[The statement of the case and part of the opinion are omitted. The action was brought by a British creditor against a Virginia debtor to recover a sum due on a bond executed by the latter in 1772 before the war for American independence. Other facts are indicated sufficiently in the opinion.]

JAY, CH. J. . . . The action is for the recovery of money due on bond prior to the war. . . .

The defendant having plead in bar, that pursuant to an act passed by Virginia during the war, he had paid the debt into the loan-office of that State, and that the debt had thereby been discharged; the plaintiff replies the 4th article of the treaty of peace, which stipulates that "creditors on either side shall meet with no lawful impediments to the recovery of all *bona fide* debts theretofore contracted." To this the defendant rejoins that the King of Great Britain had, in the instances there specified, violated the treaty, and further, that the said debt having been discharged in pursuance of a pre-existing act of Virginia, was not one of those *bona fide* debts mentioned in the 4th article. To this rejoinder the plaintiff demurs.

The first question which these pleadings naturally suggest is, whether this court has authority to take cognizance of infractions of the treaty

[39] See United States, Act of 1798, c. 67, 1 U. S. Stat. L. 578; Hooper, Admr., v. United States, 22 Ct. Cl. 408.

[40] The reporter gives no date. Jay was Chief Justice 1789–1795.

by Great Britain, and by reason of them to declare the treaty to be void as to the United States.

It is strenuously insisted that the court has such authority—

1. Because, on the distribution of the sovereignty into the three departments of executive, legislative and judicial, such authority became incident to the latter.

2. Because, treaties being laws of the land, they fall within the jurisdiction and cognizance of the judiciary.

3. Because the authority in question is given by the constitution, and is recognized to have been so given by the judicial act of Congress.

I begin with the last, for as the power of the judiciary might have been extended, or limited, according to the pleasure of those who, by the constitution, established it, it is proper to inquire whether the constitution does extend that power to the case now before us in the sense now contended for. If it does, it ought to be exercised; if not, it ought not to be assumed.

The constitution expressly declares that the judicial power shall extend to all cases in law and equity arising under treaties. It also declares that treaties shall be the supreme law of the land.

The 26th section of the Judicial Act, recognizes its power to determine cases where is drawn into question the validity of treaties.

Perhaps it may tend to elucidate the subject if we were to consider validity applied to treaties, as admitting of two descriptions, *viz.*, necessary and voluntary.

By necessary validity, I mean that which results from the treaty's having been made by persons authorized by, and for purposes consistent with the constitution. To this kind of validity all such questions as these relate, *viz:* Has the treaty been made and ratified by the President, by the advice and consent of three-fourths of the senators present? Is it temporary, and has it expired? Is it perpetual? Has it been dissolved with mutual agreement? Has it been annulled and declared to be void by the nation, or by those to whom the nation has committed that power? Does it contain articles repugnant to the constitution? Are those articles void? Do they vitiate the whole treaty? &c., &c.

By voluntary validity, I mean that validity which a treaty, become voidable by reason of violations, afterwards continues to retain by the silent volition and acquiescence of the nation. I call it voluntary, because it entirely depends on the will of the nation, either to let it continue to operate, or to annul and extinguish it.

To this head such questions as these relate, *viz:* Has the treaty been so violated as justly to become voidable by the injured nation? Is it advisable immediately to declare it void? Would such a measure probably produce a war? Would it be more prudent first to remonstrate and demand reparation, or to direct reprisals? Are we in condition for war? Ought we at this juncture to risk it, or shall we postpone

that risk until we can be better prepared for it? Shall we at this moment take any measures, or would it be prudent to remain silent for the present, and let the treaty go on and continue to operate as if nothing had happened? &c., &c., &c.

On comparing the principles which govern and decide the necessary validity of a treaty, with those on which its voluntary validity depends, we cannot but perceive that the former are of a judicial, and that the latter are of a political nature. That diversity naturally leads to an opinion that the former are referable to the judiciary, and the latter to those departments who are charged with the political interests of the State. If the order and proper disposition of the thing strongly indicates this distribution, there is great reason to presume it was intended by the constitution and the judicial act; and, therefore, that the power given the judiciary to decide on the validity of treaties, was, by the nature of the subject, restricted to their necessary validity; necessary, because while performed by one party it rests not on the volition of the other, but on that perfect obligation which contracts authorize and not improperly impose on both the parties.

The history of nations, even the most free, and whose governments were the most popular, affords no examples of their having committed the voluntary validity of treaties to the decision of courts of justice; and thence there is reason to argue, that if an idea so new and singular had been adopted by the convention, they would have pointedly and particularly expressed it in the constitution, and not have left it to be inferred from any enlarged sense in which the word validity was capable of being understood; especially as it was natural to apprehend that the tribunals of the United States, like the tribunals of all other countries, would understand it only to mean the necessary validity of treaties.

When it is considered that the voluntary validity of treaties (except so far as may concern their voidability) is to be decided not by fixed and immutable rules and principles, but entirely by prudential considerations, the inexpediency of committing its decision to two concurrent jurisdictions, that is, to the judiciary and to Congress, (it being necessarily incident to the right of making war,) and that, too, without appeal to any third body, is very apparent; for, in cases of disagreement in opinion, the same treaty might be annulled by the one against the opinion and judgment of the other, and the people would be at a loss to determine how to act, or which opinion ought to prevail.

That two such concurrent and probably clashing jurisdictions would unavoidably introduce many inconveniences, is obvious; but it is not easy to discern in what respect they would be useful.

In short, it is not, in my opinion, to be presumed that a power so pregnant with discord, political contradiction and national inconsistency, could have been within the intention and meaning of the convention,

when, by the constitution, they extended the power of the judiciary to all cases arising under treaties.

2. That treaties being laws of the land, fall within the jurisdiction and cognizance of the judiciary.

Whatever distinction there may be between a treaty considered as a great national compact, and a treaty considered as a law of the land, yet it will not warrant the conclusion that as a treaty its voluntary validity may be exclusively determinable by Congress, but that as a law of the land, the judiciary are to decide whether it be in force.

Every law derives its obligation from the will of those who had authority to enact it.

Every treaty derives its obligation from the will of those who had authority to conclude it.

Neither of them can be repealed or annulled but by the will of those who have authority to repeal them or annul them. It has been shown that the judiciary are not authorized to annul a treaty; and it will not be contended that they are authorized to repeal a law. So that, whether a certain instrument be called a treaty or a law, it belongs not to the judiciary to abrogate it. Indeed, the objection is doubled to those who consider it as having a twofold capacity of being both a treaty and a law. . . .

3. That on the distribution of the sovereignty into the three departments, of executive, legislative and judicial, the authority in question became incidental to the latter.

No right can be incident to one department which necessarily goes to the suspension of a right incident to another, or to control, suspend or defeat its operation.

If this principle be just, it follows that, where the department authorized to annul a voidable treaty shall deem it most conducive to the national interest that it should longer continue to be obeyed and observed, no right can be incident to the judiciary to declare it void in a single instance.[41] . . .

[The court concluded that the debt had not been discharged and that plaintiff was entitled to the benefit of the fourth article of the treaty of peace.]

PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW

Third Edition, Volume III, page 793. 1885.

It was at one time an international custom that the Belligerents should, at the breaking out of War, make a public and solemn proclamation that the obligations of Treaties between them had ceased. That custom has become obsolete. In the place of it has arisen the general maxim,

[41] See also Ware v. Hylton, 3 Dall. 199, 258; Charlton v. Kelly, 229 U. S. 447, 469.

that War, *ipso facto* (*von selbst*), abrogates Treaties between the Belligerents. The questions which present themselves for our consideration are, first, whether this proposition be true in all its latitude, or whether it requires any—and if any, what—limitations, before it can be enunciated as one of the admitted and incontrovertible principles of International Jurisprudence?

Secondly, if it be universally, or with certain limitations, true, that Treaties annulled by War are revived by the return of Peace without express stipulations to that effect?

THE SOCIETY FOR THE PROPAGATION OF THE GOSPEL IN FOREIGN PARTS v. THE TOWN OF NEW-HAVEN, AND WILLIAM WHEELER

United States. Supreme Court. 1823.

8 *Wheaton's Reports* 464.

This case came before the Court upon a certificate of a division in opinion of the Judges of the Circuit Court for the District of Vermont. It was an action of ejectment, brought by the plaintiffs against the defendants, in that Court. The material facts, upon which the question of law arose, were stated in a special verdict, and are as follows:

By a charter granted by William III., in the thirteenth year of his reign, a number of persons, subjects of England, and there residing, were incorporated by the name of "The Society for the Propagation of the Gospel in Foreign Parts," . . . This charter of incorporation was duly accepted by the persons therein named; and the corporation has ever since existed, and now exists, as an organized body politic and corporate, in England, all the members thereof being subjects of the king of Great Britain.

On the 2d of November, 1761, a grant was made by the governor of the province of New-Hampshire, in the name of the king, by which a certain tract of land, in that province, was granted to the inhabitants of the said province, and of the king's other governments, and to their heirs and assigns, whose names were entered on the grant. The tract so granted, was to be incorporated into a town, by the name of New-Haven, and to be divided into sixty-eight shares, one of which was granted to "The Society for the Propagation of the Gospel in Foreign Parts." . . .

On the 30th of October, 1794, the Legislature of Vermont passed an act, declaring, that the rights to land in that State, granted under the authority of the British government, previous to the revolution, to "The Society for the Propagation of the Gospel in Foreign Parts," were thereby granted severally to the respective towns in which such lands lay, and to their use for ever. The act then proceeds to authorize the selectmen of each town, to sue for and recover such lands, if necessary, and to lease them out, reserving an annual rent, to be appropriated

to the support of schools. Under this law, the selectmen of the town of New-Haven executed a perpetual lease of a part of the demanded premises, to the defendant, William Wheeler, on the 10th of February, 1800, reserving an annual rent of 5 dollars and 50 cents; immediately after which, the said Wheeler entered upon the land so leased, and has ever since held the possession thereof. . . .

Upon this special verdict, the Judges of the Court below were divided in opinion upon the question, whether judgment should be rendered for the plaintiffs or defendants, and the question was thereupon certified to this Court. . . .

[Part of the statement of the case, the arguments of counsel, and part of the opinion are omitted.]

Mr. Justice Washington delivered the opinion of the Court, and, after stating the case, proceeded as follows:

It has been contended by the counsel for the defendants,

1st. That the capacity of the plaintiffs, as a corporation, to hold lands in Vermont, ceased by, and as a consequence of, the revolution.

2dly. That the society being, in its politic capacity, a foreign corporation, it is incapable of holding land in Vermont, on the ground of alienage; and that its rights are not protected by the treaty of peace.

3dly. That if they were so protected, still the effect of the last war between the United States and Great Britain, was to put an end to that treaty, and, consequently, to rights derived under it, unless they had been revived by the treaty of peace, which was not done. . . .

[In an omitted part of the opinion the court considered the first and second contentions respectively and concluded that the plaintiff's capacity to hold lands in Vermont was not affected by the revolution and that its property rights were protected by the treaty of peace of 1782.]

The last question respects the effect of the late war, between Great Britain and the United States, upon rights existing under the treaty of peace. Under this head, it is contended by the defendants' counsel, that although the plaintiffs were protected by the treaty of peace, still, the effect of the last war was to put an end to that treaty, and, consequently, to civil rights derived under it, unless they had been revived and preserved by the treaty of Ghent.

If this argument were to be admitted in all its parts, it nevertheless would not follow, that the plaintiffs are not entitled to a judgment on this special verdict. The defendants claim title to the land in controversy solely under the act of 1794, stated in the verdict, and contend, that by force of that law, the title of the plaintiffs was devested. But if the Court has been correct in its opinion upon the two first points, it will follow, that the above act was utterly void, being passed in contravention of the treaty of peace, which, in this respect, is to be considered as the supreme law. Remove that law, then, out of the case, and

the title of the plaintiffs, confirmed by the treaty of 1794, remains unaffected by the last war, it not appearing from the verdict, that the land was confiscated, or the plaintiffs' title in any way devested, during the war, or since, by office found, or even by any legislative act.

But there is a still more decisive answer to this objection, which is, that the termination of a treaty cannot devest rights of property already vested under it.[42]

If real estate be purchased or secured under a treaty, it would be most mischievous to admit, that the extinguishment of the treaty extinguished the right to such estate. In truth, it no more affects such rights, than the repeal of a municipal law affects rights acquired under it. If, for example, a statute of descents be repealed, it has never been supposed, that rights of property already vested during its existence, were gone by such repeal. Such a construction would overturn the best established doctrines of law, and sap the very foundation on which property rests.

But we are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, *ipso facto*, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace. Whatever may be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms in relation to this subject, we are satisfied, that the doctrine contended for is not universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial, and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. If such were the law, even the treaty of 1783, so far as it fixed our limits, and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning.

We think, therefore, that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace.[43]

[42] *Cf.* Chinese Exclusion Case, *supra*, 828, in which it was said: "Between property rights not affected by the termination or abrogation of a treaty, and expectations of benefits from the continuance of existing legislation, there is as wide a difference as between realization and hopes." 130 U. S. 581, 610.

[43] See Sutton v. Sutton, 1 Russ. & M. 663; Fox v. Southack, 12 Mass. 143, 148; United States v. Karnuth, 24 F. (2d) 649; McCandless v. United States, 25 F. (2d) 71. But see Karnuth v. United States, 49 S. Ct. 274, reversing United States v. Karnuth, *supra*.

A majority of the Court is of opinion, that judgment upon this special verdict ought to be given for the plaintiffs, which opinion is to be certified to the Circuit Court.

Certificate for the plaintiffs.

SARA E. TECHT, RESPONDENT, v. ELIZABETH L. HUGHES, APPELLANT, IMPLEADED WITH OTHERS

United States. Court of Appeals of New York. 1920.

229 *New York Reports* 222.

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 30, 1920, affirming an interlocutory judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action for partition of real property.

The following question was certified: "Has the plaintiff herein an estate of inheritance in the trial property sought to be partitioned in this action?"

The facts, so far as material, are stated in the opinion.

[The arguments of counsel and part of the opinion are omitted.]

CARDOZO, J. James J. Hannigan, a citizen of the United States, died intestate on December 27, 1917, seized in fee simple of real estate in the city of New York. Two daughters, the plaintiff, Sara E. Techt, and the defendant, Elizabeth L. Hughes, survived him. In November, 1911, the plaintiff became the wife of Frederick E. Techt, a resident of the United States, but a citizen of Austria-Hungary. On December 7, 1917, twenty days before the death of the plaintiff's father, war was declared between Austria-Hungary and the United States. The record contains a concession that neither the plaintiff nor her husband has been interned, nor has the loyalty of either been questioned by the government of state or nation, and that both, remaining residents of the United States, have kept the peace and obeyed the laws. The plaintiff's capacity on December 27, 1917, to acquire title by descent is the question to be determined. . . .

Both statute and treaty are invoked in her behalf. . . . The treaty says that "where, on the death of any person holding real property, or property not personal, within the territories of one party, such real property would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by the laws of the country where such real property is situated, such citizen or subject shall be allowed a term of two years to sell the same; which term may be reasonably prolonged, according to circumstances; and to withdraw the proceeds thereof, without molestation, and exempt from any other charges than those which may be imposed in like cases upon the inhabitants of the

country from which such proceeds may be withdrawn" (Art. II of Convention between United States and Austria, concluded May 8, 1848, and proclaimed October 25, 1850; 9 Stat. 944, extending the stipulations of the treaty of Commerce and Navigation, concluded August 27, 1829, and proclaimed February 10, 1831, 8 Stat. 398). . . .

[In an omitted part of the opinion the court considered the statute (Real Prop. Law, sec. 10, as amended by L. 1913, ch. 152; Consol. Laws, ch. 50) and concluded that it did not authorize the inheritance of real estate by a resident alien enemy.]

The support of the statute failing, there remains the question of the treaty. The treaty, if in force, is the supreme law of the land (U. S. art. 6) and supersedes all local laws inconsistent with its terms (Hauenstein v. Lynham, 100 U. S. 483; Geofroy v. Riggs, 133 U. S. 258; Chirac v. Chirac, 2 Wheat. 259; Kull v. Kull, 37 Hun, 476). Judicial construction has already fixed its meaning (Kull v. Kull, *supra;* Bollermann v. Blake, 24 Hun, 187; 94 N. Y. 624; Stamm v. Bostwick, 40 Hun, 35, 37; Hauenstein v. Lynham, *supra;* Scharpf v. Schmidt, 172 Ill. 255; Wunderle v. Wunderle, 144 Ill. 40; Fischer v. Sklenar, 101 Neb. 553). The right which it secures is in form a right of sale. In substance, it is a right of ownership. The fee descends subject to the condition that it shall be disposed of within the "term of two years, which term may be reasonably prolonged according to circumstances" (Kull v. Kull, *supra*). We do not need to determine the effect of a breach of the condition. In this instance there was none. Judgment of partition and sale was entered within the term of two years. The plaintiff has an estate of inheritance if the treaty is in force (Scharpf v. Schmidt, *supra;* Kull v. Kull, *supra*).

The effect of war upon the existing treaties of belligerents is one of the unsettled problems of the law. The older writers sometimes said that treaties ended *ipso facto* when war came (3 Phillimore Int. L. 794). The writers of our own time reject these sweeping statements (2 Oppenheim Int. L. sec. 99; Hall Int. L. 398, 401; Fiore Int. L. (Borchard's Transl.) sec. 845). International law to-day does not preserve treaties or annul them regardless of the effects produced. It deals with such problems pragmatically, preserving or annulling as the necessities of war exact. It establishes standards, but it does not fetter itself with rules. When it attempts to do more, it finds that there is neither unanimity of opinion nor uniformity of practice. "The whole question remains as yet unsettled" (Oppenheim, *supra*). This does not mean, of course, that there are not some classes of treaties about which there is general agreement. Treaties of alliance fall. Treaties of boundary or cession, "dispositive" or "transitory" conventions, survive (Hall Int. L. pp. 398, 401; Westlake Int. L. II, 34; Oppenheim, *supra*). So, of course, do treaties which regulate the conduct of hostilities (Hall, *supra;* 5 Moore Dig. Int. L. 372; Society for Propagation

of the Gospel v. Town of New Haven, 8 Wheat. 464, 494). Intention in such circumstances is clear. These instances do not represent distinct and final principles. They are illustrations of the same principle. They are applications of a standard. When I ask what that principle or standard is, and endeavor to extract it from the long chapters in the books, I get this, and nothing more, that provisions compatible with a state of hostilities, unless expressly terminated, will be enforced, and those incompatible rejected. "Treaties lose their efficacy in war only if their execution is incompatible with war. *Les traités ne perdent leur efficacité en temps de guerre que si leur exécution est incompatible avec la guerre elle-même*" (Bluntschli, *Droit International Codifié*, sec. 538.) That in substance was Kent's view, here as often in advance of the thought of his day. "All those duties of which the exercise is not necessarily suspended by the war, subsist in their full force. The obligation of keeping faith is so far from ceasing in time of war, that its efficacy becomes increased, from the increased necessity of it" (1 Kent Comm. p. 176). That, also, more recently, is the conclusion embodied by the Institute of International Law in the rules voted at Christiania in 1912 which defined the effects of war on International Conventions. In these rules, some classes of treaties are dealt with specially and apart. Treaties of alliance, those which establish a protectorate or a sphere of influence, and generally treaties of a political nature, are, it is said, dissolved. Dissolved, too, are treaties which have relation to the cause of war. But the general principle is declared that treaties which it is reasonably practicable to execute after the outbreak of hostilities, must be observed then as in the past. The belligerents are at liberty to disregard them only to the extent and for the time required by the necessities of war. "*Les traités restés en vigueur et dont l'exécution demeure, malgré les hostilités, pratiquement possible, doivent être observés comme par le passé. Les Etats belligérants ne peuvent s'en dispenser que dans la mesure et pour le temps commandés par les necessités de la guerre*" (*Institut de droit international, annuaire* 1912, p. 648; Scott Resolutions of the Institute of Int. Law, p. 172. *Cf.* Hall Int. Law (7th ed.), 399; 2 Westlake Int. L. p. 35; 2 Oppenheim Int. L. sec. 99, 276).

This, I think, is the principle which must guide the judicial department of the government when called upon to determine during the progress of a war whether a treaty shall be observed in the absence of some declaration by the political departments of the government that it has been suspended or annulled. A treaty has a twofold aspect. In its primary operation, it is a compact between independent states. In its secondary operation, it is a source of private rights for individuals within states (Head Money Cases, 112 U. S. 580, 598). Granting that the termination of the compact involves the termination of the rights, it does not follow because there is a privilege to rescind that the privilege has been

exercised. The question is not what states *may* do after war has supervened, and this without breach of their duty as members of the society of nations. The question is what courts are to presume that they have done. "Where the department authorized to annul a voidable treaty shall deem it most conducive to the national interest that it should longer continue to be obeyed and observed, no right can be incident to the judiciary to declare it void in a single instance" (Jay, Ch. J., in Jones v. Walker, 2 Paine, 688, 701. *Cf.* The Legal Nature of Treaties, vol. 10, American Journal of Int. Law (1916), pp. 721, 722). President and senate may denounce the treaty, and thus terminate its life. Congress may enact an inconsistent rule, which will control the action of the courts (Fong Yue Ting v. U. S., 149 U. S. 698). The treaty of peace itself may set up new relations, and terminate earlier compacts either tacitly or expressly. The proposed treaties with Germany and Austria give the victorious powers the privilege of choosing the treaties which are to be kept in force or abrogated. But until some one of these things is done, until some one of these events occurs, while war is still flagrant, and the will of the political departments of the government unrevealed, the courts, as I view their function, play a humbler and more cautious part. It is not for them to denounce treaties generally, *en bloc*. Their part it is, as one provision or another is involved in some actual controversy before them, to determine whether, alone, or by force of connection with an inseparable scheme, the provision is inconsistent with the policy or safety of the nation in the emergency of war, and hence presumably intended to be limited to times of peace. The mere fact that other portions of the treaty are suspended or even abrogated is not conclusive. The treaty does not fall in its entirety unless it has the character of an indivisible act. "*Le traité tombe pour le tout quand il présente le caractère d'un acte indivisible*" (Rules of the Institute of Int. L. *supra*). To determine whether it has this character, it is not enough to consider its name or label. No general formula suffices. We must consult in each case the nature and purpose of the specific articles involved. "*Il faut . . . examiner dans chaque cas, si la guerre constitue par sa nature même un obstacle a l'exécution du traité*" (Bluntschli, *supra*).

I find nothing incompatible with the policy of the government, with the safety of the nation, or with the maintenance of the war in the enforcement of this treaty so as to sustain the plaintiff's title. We do not confiscate the lands or goods of the stranger within our gates. If we permit him to remain, he is free during good behavior to buy property and sell it (Trading with Enemy Act of Oct. 6, 1917; 40 St. 411, ch. 106). He is to be "undisturbed in the peaceful pursuit" of his life and occupation, and "accorded the consideration due to all peaceful and law-abiding persons" (President's Proclamation of Dec. 11, 1917).

If we require him to depart, we assure to him, for the recovery, disposal and removal of his goods and effects and for his departure, the full time stipulated by any treaty then in force between the United States and the hostile nation of which he is a subject; and where no such treaty is in force, such time as may be declared by the President to be consistent with the public safety and the dictates of humanity and national hospitality (U. S. R. S. sec. 4068, re-enacting the act of July 6, 1798). A public policy not outraged by purchase will not be outraged by inheritance. The plaintiff is a resident; but even if she were a non-resident, and were within the hostile territory, the policy of the nation would not divest her of the title whether acquired before the war or later. Custody would then be assumed by the alien property custodian. The proceeds of the property, in the event of sale, would be kept within the jurisdiction. Title, however, would be unchanged, in default of the later exercise by Congress of the power of confiscation (40 Stat. ch. 106, pp. 416, 424), now seldom brought into play in the practice of enlightened nations (2 Westlake Int. L. 46, 47; Brown v. U. S., 8 Cranch, 110). Since the argument of this appeal, Congress has already directed, in advance of any treaty of peace, that property in the hands of the custodian shall be returned in certain classes of cases to its owners, and in particular where the owner is a woman who at the time of her marriage was a native-born citizen of the United States and prior to April 6, 1917, intermarried with a subject or citizen of Germany or Austria-Hungary (Act of June 5, 1920, amending sec. 9 of the act of Oct. 6, 1917). It follows that even in its application to aliens in hostile territory, the maintenance of this treaty is in harmony with the nation's policy and consistent with the nation's welfare. To the extent that there is conflict between the treaty and the statute (40 Stat. ch. 106), we have the same situation that arises whenever there is an implied repeal of one law by another. To the extent that they are in harmony, both are still in force. There is in truth no conflict here except in points of detail. In fundamental principle and purpose, the treaty remains untouched by later legislation. In keeping it alive, we uphold the policy of the nation, revealed in acts of Congress and proclamations of the President, "to conduct ourselves as belligerents in a high spirit of right and fairness" (President Wilson's Address to the Congress, April 2, 1917; Scott Diplomatic Correspondence between United States and Germany, p. 324), without hatred of race and without taint of self-seeking.

I do not overlook the statements which may be found here and there in the works of authors of distinction (Hall, *supra;* Halleck Int. L. (4th ed.) 314; Wheaton Int. L. (5th ed.) 377) that treaties of commerce and navigation are to be ranked in the class of treaties which war abrogates or at least suspends. Commerce is friendly intercourse. Friendly

intercourse between nations is impossible in war. Therefore, treaties regulating such intercourse are not operative in war. But stipulations do not touch commerce because they happen to be embodied in a treaty which is styled one to regulate or encourage commerce. We must be on our guard against being misled by labels. Bluntschli's warning, already quoted, reminds us that the nature and not the name of covenants determines whether they shall be disregarded or observed. There is a line of division, fundamental in importance, which separates stipulations touching commerce *between* nations from those touching the tenure of land *within* the territories of nations (*Cf.* The Convention "as to tenure and disposition of real and personal property" between the U. S. & Great Britain dated March 2, 1899). Restrictions upon ownership of land by aliens have a history all their own, unrelated altogether to restrictions upon trade (Kershaw v. Kelsey, *supra;* Fairfax v. Hunter, *supra*). When removed, they cease to exist for enemies as well as friends, unless the statute removing them enforces a distinction (Kershaw v. Kelsey, Fairfax v. Hunter, *supra*). More than that, the removal, when effected by treaty, gives reciprocal privileges to the subjects of each state, and is thus of value to one side as much as to the other. For this reason, the inference is a strong one, as was pointed out by the Master of the Rolls in Sutton v. Sutton (1 Russ. & M. 664, 675) that the privileges, unless expressly revoked, are intended to endure (*Cf.* 2 Westlake, p. 33; also Halleck Int. L., *supra*). There, as in Society for the Propagation of the Gospel v. Town of New Haven (8 Wheat. 464, 494), the treaty of 1794 between the United States and England protecting the citizens of each in the enjoyment of their landed property, was held not to have been abrogated by the war of 1812. Undoubtedly there is a distinction between those cases and this in that there the rights had become vested before the outbreak of the war. None the less, alike in reasoning and in conclusion, they have their value and significance. If stipulations governing the tenure of land survive the stress of war though contained in a treaty which is described as one of amity, it is not perceived why they may not also survive though contained in a treaty which is described as one of commerce. In preserving the right of inheritance for citizens of Austria when the land inherited is here, we preserve the same right for our citizens when the land inherited is there (Brown v. U. S., 8 Cranch, 110, 129). Congress has not yet commanded us, and the exigencies of war, as I view them, do not constrain us, to throw these benefits away.

No one can study the vague and wavering statements of treatise and decision in this field of international law with any feeling of assurance at the end that he has chosen the right path. One looks in vain either for uniformity of doctrine or for scientific accuracy of exposition. There are wise cautions for the statesman. There are few precepts for the judge. All the more, in this uncertainty, I am impelled to the belief

that until the political departments have acted, the courts, in refusing to give effect to treaties, should limit their refusal to the needs of the occasion; that they are not bound by any rigid formula to nullify the whole or nothing; and that in determining whether this treaty survived the coming of war, they are free to make choice of the conclusion which shall seem the most in keeping with the traditions of the law, the policy of the statutes, the dictates of fair dealing, and the honor of the nation.

The judgment should be affirmed with costs, and the question certified answered in the affirmative.

Hiscock, Ch. J., Chase, Hogan, McLaughlin and Crane, JJ., concur; Elkus, J., concurs in result.

Judgment affirmed.[44]

Vattel, Le Droit des Gens, ou Principes de la Loi Naturelle, Appliqués à la Conduite et aux Affaires des Nations et des Souverains

Book II, chapter 17, section 296. 1758.

§296. The following question has been proposed and debated: Whether promises necessarily include the implied condition that circumstances remain as they are, or whether a change in the circumstances can create an exception to the promise, and even render it void. The question must be solved by applying the principle of the motive involved in the promise. If it is certain and evident that the consideration of the circumstances existing at the time entered into the motive of the promise, that the promise was made in view and because of those circumstances, the promise is dependent upon the continued existence of the same circumstances. This is evident, since the promise was only made upon that supposition. When, therefore, the circumstances essential to the promise, and without which it certainly would not have been made, happen to change, the promise falls when its basis is destroyed; and in particular cases, when circumstances cease for a time to be the same as those which brought about or helped to bring about the promise, an exception should be made to its enforcement. . . .

[44] See also State v. Reardon, 120 Kan. 614; 11 A. L. R. 180. *Cf.* Karnuth v. United States, 49 S. Ct. 274. And see Crandall, Treaties, 2d ed., 442; Hyde, II, §§547–551; Moore, Dig. Int. L., V, 372; Oppenheim, 4th ed., II, §99. The treaties of peace, 1919–23, provided expressly for the revival of certain treaties and the abrogation of others. See Treaty of Versailles, June 28, 1919, arts. 282–295, 13 Am. Jour. Int. L. Suppl. 151, 291; Treaty of St. Germain, Sept. 10, 1919, arts. 234–247, 14 *ibid.* 1, 105; Treaty of Neuilly, Nov. 27, 1919, arts. 162–175, 14 *ibid.* 185, 239; Treaty of Trianon, June 4, 1920, arts. 217–230, 15 *ibid.* 1, 83; Treaty of Lausanne, July 24, 1923, arts. 99–100, 18 *ibid.* 1, 39.

But great caution must be observed in the application of the present rule. It would be a shameful abuse of it to take advantage of every change of circumstances in order to set aside a promise; there would be no promise on which reliance could be placed. Only those circumstances because of which the promise was made are essential to it; and it is only a change in those circumstances which can lawfully hinder or suspend the effect of the promise. That is the sense to be given to the principle of the jurisconsults, *Conventio omnis intelligitur rebus sic stantibus.*[45] [FENWICK'S transl.]

WILLIAMS, THE PERMANENCE OF TREATIES

American Journal of International Law, Volume XXII, pages 89-90. 1928.

The doctrine that we set out to consider is the doctrine that treaties, for the duration of whose obligations no special period is fixed, are not to be understood as binding on the contracting Powers in the event of some material change in the conditions with reference to which they were concluded, the word "conditions" in this statement including not only material, but also moral, facts. For the purpose of the discussion, the phrase "*rebus sic stantibus*" is a convenient catchword: treaty obligations, when the treaty itself is silent, are subject to the provision that, if the obligations are to remain, the essential "things," inanimate and animate, material, moral and mental, must remain in the condition in which they were when the treaty was concluded. But in the absence in the past of any court administering international law, the matter has remained in the realm of theory. We have no decided cases and no "jurisprudence." And international practice has fixed no certain rule.

Still, there has been a general acquiescence in the doctrine that an essential change of conditions involves the obsolescence, that is to say, the supervening invalidity, of treaty obligations contracted with a view to the conditions so changed, so far as those obligations remain executory. The doctrine has commended itself, as we shall see, to lawyers as to philosophers, *nemo in futurum contrahit nisi positis praecedentibus circumstantiis. His enim mutatis totius status etiam mutatur ratio.* [Spinoza, *Tractatus Politicus*, III, 14.] The general sense of mankind supports

[45] "That doctrine is not that one State has a unilateral right to declare itself not bound by a subsisting contract; it is that the treaty itself has gone, since an essential condition in which it was concluded has disappeared; and this results, either because on the treaty's true construction this is what the parties themselves have intended, or because the very nature of the case requires that the change of an essential condition should have this effect. The treaty in this event is, in fact, not voidable, but dead or 'obsolete,' if that word be preferred." WILLIAMS, in 22 Am. Jour. Int. L. 89, 91. See GROTIUS, II, xvi, 25. *Cf.* OPPENHEIM, 4th ed., I, §539.

it; an analogous doctrine of English municipal law may be vouched in its favor. To say that it is not easy to apply this doctrine in practice or to formulate it otherwise than in very general language, is to offer a criticism invariably applicable to the propositions of a legal system, such as the international, which is in an early stage of developement.[46]

THE COVENANT OF THE LEAGUE OF NATIONS

Article 19. 1920.

Article 19. The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world.[47]

WILLIAMS, THE PERMANENCE OF TREATIES

American Journal of International Law, Volume XXII, pages 89, 99–100. 1928.

The language of the first part of the article might seem at first sight to take us directly to the doctrine of *rebus sic stantibus;* the treaties whose reconsideration may be advised are those "which have become inapplicable," *i.e.*, treaties the relation of whose provisions to the facts of international life has changed and whose terms can no longer be applied. Now a treaty which cannot be applied is very like a contract whose further execution has been frustrated: both are instruments which cannot be carried out.

But on consideration, the better opinion seems to be that the article does not involve an appeal to the legal doctrine of obsolescence, and

[46] "As already suggested, the doctrine of *rebus sic stantibus*, like the doctrine of frustration in municipal law, may be explained in either one of two ways. We may either say that the treaty, so far as it remains executory (for executed provisions are not affected), is avoided because it must be construed as containing an implied stipulation that in the event of a change of essential conditions it ceases to be binding as from the date of the change, or we may say that *naturaliter*, from the very nature of the case, a contract made with reference to certain conditions disappears when the conditions are gone. An Anglo-Saxon lawyer will perhaps tend to decide the point as one of construction, while the civilian will prefer what may be thought the bolder solution." WILLIAMS, *op. cit.*, 93. See KAUFMANN, Das Wesen des Völkerrechts und die Clausula Rebus sic Stantibus; POURITCH, De la Clause Rebus sic Stantibus en Droit International Public; SCHMIDT, Über die völkerrechtliche Clausula Rebus sic Stantibus.

[47] See dispute with respect to the application of art. 19, *supra*, to the Treaty of Peace of 1904 between Bolivia and Chile, League of Nations, 2nd Assembly, Plenary Meetings, pp. 45–53, 56, 261, 466–471.

this mainly for two reasons. In the first place, it is doubtful whether the word "inapplicable" can be pressed so far. A synonym for "inapplicable," the dictionary tells us, is the word "unsuitable." If so, we need not go so far as to say that it is completely impossible for any given treaty to be carried out before Article 19 can be brought into play. In the next place, and this is the more powerful argument, the task allotted to the Assembly (it is remarkable that the Council has here no authority) is not to deal with the situation on the basis that the treaty is gone, or even to declare the treaty gone. The task of the Assembly is to "advise" reconsideration, or, as the French text puts it, "*inviter les Membres de la Société à procéder à un nouvel examen.*" This is in no sense the power of a court to declare a treaty no longer binding as being obsolete or "frustrated"; it is merely a political power to give friendly advice. Thus, not only has the Assembly no power to declare the treaty obsolete or frustrated, but the article assumes that the treaty continues to subsist. If it did not subsist, it could not be made the subject of "reconsideration," which is itself a political process, carried through by the parties.

Thus the first part of the article (which is the only part which refers to treaties) does not give a legal treatment of a legal problem.[48]

[48] On treaties, in general, see BUTLER, Treaty-Making Power of the United States; CRANDALL, Treaties, 2d ed.; FAUCHILLE, I, Pt. III, 289; HALL, 8th ed., 379; HYDE, II, §§489–551; MOORE, Dig. Int. L., V, 155; OPPENHEIM, 4th ed., I, §§491–580; RALSTON, Int. Tribunals, 2d ed., 5.

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